IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. 6/1994

BEFORE THE RT. HON. MR. JUSTICE EDWARD ZACCA, P.C., PRESIDENT
THE HON. MR. JUSTICE JAMES KERR JA
THE HON. MR. JUSTICE GERALD COLLETT JA

BETWEEN JOHN MITCHELL REA APPELLANT/ PLAINTIFF

A N D DETECTIVE INSPECTOR BRIAN GIBBS

THE COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE FORCE

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS RESPONDENTS DEFENDANTS

Mr. R. Alberga, Q.C. and Mr. S. McCann for the Appellants

Mr. P. LaMontagne, Q.C. and Mr. Ivor Archie for the Respondents

AUGUST 7,8,9,10,14,15,16; DECEMBER 7, 1995

ZACCA, PRESIDENT:

On the 25th October, 1991, the first Respondent, Detective Inspector Gibbs, laid three informations in support of applications for search warrants under Section 16[M] of the Misuse of Drugs Law:

S16[M] as it is relevant is as follows :

> [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 authorizing a constable to enter and search the premises if he is satisfied that -
>
> .....
> .....
>
> [c] the conditions in subsection [4] are fulfilled.
>
> [3] .....
>
> [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 be particularized; and

[c] [i] .....

[ii] .....

[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.

[5] Where a constable has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, 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 warrant was issued."

Each information stated that there were reasonable grounds for

suspecting that the appellant, John Mitchell Rea had carried on or had benefitted from drug trafficking. The Information also contained reference to the provisions of subsection [4] paragraphs [b] and [c][iii] of section 16M of the Misuse of Drugs Law. The premises to which the application related was stated in the Information.

Again on the 25th October, 1991 a Judge of the Grand Court based on the Informations, issued three warrants to search the premises of a Company, of Pierson Heldring & Pierson, and appellant's residence. The appellant was at that time the Managing Director of Pierson, Heldring, Pierson [Cayman Ltd.], [P.H.P. Cayman] a Banking group with headquarters in Amsterdam.

A fourth warrant relating to Safety Deposit Boxes at Cayman National Bank and Trust was issued by the Grand Court Judge on November 1, 1991 on an application by the first respondent.

On the 27th October, 1991, the first respondent spoke with a representative from Amsterdam of P.H.P. [Cayman] with respect to a search of the Bank's premises in Cayman.

On the 28th October, 1991, the first Respondent along with other police officers and representatives of the Amsterdam Bank went to the premises of P.H.P. [Cayman]. The premises and the offices of appellant were searched in the presence of the Amsterdam representatives.

At this time, the appellant was in Amsterdam. It is clear from the evidence that the Bank's officers in Amsterdam were aware of the search of the Bank's premises in Cayman. It is reasonable to assume that they were also aware of the reasons for the search.

At about 1.00 p.m. [Amsterdam time] the appellant was ushered into the office of the Chairman, a Mr. Kleiterp, and was shown an unsigned letter. It is also not in dispute that this letter

was presented to the appellant, subsequent to the search of the Bank's premises.

The letter was dated 28th October, 1991 and is as follows :

> Dear Mr. Rea,
>
> We confirm herewith today's meeting, in which you apprised us of your decision to resign as director of Pierson, Heldring & Pierson [Cayman] Limited, on account of an apparent conflict of interest between your involvement in private affairs and in those of the Bank.
>
> We herewith accept your resignation as of today.
>
> We will in due course take further steps to effect your resignation and to settle the financial aspect thereof. The financial arrangements will include your profit share for full year 1991, compensation for unused holiday entitlement, the transfer free of value of the company car you presently use and settlement of your full entitlement under the pension scheme [our contribution as well as your personal contribution]. Finally, it will include payment of six months in lieu of notice and the corresponding personal benefits.

Sincerely yours,
J. Kleiterp A. van Marken"

In his evidence, the appellant stated that he was told that he could either resign or be dismissed. Mr. Van Marken on being asked by the appellant what was going on was told that he would know all about it when he returned to Cayman. The appellant made reference to an Audit which had been done at the Bank and an Audit of Companies in which the appellant had an interest, but they showed no interest in his queries.

The appellant considered himself fired and returned to Cayman on 4th November, 1991. It is accepted that there was a constructive dismissal.

The reasons for his dismissal will be considered later.

There is absolutely no evidence to suggest that the appellant was involved in drug trafficking. In fact no evidence was placed before the trial Judge as to the reasons for suspecting the appellant.

The police took no action against the appellant subsequent to the search. As the trial Judge stated "the appellant was met with a wall of silence with regard to the reasonable grounds for suspicion put forward as the basis for the application to the Judge".

Having received what was termed by the trial Judge as a dismissive letter from the Commissioner of Police dated 23rd March, 1992, the appellant commenced this action.

In his action the appellant claimed :

"1. A declaration that the production order obtained on the 25th October 1991 by the First Defendant as servant and agent of the Second and Third Defendants and of the Government of the Cayman Islands was falsely, wrongfully and maliciously procured without any reasonable or probable grounds for suspecting that the Plaintiff had carried on or benefited from drug trafficking.

2. Damages for personal injuries, loss and damages sustained by the Plaintiff by reason of the fact that the First Defendant as servant or agent of the Second Defendant and of the Government of the Cayman Islands falsely, wrongfully and maliciously invoked the process of the Court and procured the grant of the production order dated the 25th October 1991.

3. Damages sustained by the Plaintiff by reason of the trespass to goods by the First Defendant acting as servant and agent of the Second Defendant and the Third Defendant and of the Government of the Cayman Islands in and about the unlawful and wrongful seizure and removal of the Plaintiff's property on the 28th October 1991.

4. Damages sustained by the Plaintiff by reason of the trespass to the Plaintiff's property at Columner Court, Governor's Sound, West Bay Road, Grand Cayman, wherein the First Defendant as servant and agent of the Second and Third Defendants and of the Government of the Cayman Islands unlawfully and wrongfully entered the aforesaid Plaintiff's property. "

In his evidence the appellant stated that he began his Banking career at an early age with Barclays Bank. He had a successful and rewarding banking career in the Cayman Islands. He was appointed Managing Director of P.H.P. Cayman. The Bank under his management grew and he brought it from a loss to a huge profit. The appellant at the same time had an outside interest in several Companies. This, however, was not an active interest. The

appellant also stated that he has never been engaged in or benefitted from drug trafficking.

The defendants in their re re-amended defence admit that a Judge of the Grand Court issued warrants, pursuant to Section 16M of the Misuse of Drugs Law on the applications and informations of the first Respondent and that the premises were entered and searched in obedience to the warrants. The defence denied that the first Respondent invoked the process of the Court wrongfully, falsely and/or maliciously and that the warrants were obtained wrongfully, falsely or maliciously. It was also denied that the first Respondent had no reasonable or probable cause for invoking the process of the Court. It was also denied that the applications made by the first Respondent under Section 16M and/or the warrants did not comply with the provisions of the Misuse of Drugs Law.

In its original defence, the defendants had pleaded that the first Respondent's belief was based on information from an

authoritative and normally reliable source upon which he was entitled to rely. This pleading was subsequently struck out by the defendants.

The defendants called no evidence at the trial. The first Respondent did not give any evidence. At the trial, the defendants relied on the following :

[1] That the issue of the warrant by the Grand Court Judge was an answer to the appellant's case. That there was a presumption of regularity when the Grand Court Judge issued the warrant.

[2] That the appellant failed to establish a case which would require the defendants to give evidence in answer to the allegations.

[3] That the Appellant had failed to prove that the first Respondent acted without reasonable and probable cause and maliciously.

There was no evidence from the defendants to ground the suspicion of the first Respondent that the appellant was engaged or had benefitted from drug trafficking.

Mr. Alberga for the appellant submitted that the issue of the warrant was unlawful and invalid. That it was incumbent on the first Respondent to satisfy the Grand Court Judge the grounds on which his suspicion arose. The Informations did not contain any grounds of suspicion and there is no evidence that the first Respondent gave any evidence to satisfy the Grand Court Judge as to his suspicion.

Mr. LaMontagne submitted that the warrant stated that the Grand Court Judge was satisfied that there are reasonable grounds for believing that the appellant had carried on or benefitted from drug trafficking. There was therefore a presumption of regularity and it cannot therefore be said that the issue of the warrant was unlawful or invalid. Mr. Lamontagne relied on the cases of ***HOPE V EVERED*** [1886] 17 QBD 338 and ***INLAND REVENUE COMMISSION et al V ROSSMINISTER LTD. 1980 1 ALL E.R. 80.***

HOPE V EVERED [SUPRA] was an action for maliciously and without reasonable and probable cause laying a complaint and information before a Justice and procuring him to grant a warrant to search the Plaintiff's house , on the ground that there was reasonable cause to suspect that the defendant's daughter was detained there by Plaintiff's son for immoral purposes. The application for a search warrant by the defendant was made under 48 and 49 Vict. c. 69 [The Criminal Law Amendment Act, 1885], s. 10.

The Section provides that :

> "if it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the Justice, is bona fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorizing any person named therein to search for ... such woman or girl".

It was held that under this Section, the Justice has a judicial duty to perform and that his decision that there is reasonable cause for such suspicion is a protection to a person who bona fide applies for a search warrant; and is an answer to an action for maliciously causing the warrant to issue.

Lord Coleridge, C.J. at page 340 stated :

> "The Act of Parliament therefore casts on the magistrate [and if legislation of this nature is to be effective, most properly so] the onus of its being made to appear to him that there is reasonable cause that the girl is being detained for immoral purposes. If the person who puts the magistrate in action only states the grounds of his suspicion and says that on those grounds he reasonably suspects that the girl is improperly detained, and if the magistrate agrees with him and thinks that it has been made to appear to him that a person acting bona fide has reasonable cause for his suspicion, then that decision of the magistrate is an answer to such an action as the present. The magistrate has to act judicially. 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 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; but where bona fides is present, and the matter is stated fully and fairly to the magistrate and he concludes that there is reasonable ground for the applicant's suspicion, then his conclusion is an answer to any proceeding. "

In that case, it appears that the grounds for suspicion was placed before the Magistrate and Lord Coleridge is saying that if the Magistrate agrees with the informant and thinks that it has been made to appear to him that a person acting bona fide has reasonable cause for his suspicion, then that decision of the Magistrate is an answer to an action.

Lord Coleridge, however, recognized as an exception the existence of an action in Tort for the wrongful obtaining of a search warrant obtained in a false and fraudulent manner knowing that he had no reasonable cause for suspicion. The obtaining of a search warrant maliciously and without reasonable and probable cause would therefore be an actionable tort.

Does ***HOPE V EVERED*** provide a protective screen for the Respondents. It appears that the learned trial Judge had some reservations.

In his judgment, the learned Chief Justice stated :

> "In Lea v Charringon [1889 XXIII QBD 45 p 272 [CA] Lord Esher MR is reported as saying that the Court of Appeal would some day have to decide whether it agreed with Hope v Evered. Concerns have been expressed about that case. See Feldman, Law of Entry, Search and Seizure paragraphs 15.67 - 15.69 where it is suggested that Reynolds v, Metropolitan Police Commissioner 1984 3 All ER 649 is inconsistent with it. But there are passages in the speeches of their Lordships in the Rossminister case - a case to which I shall be referring in detail later - which may be an indication [though the point was not decided] that there is life in Hope v Evered yet. "

No procedure is laid down for an application under S.16M of the Misuse of Drugs Law. In the case under appeal, no grounds for suspicion were stated in the Information. There was no evidence

before the trial Judge to establish the grounds of suspicion on which the Grand Court Judge was satisfied that there was reasonable grounds for suspecting that the appellant had carried on or has benefitted from drug trafficking.

The first Respondent failed to give evidence at the trial. He did not state the grounds of his suspicion. The pleading which had originally stated that the first Respondent belief was based on information from an authoritative and normally reliable source, was struck out by the defendants.

In **GEORGE V ROCKETT AND ANOTHER** 93 ALR, it was held that the sworn complaint contained no facts which might have have satisfied the Magistrate, and was thus inadequate to found the magistrate's conclusion that there were reasonable grounds for believing that the specified objects of the search would, if found, afford evidence as to the commission of an offence. The application for a search warrant was made under the provisions of S.679[6] of

the Criminal Code. The section prescribes that there must be a complaint on oath.

In the instant case, Section 16M of the Misuse of Drugs Law is silent as to the procedure to be adopted for making the application. However, the first Respondent adopted a procedure of swearing to an Information on oath. As was however observed, the first Respondent failed to state the facts on which the Grand Court Judge could have satisfied himself.

In ***G V S.*** 1992 - 1993 C.I.L.R. 203, an application for a production Order was made under Section 16L of the Misuse of Drugs Law. It was held that in granting the application there must be evidence on which it could be said that the Respondent had "reasonable grounds for suspecting". In that case, there was insufficient evidence.

The learned trial Judge referred to a number of cases dealing with suspicion. He stated however, that in all these cases, the Judge

had evidence of facts upon which suspicion was founded and reached a conclusion upon them.

Harre, C.J. in his Judgment at page 32 stated :

> "In this case I am faced with a quite different situation. There is no evidence at all, either in the form of a written note by the judge or other documentary evidence, or of testimony by Detective Inspector Gibbs or anyone else at the trial, as to what transpired between him and the judge on the 25th October 1991. I am asked to come to a conclusion entirely by inference and the plaintiff is faced with the formidable task of having to prove a negative.
>
> In keeping no record the judge seems to have followed English practice but the lack of it does undermine the protection which a judicial procedure for vetting applications for warrants should provide. In ***G v S*** 1992 - 3 CILR 203 it is clear that the former Chief Justice made notes of the evidence of the police officer who laid the information under section 16L of the Misuse of Drugs Law [see page 214 lines 30 seq in the report]. That is the practice which should be followed here. The police officer should give evidence on oath before a judge to satisfy him as to his reasonable grounds for suspicion, and the evidence, just as any other, should be properly recorded. It may be that disclosure of such evidence may be resisted, and successfully, for reasons of public

> interest or privilege at some later stage, but that it should not exist at all is contrary to justice. Even if the matter never comes to trial, the application is made ex parte and there may be an application to set it aside, as there was in G v S. "

In the absence of stated procedure, an application could be made in the following ways :

[1] stating the grounds of suspicion in the sworn Information ;

[2] affidavit evidence stating the grounds of suspicion ;

[3] The Informant giving evidence on oath before the Grand Court Judge.

In all cases it would be open to the Judge to take evidence on oath.

Feldman's Law of Entry, Search and Seizure makes reference to the case of ***HOPE V EVERED***. At page 396 the author states :

> 15.67 "The decision in ***HOPE V EVERED***, however, shows the limits to the value of malicious prosecutions

as a remedy, limiting the cases where it would be open to a plaintiff to allege absence of reasonable cause. A magistrate had issued a warrant to search the plaintiff's house on the application of the defendant who alleged that the plaintiff's son was detaining the defendant's daughter there for immoral purposes. The plaintiff's action for malicious prosecution succeeded before Manisty, J. who held that there was an absence of reasonable and probable cause and left the question of malice to the jury, which found for the plaintiff. The defendant moved for judgment or a new trial, on the ground that Manisty, J. had been wrong to rule that there had been no reasonable cause. The court agreed, and gave judgment for the plaintiff, Lord Coleridge, CJ, with whom Mathew, J. concurred, held that the statute cast the burden of deciding whether there was reasonable cause to issue a warrant on the magistrate, who was under a duty to act judicially. His decision that there had been reasonable cause, evidenced by the issue of the warrant, was a complete answer for the plaintiff, save in one event; it would not protect the informant if he were to lay a false and fraudulent information for the purpose of oppression. "

15.68 ***HOPE V EVERED*** was considered in ***LEA V CHARRINGTON***, a case on the same statute. The plaintiff was nonsuited in his action for malicious prosecution. On his motion for a new trial the court held that the case was covered by ***HOPE V EVERED*** which was of general application. The plaintiff appealed. The Court of Appeal decided that there had been no evidence of want of reasonable and probable cause to go to the jury, and so dismissed the appeal without having to decide on the effect of

HOPE V EVERED. However, Lord Esher MR is reported in the Times Law Report as saying that the Court of Appeal would some day have to decide whether it agreed with the earlier decision. This suggests that the Court had reservations about the decision. The reservations are easy to understand. If ***HOPE V EVERED*** is correct, a person whose premises are the subject of a search warrant which was obtained by a malicious informant has no remedy if the magistrate once decides that there is reasonable and probable cause, unless the informant misled the magistrate. The plaintiff probably cannot sue the magistrate, and the finding of reasonable cause acts as a bar to an action against the informant. This is particularly worrying because many statutes authorize searches regardless of whether or not the occupier of the premises is suspected of any offence. It is undesirable to deprive an innocent occupier of any redress if his property is entered under a warrant obtained on an information which does not show reasonable cause, whatever the magistrate thinks, and which was laid by an informant acing for ulterior purposes. There are two other reasons for thinking that the decision in ***HOPE V EVERED*** would not be given effect now as in 1889. First, applications for search warrants are made ex parte, so the rules of res judicata do not apply to the decision to issue or refuse a warrant. Second, showing reasonable cause is normally a condition precedent to the issue of a warrant. It is a factual matter, but it is a jurisdictional fact. There is no reason to hold a plaintiff to be debarred from arguing that the magistrate had no jurisdiction to issue the warrant, or [to put it another way] that he made a jurisdictional error and the warrant was invalid. To hold that the magistrate can protect a malicious informant by making a jurisdictional error would

be unnecessary and unfortunate. "

In a note to 15.68 the author refers to the case of Reynolds v Metropolitan Police Com. 1985 Q.B. 881, 1985 1 ALL E.R. 649 as a case which was decided without reference to ***HOPE V EVERED*** and that it was inconsistent with the case. He states that ***HOPE V EVERED*** should be regarded as completely overruled.

To hold that once a warrant is issued by a Grand Court Judge even if obtained maliciously and without reasonable or probable cause, it would be an answer to a claim for malicious process, would be to open the flood gates for dishonest police officers to obtain warrants even if there were no grounds for suspecting. It would also lead to unfairness and would shut out any challenge to an ex parte order. An action for maliciously procuring a search warrant could never be maintained.

If ***HOPE V EVERED*** suggests that the granting of the warrant by the Grand Court Judge is a complete answer to the appellant's

claim which is based on an absence of reasonable and probable cause, it ought not to be regarded as good law. I would not be prepared to follow the decision in that case.

In ***EVERETT V*** RIBBANDS ***AND ANOTHER*** 1952 ALL E.R. 823, Denning, L.J. stated that if a search warrant is obtained maliciously and without reasonable and probable cause an action would lie.

In ***REYNOLDS AND ANOTHER V COMMISSIONER OF POLICE OF THE METROPOLIS*** 1984 1 ALL E.R. 823, the police obtained a search warrant under S. 16[1] of the Forgery Act 1913. No prosecution was brought by the police.

Waller, L.J. at page 652 stated :

> "There is no dispute that to procure the issue of a search warrant without reasonable or probable cause and maliciously is an actionable wrong [see ***Clerk and Lindsell on Torts*** [15th edn. 1982] para. 18-08 and ***Everett v Ribbands*** [1952] 1 All ER 823 AT 826 [1952] 2 QB 198 at 205 per Denning LJ and the burden of proof is on the plaintiff who is asserting that there was no reasonable or probable cause [see ***Abrath v North*** Eastern ***Rly Co*** [1886] 11

> App Cas 247]. When the facts on which the application was based are established, it is then for the judge to decide whether it has been proved that there was no reasonable and probable cause for the issue of a search warrant. "

The learned Chief Justice relied heavily on the case of ***Inland Revenue Commissioners and another v Rossminister Ltd.*** [1980] 1ALL E.R. 80. This was a case in which an officer of the Board of Inland Revenue, laid an Information on oath before a Circuit Judge alleging that there was reasonable grounds for suspecting that an offence, involving tax fraud had been committed. The Judge issued search warrants. There was an application for Judicial Review of the seizure. It was held that at the stage of Judicial Review, made prior to the criminal prosecution, public interest immunity entitled the officer to refuse to give any reason for his decision to seize any particular documents. However, in a civil action the Revenue Officers would have to disclose and substantiate the grounds of their belief.

Lord Wilberforce at page 85 states :

> "Two remarks in conclusion. First. I would wish to make it clear that the failure of the respondents at his stage is not necessarily the end of the matter. They can proceed with an action against the Revenue for, in effect, excess of power and for trespass and any aggravation can be taken into account. At some stage, which cannot be particularized now with precision but which broadly would be when criminal proceedings are over, or, within a reasonable time, are not taken, the immunity which exists at the stage of initial, investigation will lapse. Then the Revenue will have to make good and specify the existence and cause of their belief that things removed might be required as evidence for the purpose of 'tax fraud' proceedings and the issue will be tried in a normal manner."

Lord Diplock at page 91 said :

> "In the instant case the search warrant did not purport to be issued by the circuit judge under any common law or prerogative power but pursuant to s 20C[1] of the Taxes Management Act 1970 alone. That subsection makes it a condition precedent to the issue of the warrant that the circuit judge should himself be satisfied by information on oath that facts

exist which constitute reasonable ground for suspecting that an offence involving some form of fraud in connection with or in relation to tax has been committed, and also for suspecting that evidence of the offence is to be found on the premises in respect of which the warrant to search is sought. It is not, in my view, open to your Lordships to approach the instant case on the assumption that the Common Sergeant did not satisfy himself on both these matters, or to imagine circumstances which might have led him to commit so grave a dereliction of his judicial duties. The presumption is that he act lawfully and properly; and it is only fair to him to say that, in my view, there is nothing in the evidence before your Lordships to suggest the contrary; nor, indeed, have the respondents themselves so contended.

All that the subsection expressly requires shall be specified in the warrant are the address of the premises to be searched and the name of the officer or officers of the Board who are authorized to search them. The premises need not be in the occupation of the person suspected of the offence: they may be premises of some wholly innocent custodian or third party. The matter is still at the investigatory stage; good grounds must exist for suspecting that a tax fraud has been committed, but as yet there is

> not sufficient evidence in a form admissible at a criminal trial to prove it. The sole purpose of the search is to obtain such evidence. "

Again at page 93, Lord Diplock states :

> " The public interest in immunity from disclosure of the grounds of the officer's belief that a document that he seized may be required as evidence in a future prosecution for an offence involving a tax fraud is thus, in general, temporary in is nature, except as regards identity of informants ***[cf D v National Society for the Prevention of Cruelty to Children]*** and possibly new and unusual methods of investigation used by the Inland Revenue. This, as it seems to me, provides an obvious method of reconciling the two conflicting public interests where an ordinary civil action is involved. If there is to be a criminal prosecution it is, in my view, clearly in the public interest in the proper administration of justice, both criminal and civil, that the civil action should not proceed to trial until the criminal trial is over; so discovery, whether of documents or by interrogatories, directed to eliciting the factual grounds for the officer's belief can be deferred at least until the Inland Revenue have had a reasonable time to complete their investigations into suspected tax frauds and to decide

whether to bring criminal proceedings at all and, if so, for what offences. If they decide to bring proceedings the public interest immunity would continue to apply until the conclusion of the criminal trial; if they decide not to bring any criminal proceedings the public interest immunity would come to an end with that decision. The court in the civil action could and should be vigilant to see that the Inland Revenue proceeded with their investigations with reasonable dispatch and reached their decision whether to prosecute or not without unreasonable delay. If this were not done the court could properly hold continuation of the immunity to be no longer justified in the public interest, and allow discovery to go ahead.

In cases where those claiming a public interest immunity against premature disclosure of information relating to criminal investigations or pending prosecutions are not [unlike the appellants in the instant case] protected against injunctive relief by s. 21 of the Crown Proceedings Act 1947, he immunity would, in my view, extend to applications for an interlocutory mandatory order for return of the documents seized. Despite the fact that when the action came to be tried the onus would lie on the defendant to show that there existed reasonable grounds for his belief that they might be required as evidence

> in criminal proceedings, the court should not require him to disclose the grounds of his belief in opposition to the claim for interlocutory relief, but should be satisfied with his statement on affidavit that he had reasonable grounds for his belief, unless the other evidence on the application was strong enough to justify the inference that no reasonable person could have thought so. It is to be borne in mind that if at the trial it should turn out that the defendant was unable to satisfy the onus of proving that reasonable grounds did in fact exist the plaintiff has the advantage that the action falls into one of those exceptional categories in which punitive damages may still be awarded ***[Rokes v Barnard*** and ***Cassell & Co. Ltd. v. Broome]*** "

Lord Scarman at page 104 said :

> " Thus the application for judicial review, where a declaration, an injunction or damages are sought, is a summary way of obtaining a remedy which could be obtained at trial in an action begun by writ; and it is available only where in all the circumstances it is just and convenient. If issues of fact, or law and fact, are raised which it is neither just nor convenient to decide without the full trial process, the court may dismiss the application or order, in effect, a trial. In the

present case there are, in my judgment, insuperable objections to the granting of a declaration in proceedings for judicial review. With all respect to the Court of Appeal, the evidence is not such that a court could safely say at this stage that the officers had no reasonable cause to believe that what they seized might be required as evidence. A trial is necessary if justice is to be done. The applicants could have asked for the proceedings to be continued as if begun by writ, but did not, no doubt because they have already begun proceedings by writ issued in the Chancery Division. I agree with the views expressed by the Divisional Court on this point as well as on the point relating to the validity of the warrants. "

At page 105 :

" But can the Revenue, if their seizure be challenged in proceedings for judicial review, refuse at that stage to disclose particulars of the offences suspected? That is a matter for their decision. If the Revenue chooses, as in this case, not to disclose them, it runs the risk of failing to show that there is a triable issue as to reasonable cause. But if, as in the present case, the affidavits disclose evidence sufficient to show a triable issue, it is 'just and convenient' to leave the issue to trial. And, as my noble and learned friends,

> Lord Wilberforce and Lord Diplock, have emphasized, trial or an investigation in substitute for trial, if undertaken in the proceedings for judicial review; should ordinarily be delayed until after criminal proceedings have been completed or abandoned or, if none are begun, after a reasonable period, in which to take a decision whether or not to institute such proceedings, has elapsed. "

As I understand the ***Rossminister*** case, where criminal proceedings are contemplated, public interest immunity, would not require, in a claim for interlocutory relief, that the Revenue Officer disclose the grounds of his belief. The public interest immunity would come to an end if a decision is taken not to bring criminal charges. In a civil action the Revenue would then have to specify the existence and cause of their belief. Their Lordships held that the prayer for a declaration was premature.

The Rossminister case can be distinguished from the instant case. Judicial review was sought while the criminal investigations were in progress. In the instant case the criminal investigations have

been terminated. No criminal charge have been made against the appellant. The refusal to disclose the grounds of suspicion was upheld in a public interest claim.

In the instant case, there was no claim for public interest. An action may be maintainable in certain circumstances at the end of the criminal investigations.

In my opinion the *Rossminister* case is not authority for saying that if the applicant in a subsequent civil action had established an absence of reasonable grounds for suspecting the commission of a tax fraud and there was a presence of improper motive in applying for the search warrant, the applicant would not have succeeded in the civil action.

The learned Chief Justice fell into error in relying on the *Rossminister* case in arriving at his decision to dismiss the appellant action.

The first Respondent cannot now hide behind the warrant. The wall of silence has been broken. He is obliged to state the grounds on which he had reasonable grounds for suspecting that the appellant had been engaged in or benefitted from drug trafficking.

The issue as to whether the warrant was procured by the first Respondent without reasonable and probable cause for suspecting is a live issue.

The first Respondent cannot now set up a screen for a presumption of regularity at the stage of the civil action and it is not a defence to the action.

The appellant alleges that the first Respondent acted without reasonable and probable cause and with malice in procuring the issue of the warrant. This is a triable issue and it is necessary to consider whether the appellant has presented evidence sufficient for the first Respondent to show that he did act with reasonable and probable cause.

Has the appellant established on a balance of probabilities that the first Respondent procured the warrant maliciously and without reasonable and probable cause? The learned trial Judge held that the appellant had failed to discharge the burden of proof to show that the first Respondent had acted without reasonable and probable cause. There was therefore no duty on the defendants to call any evidence.

The evidence of the appellant was not challenged to any extent. The burden of proof must be considered.

Halsbury's Laws of England 4th Edition, Volume 45 states :

Paragraph 1358 - " Burden on the plaintiff in the first instance. The burden of proof in an action for damages for malicious prosecution lies in the first instance on the Plaintiff. Or is not sufficient for him to prove that he was innocent of the crime for which he was prosecuted by the defendant by proving that the prosecution terminated in his favour; he must also show that the defendant acted maliciously and without reasonable and probable cause.

1359 Shifting the burden of proof. If want of reasonable care on the part of the

defendant is relied upon, that, as an element in the absence of reasonable and probable cause, must be proved by the plaintiff; and so if facts existed which, if known to the defendant, would have constituted reasonable and probable cause, the burden of showing that they were not known to him would lie on the plaintiff. The burden of proof, in the sense of the burden of adducing evidence is not stationary; when the plaintiff has given such evidence as, if not answered, will entitle him to a verdict, the burden of proof is shifted to the defendant.

1363 Proof by the Defendant. The defendant in an action for damages for malicious prosecution may give evidence of all the facts that were before his mind at the time of the prosecution, whether for the purpose of negativing malice or of establishing reasonable and probable cause.

1364 Only slight evidence of absence of reasonable and probable cause is necessary. In proving the absence of reasonable and probable cause in an action for damages for malicious prosecution, the Plaintiff has to prove a negative, and, in general, need only give slight evidence of that.

> However, absence of reasonable and probable cause cannot be inferred from the most express malice. The mere innocence of the plaintiff is not prima facie proof of its absence, and the fact that no indictment was preferred, or that the defendant did not give evidence at the trial although he was present in Court, does not prove it. "

In ***CLAYTON AND TOMLINSON*** - Civil Actions against the Police - 1992 at page 304 the author states :

> "A police officer who maliciously obtains a search warrant without reasonable and probable cause will be liable in tort. As Hirst J. put it in the case of *Bayliss v. Hill.*
>
> > "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."
>
> This view was confirmed by the Court of Appeal in the case of *Reynolds v. Metropolitan Police Commissioner.* Waller L.J. stated the position as follows :

> 'There is no dispute that to procure the issue of a search warrant without reasonable or probable cause and maliciously is an actionable wrong [see *Clerk and lindsell on Torts* 1982 at para. 18-08 and *Everett v. Ribbands* [1952] 1 All E.R. 823 at 826; [1952] 2 Q.B. 198 at 205, per Denning L.J.] and the burden of proof is on the plaintiff who is asserting that there was no reasonable or probable cause [see *Abrath v. North Eastern Rly. Co.* [1886] II App. Cas. 247]. When the facts on which the application was based are established, it is then for the judge to decide whether it has been proved that there was no reasonable and probable cause for the issue of a search warrant. "

In Tempest v. Snowden [1952] 1 K.B. 130, Denning, L.J. at at page 138 said :

> "In my opinion in order to determine the question of reasonable and probable cause, the judge must first find out what were the facts as known to the prosecutor, asking the jury to determine any dispute on that matter and then the judge must ask himself whether those facts amounted to reasonable and probable cause. In *Herniman v. Smith* Lord Atkin put it quite clearly: "The facts upon which the prosecutor acted should be ascertained; in principle, other facts on which he did not act appear to be irrelevant. When the

> judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford a reasonable or probable cause for prosecuting the accused." If these facts do afford reasonable and probable cause, then the prosecution is justified, and it is not as a rule necessary for an inquiry to be made into the prosecutor's belief. The state of his belief goes to malice but not, as a rule, to reasonable and probable cause."

Taylor v Williams [1831] 2B and AD 845 was a case in which Taylor in an action for falsely and maliciously and without reasonable and probable cause indicted Williams, failed to give evidence.

Lord Tenterden, C.J. at page 1361 said :

> " It was left for the jury to determine whether Taylor's non-appearance arose from a consciousness that he had no evidence to give which would support the indictment, or from any [857] other cause. Now, the exception ultimately taken is not that the evidence was not sufficient for the jury to draw any conclusion, but that the Judge ought to have drawn it himself. 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 inferences 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 ? "

GUSTAV ADOLPH ABRATH V THE NORTH EASTERN RAILWAY COMPANY [1886] 11 AC 247 established that the burden of satisfying the jury that there was no reasonable and probable cause lies upon the plaintiff.

EARL OF SELBORNE at page 249 stated:

> " In my judgment the learned judge did not misdirect the jury, and the Court of Appeal

> were right in their view of the law; and the only question is, is there any ground for saying that upon the weight of evidence the jury miscarried, and that a new trial ought to be directed? Speaking for myself, I cannot imagine a more hopeless case in that point of view. The railway company had to determine whether or not they would institute this prosecution; and the evidence given by the gentleman who was acting for them in the matter is, to my mind, as completely sufficient to negative the idea of the absence of reasonable and proper care on the part of the company to inform themselves of the facts as anything for the purpose of an action of this sort can be.
>
> The statements of certain persons were obtained, carefully considered, and laid before counsel, and counsel advised a prosecution upon those materials. "

Lord Watson at page 250 said :

> " My Lords, I am of the same opinion. I have no doubt that the learned judge rightly directed the jury, and that there is nothing to show that the defendants acted without reasonable and probable cause. The authorities cited by Mr. MacClymont in the course of his able argument do not form, in my opinion, any exception to the ordinary rule that the burden of proof lies upon the plaintiff. Some of them establish that

> a slight amount of evidence may be sufficient to launch the plaintiff's case when the whole circumstances of the case are in themselves sufficient to raise a presumption of want of reasonable care on the part of the prosecutor but that is not the case here."

Lord FitzGerald at page 255 said :

> " To deal with the case as it really comes before us, I do not entertain any doubt that the issue upon the question of probable cause as well as upon the question of malice lies upon the plaintiff, in this sense, that the plaintiff is bound to offer evidence sufficient, if uncontradicted, to sustain both these issues on his behalf. At the close of the plaintiff's case, supposing it had closed there, and no evidence had been offered directly on behalf of the defendants, was there such a case upon the two issues as that it could be said that there was evidence to sustain the issues for the plaintiff ? I so far differ from the opinion of my noble and learned friend that I think there was evidence upon both issues, if uncontroverted, from which the jury might have found, and the judge who presided, drawing the proper inference from the facts himself, might have found in the plaintiff's favour. "

Reference was also made to the cases *Glinski v. McIver* [1962] 1 ALL ER 696; *Abbott v Refuge Assoc. Ltd.* [1962] 1 QB 433; *Cotton v*

James 1 BL Ad 128; *Russell v MacNamara* 9 East. 361; *Rhesa Shipping Co. S.A. v Edmunds et al. The Popi M.* [1985] 2 ALL ER 712.

The principles established in all the above cases are not in dispute. The Respondents submit that on the facts of the case there is no evidence of want of reasonable and probable cause on the part of the first respondent. The appellant has not made out a case and has not discharged the burden of proof which rests on him.

Mr. Alberga submitted that by his evidence, the plaintiff has discharged the burden of proof which rests on him and that the evidence established an absence of reasonable grounds for suspecting that the appellant had carried on or benefitted from drug trafficking. It was further submitted that there was therefore an absence of reasonable and probable cause on the part of the first respondent for invoking the process of the Court. Mr. Alberga prayed in aid of the following in support of his submissions :

[1] the evidence of the Appellant relating to his past performance in Grand Cayman and his behaviour in general which was unchallenged

in cross-examination ;

[2] the absence of any oral or any documentary evidence which could indicate that there was any basis for the suspicion which the First Respondent said he had and which was reasonable ;

[3] the failure of the First Respondent to attempt to satisfy any of the tests emerging from the leading cases as to what amounted to reasonable suspicion ;

[4] that no criminal proceedings are pending against the Appellant or even contemplated ;

[5] that a reasonable time for criminal proceedings to be taken had elapsed ;

[6] that no claim to protect disclosure of evidence or information on the grounds of public interest immunity had ever been made ;

[7] that no claim to protect disclosure of evidence or information on the grounds of privilege had ever been made ;

[8] that no notes were produced of what the First Respondent told the Judge in the privacy of his Chambers and in the absence of the Appellant ;

[9] that there was no affidavit by the First Respondent giving the grounds of his suspicion ;

[10] that the First Respondent failed to produce during

discovery a police file on the Appellant thereby indicating that he never had one ;

[11] that no statements taken from anyone were produced during discovery thereby indicating that none were taken or obtained ;

[12] that no opinion was ever taken from the law officers of the Crown before invoking the process of the Court ;

[13] that none of the guidelines laid down by Denning L.J. in Glinski v. McIver [1962] 1 ALL ER 696 could be prayed in and relied upon by the First Respondent to show reasonable and probable cause on his part ;

[14] that none of the tests laid down by Upjohn L.J. in Abbott v. Refuge Assoc. Ltd. [1962] 1QB 443 could be prayed in and relied upon by the First Respondent to show reasonable and probable cause on his part ;

[15] that there was no indication that the First Respondent even obtained information from a reliable source on which he relied ;

[16] that there was an express withdrawal from the defence as originally pleaded that the First Respondent acted on information from a reliable source. "

The Respondents had contended that s. 27[1] of the Police Law was a complete answer to the appellant's claim. However, it was

conceded at the trial that s. 27[1] does not protect a Constable in relation to acts committed before the issue of the warrant. [Judgment of Harre, C.J. at page 18]. I am of the opinion that this section is no answer to the applicant's claim.

Taking all the above into consideration, I am of the view that the learned trial Judge was in error in holding that the appellant had not discharged the onus which was on him of showing an absence of reasonable and probable cause on the part of the respondent. The evidence looked at as a whole was sufficient to now place the onus on the first respondent of showing that he acted with reasonable and probable cause.

The first respondent failed to give evidence. There was therefore no disclosure as to the grounds for his suspecting that the appellant had been involved in drug trafficking or had benefitted from drug trafficking. The information did not contain the grounds of his suspicion. No documentary evidence was produced to

indicate the reasons for his suspicion. No oral evidence or affidavits are on record to assist the first respondent. There has been no prosecution or even a hint at prosecution of the appellant.

The only specific pleading of the first respondent's belief which was that it was based on information from an authoritative and normally reliable source upon which he was entitled to rely, was struck out by the respondents. Apart from the bald denial in the pleadings that the first respondent acted without reasonable and probable cause, there is absolutely nothing to show the reasons for his suspicion.

The only reasonable conclusion based on the evidence is that the first respondent had no reasonable grounds for suspecting the appellant. He acted without reasonable and probable cause. What more could the appellant have done to satisfy the onus placed on him. The evidence called for a reply and none was given.

The onus was also on the appellant to show that the first respondent acted maliciously. It was submitted by Mr. Alberga that an absence of reasonable and probable cause can amount to malice. *BROWN V HAWKES* [1891] 1 QB 718.

Cave, J. at page 723 said :

> " Of course there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecution could not honestly have believed in the charge he made, and in that case 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 this appeal there is a complete absence of reasonable and probable cause. This is sufficient to say that there was an improper motive on the part of the first respondent to invoke the process of the Court.

In my opinion malice may be inferred in this case as a result of the absence of reasonable and probable cause.

In my opinion there was sufficient evidence to call upon the respondents to answer and they choose not to answer. The respondents would be liable in this action.

Is the appellant entitled to damages ? The case for the appellant was that he was fired from his position from the Bank as a result of the search following the issue of the search warrants. The respondents assert that the appellant was dismissed as a result of his involvement in several companies not connected with the Bank. There was also an audit involving cheque traffic at the Bank. These transactions involved the companies in which the appellant had an interest.

It cannot be disputed that the Directors of the Bank in Amsterdam were aware of the search at the Bank's premises. This knowledge was prior to the search in Cayman. An allegation of

suspicion that the Manager of their Bank was engaged in drug trafficking or had benefitted from drug trafficking was in the knowledge of the Directors.

Having regard to the learned trial Judge's finding, he did not consider the question of damages. He therefore did not come to any finding as to whether the appellant had been dismissed as a result of the search or his involvement with the other companies.

Counsel for the respondent and the appellant have urged us to determine the issue and to assess the damages, if the appellant is entitled to same.

The appellant's contract with the Bank specifically provided that he should not engage himself in any business without the written permission of the Bank. The appellant had an interest in a sports shop. He informed the Bank of his interest and the Bank replied that there was no objection to his involvement in that company.

The learned trial Judge dealt fully with the letters which passed between the appellant and the Bank with respect to his involvement in the other companies.

There is no doubt that the Bank's directors were concerned about the appellant's involvement in companies other than the one for which they had been informed. They were also concerned about the cheque traffic taking place in their Bank. There was also to be an audit with respect to these companies. The correspondence by the Bank does not in any way indicate a consideration by the Bank to summarily dismiss the appellant.

Appellant left the Cayman Islands on the 21st October, 1991. He was to attend a meeting in Amsterdam on the 28th October, 1991. This was to be followed by a Management meeting on the 29th October, 1991.

The appellant's account of what happened in Amsterdam was not challenged. On the 28th October, 1991, he was presented with a

letter confirming that he had resigned from the Bank on account of a conflict of interest between his involvement in private affairs and in those of the Bank.

There is no evidence that the appellant had informed the Bank of his intention to resign. He was told by the Chairman that he could either resign or be dismissed. He was given one hour to make up his mind. He asked Mr. van Marken what was going on and he was told that he would know all about it when he got back to Cayman.

The learned trial Judge held that Mr. Kleiterp and Mr. van Marken were being kept fully informed about what was going on in Cayman. This was a reasonable inference to draw from the evidence. This can only be a reference to the obtaining of the search warrant and the subsequent search of the Bank's premises.

The appellant also stated in his evidence that he attempted to raise the topic of the audit of the Bank and the audit of the companies

but they showed no interest whatever in that.

It seems strange, that if their main concern was in relation to the appellant's involvement in the companies, that a meeting would have been arranged for the 28th October, 1991 and a Management meeting for the 29th October, 1991. The appellant was never informed that his involvement in the companies was to be the subject of these meetings. If the Directors of the Bank had intended to fire the appellant on the 28th October, 1991, there would have been no reason for a subsequent meeting on the 29th October, 1991.

The appellant's contract of employment provided for the termination of his employment by the giving of notice of termination.

Apart from the letter of the 28th October, 1991 to Mr. Rea, there is no evidence on behalf of the respondents to indicate the reason for the dismissal of the appellant.

This letter was prepared by the Directors of the Bank. It is attempting to confirm something which never took place. At no

time did the appellant offer his resignation on account of his involvement in the companies. There is no evidence that his outside interest was ever discussed at the meeting in Amsterdam on the 28th October, 1991.

The unchallenged evidence of the appellant is that he was told that he would know all about it when he got back to Cayman. This was the response of van Marken when the appellant asked him what was going on. This could only have been in reference to the obtaining of the search warrant and the search of the Bank's premises.

If the concern of the Bank was with respect to the outside interests of the appellant, is it reasonable to believe that the Bank would have acted in the way they did ? One would have expected a discussion on the matter and perhaps a notice of termination as provided for under the contract.

It is clear that the appellant's outside interests had no adverse effects on the Bank. The Bank's profits increased over the years. The salary of the appellant was also increased. This is an indication of the competence and efficiency of the appellant.

Was his outside interest so serious a concern that it would have prompted the Bank to act in the way they did ? I think not. Taking all the evidence into consideration, I find that the real reason for the dismissal of the appellant was the obtaining of the search warrant and the search.

Having found that the first respondent acted without reasonable and probable cause and with malice in invoking the process of the Court in obtaining the search warrant, the appellant would be entitled to damages.

The special damages were quantified and assessed at C.I. $566,281.00.00. This amount was not challenged at the trial or on appeal.

It is, however, necessary to consider and assess what would be a reasonable sum to award for General Damages.

The evidence of Ms. Jennifer Dilbert, the Island's Inspector of Banks, disclosed that the appellant would have been unable to obtain employment in Banking in the Cayman Islands following the search and having regard to the ongoing investigations. This is a factor to be taken into account in assessing General Damages insofar as loss of reputation is concerned.

To falsely accuse an off shore Banker of being implicated in drug trafficking is a devastating attack on his character. The respondents persisted in their allegations for a considerable period of time.

The respondents did not attempt to produce any evidence to connect the appellant with drug trafficking. Nor was there any evidence to lay the foundation for their suspicions. As has been observed, the respondents in their re re amended defence struck out

from their pleading "the first respondent's belief was based on information from an authoritative and normally reliable source upon which he was entitled to rely".

In the absence of any evidence to the contrary, the inference to be drawn is that there was never any such information given to the first respondent and that the belief did not exist.

There has been no retraction or apology from the respondents. These are aggravating circumstances and it would be appropriate to award aggravated damages.

In the circumstances, I would award the sum of C.I. $50,000.00 for General Damages.

I would allow the appeal and set aside the judgment of the learned Chief Justice.

The declaration prayed for in paragraph 1 of the re amended Writ of Summons will be granted. Judgment will be entered for the

appellant in the sum of C.I. $618,281, with costs of the trial below and the costs of the appeal to be agreed or taxed.

KERR, J.A. :

By writ filed on April 29, 1992, the plaintiff instituted proceedings seeking: (1) a declaration that the search warrants obtained on October 25, 1991, by the first defendant as servant and agent of the second and third defendants and of the Government of the Cayman Islands was falsely, wrongly and maliciously procured without reasonable or probable grounds for suspecting that the plaintiff had carried on or benefited from drug trafficking; (2) damage for personal injuries, loss and damages sustained by the plaintiff by reason of the fact that the first defendant as servant or agent of the second defendant and of the Government of the Cayman Islands falsely, wrongly and maliciously invoked the process of the Court and procured the grant of the production order dated the 25th October, 1991; (3) damages sustained by the plaintiff by reason of the trespass to goods by the first defendant acting as servant and agent of the second defendant and the third defendant and of the Government of the Cayman Islands in and about the unlawful and wrongful seizure and removal of the plaintiff's property on October 28, 1991; (4) damages sustained by the plaintiff by reason of the trespass to the plaintiff's property at Columner Court, Governor's Sound, West Bay Road, Grand Cayman, wherein

> "I have already described my view of the nature of the first defendants' work and the importance of secrecy in relation to it, and I do not accept the proposition that the absence of such a source is the only or indeed the most probable explanation for the deletion in the defendants' pleading of any reference to it as being part of his case."

Now the amendment removed an averment, which if supported by evidence, would be an answer to the plaintiff's case. The deletion at that early stage was clearly indicative of an intention not to call evidence. Mr. LaMontagne's supportive suggestion of the Learned Chief Justice's treatment of the submission was that the plaintiff could seek information by interrogatories. In the light of the general blanket denial in the defence and the purposeful deletion of this averment, interrogatories would likely be unhelpful and an exercise in futility. It was clear from then that the defence intended to rely on the protective screen of regularity attendant on the issue of the warrant. As Mr. Alberga pointed out in all these search warrants actions in tort there was some evidence indicative of the bona fides of the applicant; no where in this case was there the slightest evidence of the applicant being in possession of any relevant information even though the same need for secrecy as in the **Rossminster** case no longer existed.

the first defendant as servant and agent of the second and third defendants and of the Government of the Cayman Islands unlawfully and wrongfully entered the aforesaid plaintiff's property.

After a keenly contested trial over eight days, Harre, C.J., in his written judgment of the 15th July, 1994, dismissed the plaintiff's claim and entered judgment for the defendants. Against this judgment the plaintiff appealed.

The plaintiff, at the time the search warrants were issued, was the managing director of Pierson, Heldring and Pierson (Cayman) Ltd (Pierson Cayman), a banking company registered in Cayman and a member of a large reputable and respected group with headquarters in Amsterdam. In evidence he gave a history of his banking career from 1963 when at the age of 18 years in England he joined as a junior in Barclays Bank and after ten years service he held the position of second assistant manager in the Nottingham Branch. In 1973, he migrated to the Cayman Islands where he obtained employment in the World Bank Corporation (Cayman) Ltd which subsequently merged with the Bank of America (Cayman). His services with this bank ended when he declined to accept a transfer to Singapore, preferring to remain resident in Cayman, having obtained Caymanian status in 1982. After short stints as manager in the Inco Bank and Cayman Corporate

specifically pleaded, it would be open to him to make ad hoc claims to privilege in relation to certain questions eg those seeking to uncover confidential information between attorney and client or the identity of an informer or the source of information.

These factors are relevant to the ease of proving the affirmative by the defence if called upon. They do not relieve the plaintiff of the burden of tendering sufficient evidence to call upon the defence. To that end Mr. Alberga relied on a number of factors including the plaintiff's testimony, the documents tendered in evidence, the nature and conduct of the defence and the conduct of the first defendant.

As regards the plaintiff's unchallenged testimony which was relevant to this issue, in addition to his career in banking in England and Cayman, it was to the effect that he had never ever been concerned in Cayman or anywhere in producing, supplying, storing, exporting or importing, a controlled drug or done anything which could have given rise to his being suspected of carrying on or benefiting from drug trafficking. He had never done anything which might put him in the position where anyone could suspect him of being involved in drug trafficking or benefiting therefrom. As illustrative of the importance of this evidence, Mr. Alberga referred to the following statement of Cameron, C.J., in Young v Nichol -

The Ontario Reports [1885] Vol. IX p 363:

> "In the present case the plaintiff swore to his innocence, and denied that he ever had possession of the account which was the only thing to connect him with the alleged theft. When that case was made out the plaintiff would have been entitled to succeed. The existence of reasonable and probable cause would be disproved, and malice might be inferred from its absence; but the previous litigation between the parties in which the plaintiff was successful, was some evidence of actual malice; and the plaintiff, applying the test suggested by Bowen, L.J., was entitled to succeed. When the defendant gave his evidence there was a conflict between it and the plaintiff's, to settle which the opinion of the jury was essential."

The Learned Chief Justice dealt with this evidence thus:

> "No challenge was ever made to the allegation of complete innocence made by the plaintiff. The defendants did not need to do so. Investigation of suspicion, even if that suspicion is reasonable may lead to the conclusion that the suspicion is unfounded."

and later -

> "I mean no disrespect to Mr. Rea when I say that his assertions of innocence are completely self serving merely that the argument "I am innocent because I say I am" is not a powerful one."

Now it has been said that no one, not even Caesar's wife, is above suspicion but 'suspicion' here must be based on reasonable grounds. In so tersely dealing with this evidence, with due deference to his manifestly painstaking efforts to deal with the complex questions of law and issues arising in the case, the Learned Chief Justice has clearly overlooked its deeper import. The plaintiff by this evidence was obviously seeking the inference that there was unlikely to be any information concerning his involvement in any offence against the Misuse of Drugs Law and in particular, drug trafficking or benefiting from drug trafficking; alternatively, if any such information was given to the applicant, Detective Gibbs, it was false and Gibbs could have had no personal knowledge of any antecedent conduct or ill-repute that could give verisimilitude to that information.

With respect to the nature and conduct of the defence Mr. Alberga adverted to the omission to plead public interest or privilege and to the amendment to the original defence by deleting the positive averment that "the first defendant's belief was based on information from an authoritative and normally reliable source upon which he was entitled to rely". It was the submission on behalf of the plaintiff before the Learned Chief Justice as before us that the most probable explanation for the deletion was that there was no such information. Of this submission the Learned Chief Justice said:

The Learned Chief Justice on the absence of this evidence said:

> "It may be that the justification for deep secrecy in relation to particular activities of drug 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."

Although enquiries both oral by the Plaintiff and in writing by his Attorneys seeking positive information on the termination of the investigations resulted in an INCONCLUSIVE and unsatisfactory answer in the same letter of March 23rd. 1992, from the Commissioner of Police advising that the plaintiff's documents were returnable, the excuse of continuing investigations was never pleaded in defence.

In my view, in the absence of any evidence to the contrary, the deletion certainly in the end would leave it open, to infer that there was never any such information given to the first defendant.

Mr. Alberga further submitted that in omitting to take advice from the law officers of the Crown before obtaining the search warrants he failed one of the judicial tests identified by Upjohn, L.J., in the **Abbot** case (ante). The Learned Chief Justice held that he did not regard the first defendant's omission to take such legal advice as tending to show absence of reasonable and probable cause. I am in agreement with the Learned Chief Justice on this. Obtaining legal advice would be evidence of reasonable and probable cause but in regard to the absence of reasonable and probable cause omissions to seek legal advice before applying for the warrant would not per se have any probative weight. An investigating dectective is competent

and in the best position to determine what documentary evidence would be material or helpful to his investigations on the basis of the information which he has or the state of the investigations and where such documents could be found.

Against the background of the other circumstances adumbrated by Mr. Alberga and the testimony of the plaintiff and the documents tendered, with regard to the negative averment - "the absence of reasonable and probable cause" - I am of the view that the plaintiff has done all that rested with him to call for a reply and none has been given **[Cotton v James]** (ante).

On the question of malice it is accepted on all sides, that depending on the circumstances, malice in relation to this type of tort, may be inferred from a complete absence of reasonable and probable cause. See **Brown v Hawkes** [1891] 2 QB 718.

In **Glinski v McIver** (supra) in dealing with malice at p 707 - Lord Radcliffe said:

> "I cannot say that I see any special difficulty in keeping separate the respective functions of judge and jury, nor do I wish to approach this matter with any preconception that the judge has a duty to lean towards protecting a prosecutor, ex hypothesi unsuccessful and malicious, from the possible injudiciousness of a jury. If there really is some evidence founded on speech, letters or conduct that supports the case that the prosecutor did not believe in his own charge the plaintiff is in my view entitled as of right to have the jury's finding on it."

Mr. Alberga adverted to the fact that in this case the prosecuting officer as in **Young v Nichol** gave evidence as to the considerations that moved him.

As regards conduct, Mr. Alberga submitted that defendant's conduct subsequent to the issue of the warrant is relevant to malice and relied on the following statement in **Taylor v Williams** [1831] 2B Ad 1361 :

> "It was left for the jury to determine whether Taylor's non-appearance arose from a consciousness that he had no evidence to give which would support the indictment, or from any [857] other cause. Now, the exception ultimately taken is not that the evidence was not sufficient for the jury to draw any conclusion, but that the Judge ought to have drawn it himself. 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."

On the question of the conduct of the applicant the Learned Chief Justice said, referring to the **Rossminster** case and seeking to draw a distinction in approach, thus:

> "At the stage of judicial review their Lordships were prepared to go on what they had. They undoubtedly contemplated that at a later stage it would be proper that there should be more evidence about what was before the judge. They were dealing with tax, I am dealing with the application of drugs legislation, and the question which I have to decide is whether, as I am invited to do, I should find the plaintiff's case proved by the adverse inferences which I would draw by not, at the trial of this action, having more, and indeed from the conduct of the defendants throughout."

In my view there is nothing in the statements of their Lordships dealing with the drastic nature of search warrants issued in accordance with modern statutory provisions that would support this distinction or in any way affect the general principle that subsequent conduct sufficiently contemporaneous to a fact in issue may be relevant to that issue.

In support of his submissions that in this case malice may be inferred from the absence of reasonable and probable cause, Mr. Alberga argued that there is the probability of the judge granting the warrant upon being misled by a "fairy tale" and he again referred to the absence of any evidence including judge's notes, police case file or any document anywhere of the basis on which the applicant sought and was granted the search warrants. He contrasted the position here with that in **Brown v Hawkes** [1891] 2 QB 718 where there was evidence

on which the jury found the defendant had an honest belief in what he did.

In my view, there was sufficient evidence both on the absence of reasonable and probable cause and on requisite malice to call upon the defence to answer and the defence declined to answer.

There remains section 27(1) of the Police Law which reads:

> "Where the defence to any suit instituted against a police officer is that the act complained of was done in obedience to a warrant purporting to be issued by a Judge or Justice of the Peace, the Court shall, upon production of the warrant containing the signature of the judge or Justice of the Peace and upon proof that the act complained of was done in obedience of such warrant, enter judgment in favour of such police officer.".

The section is expressly concerned with the execution of warrants. The provisions are illustrative of legislative wisdom. Here the search warrants, as is normal, were addressed "to each and all of the Constables of the Royal Cayman Islands Police". Ordinarily a police officer to whom such a warrant may come for execution, is entitled to rely on its prima facie validity and will be protected by the statute in the exercise of the powers conferred on him by the warrant. At the outset of the trial Mr. LaMontagne indicated that in so pleading [i.e. denying, inter alia, that the entry and search amounted to a trespass] he relied on section 27 of the Police Law,

subsection (1) ----- but acknowledged that the hearing of an application to enter judgment on that basis would be in effect the trial. The trial proceeded on that understanding and it was conceded that section 27 did not protect a constable in relation to acts committed before the issue of the warrant. Before us on behalf of the respondent it was submitted that section 27 of the Police Law is a complete answer to the claim in trespass.

In my view, the constable who procures the warrant maliciously and without reasonable and probable cause would have imputed knowledge of its invalidity and could not seek the protection of the statute for his tortious acts which were directly consequential to his original delict. To interpret the provisions of section 27(1) of the Police Law as asked by the respondents' counsel, would enable the first defendant to use the warrant so wrongfully obtained to legitimise what would otherwise be an impertinent trespass to the first defendant's premises. Such an interpretation would be contrary to principle and beyond contemplation of the statute.

On this basis that the provisions of section 27(1) would offer no protection to the first defendant, I would hold that the action for trespass was well founded.

For the reasons I have essayed to set out herein, I would allow the appeal, set aside the judgment in favour of the defendants and enter judgment for the plaintiff.

Because of the decision to which the Learned Chief Justice eventually came, it was not necessary for him to deal with the question of damages. I have had the benefit of seeing the draft Judgment of the Rt. Honourable President. In it he has identified the evidence in support of the plaintiff's claims for damages, both general and special. On the basis that the generaal damages of $50,000.00 would include damages for trespass which I would assess nominally at $1,000.00, I am in agreement with the quantum awarded.

In all other respects, I agree with his final Judgment and Orders.

Collett J.A.

This is an appeal against dismissal by the Grand Court of the Appellant/Plaintiff's action against the Respondents for alleged malicious abuse of process without reasonable and probable cause, arising out of the issuance and execution of three search warrants pursuant to section 16M (now section 44) of the Misuse of Drugs law (Revised). That section, so far as is relevant is in the following terms:-

> "(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 it is satisfied that -
> (a)...
> (b)...
> (c) The conditions in subsection (4) are fulfilled.
>
> 3. 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) (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."

The application in this instance was made by the first respondent, a senior police officer in charge of the Drug Profit Confiscation Unit of the Royal Cayman Islands Police Force to a Judge of the Grand Court sitting in Chambers. No note was apparently made by the Judge of the proceedings before him. Three informations purporting to be sworn and signed by the first respondent were, it appears, presented to the Judge on 25th October, 1991 and whether or not additional material or evidence, sworn or unsworn, was tendered to him by the first respondent on that occasion has been left entirely uncertain. At all events the Judge issued three warrants in respect of three separate premises, one of which was the appellant's residence and another his office at the Pierson Heldring and Pierson and Pierson Bank of which the appellant and had been for the past six years the manager. They were executed on 28th October 1991, when police officers under the supervision of the first respondent seized and removed a quantity of documents.

On the same day that these warrants were executed the appellant, who had been absent from Grand Cayman for some days was attending a meeting prearranged with his employers at the Bank's head office in Amsterdam. At that meeting he was quite unexpectedly faced, on arrival, by a demand for his immediate resignation with the alternative of dismissal and told that the reasons for this would become apparent to him upon his return to Grand Cayman.

On his return the appellant consulted attorneys and they sought by correspondence to elicit from the second respondent the basis for the

investigation and procurement of the warrants, but without success. They were equally unsuccessful in obtaining any indication as to the duration of the investigation. Even when on 23rd March, 1992 the then Commissioner of Police permitted the documents seized to be returned to Mr. Rae, he was told that no estimation of its duration could even then be provided. Indeed termination of this investigation has still not been yet signalled although some four years have now elapsed since the search and no proceedings of any nature have been instituted against the appellant in relation to alleged drug trafficking.

It was in these circumstances that the appellant commenced these proceedings in the Grand Court claiming a declaration that the warrants had been unlawfully, maliciously procured without any reasonable cause together with damages resulting as well as a separate claim based on alleged trespass to goods. During the early stages of the action it became apparent that the respondents' stance would be one of pure denial. Even a specific allegation that the first respondent had based his belief as to the appellant upon information from an authoritative and normally reliable source, which was introduced by an early amendment of the defence was subsequently removed by a further amendment before trial, an indication of some significance.

Discovery given by the Respondents was meagre and it disclosed no traces of a police file compiled upon the appellant's activities prior to the Grand Court application or of any statements of alleged

witnesses as to any activity on his part which might smack of drug trafficking. Nor was there any indication that the first respondent had ever sought or obtained legal advice as to that application from the Attorney General's office or elsewhere prior to its being made to the Judge.

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. The first respondent in his turn elected to give no evidence whatever. The case for the defence rested upon the propositions that, firstly, the appellant had not discharged the onus of proof lying upon him to establish a want of reasonable and probable cause; secondly, that the decision of the Judge to issue the warrants was in itself a complete answer to the claim since the Judge must necessarily have been satisfied as to existence of reasonable grounds for suspicion in terms of the section. It was on the basis of those submissions that the Court gave judgement for the respondents.

During the hearing of this appeal it has not been seriously challenged that a well known cause of action exists for wrongful abuse of judicial process, the elements of which are that a defendant has

maliciously and without reasonable and probable cause set in motion the machinery of the courts against the plaintiff. This cause of action extends to the wrongful procurement of a search warrant. See generally the observations of Waller L.J. in Reynolds v Commissioner of Police (1984) 1 AER 823 at p. 652 and of Slade L.J. at p. 656. In that case it was re-iterated that the burden of proof of demonstrating both malice and the absence of reasonable and probable cause lies upon the plaintiff but both Lords Justices observed that the failure of a defendant to obtain legal advice before applying for the warrant was a factor which could be taken into account in considering that issue.

Although the formal and initial burden of proof of these matters undoubtedly lies upon the plaintiff in an action of this nature, the speeches of their Lordships in Abrath and North Eastern Rly Co. (1886) II App. Cas. 247 clearly show that the evidential burden during the trial may constantly shift so that, in the end, the proper test is to ask oneself which party will be successful if no further evidence is given at a particular point in the case. It is the contention of the appellant here that he was entitled to succeed upon the evidence which he had given at the point at which the respondents elected to give no factual evidence in reply. Moreover, in Cotton and James (1830)Q.B. and at 128 it was held by Lord Tentenden, C.J., that where a plaintiff is obliged to prove a negative proposition, as here, very slight evidence will suffice to cast upon the defendant the onus of proving the affirmative in reply.

Considerable reliance was placed by the respondent both here and in

the Court below upon certain observations of Lord Coleridge C.J. in the English Divisional Court case of Hope v Everard (1886) XVII QBD 338 implying restrictions upon the ambit of this cause of action in a case such as the present where the applicable statute casts upon a judicial authority the task of deciding independently of the applicant that reasonable grounds exist for the issue of a warrant. Lord Coleridge observed -

> "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 purpose 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; but where bona fides is present and the matter is stated fully and fairly to the magistrate and he concludes that there is reasonable ground for the applicant's suspicion, then his conclusion is an answer to any proceeding."

In Lea v Charrington (1889) QBD, 45 a differently constituted Divisional Court followed Hope and Everard but, at p. 272 the Court of Appeal, while upholding their decision on the facts, declined to decide whether Lord Coleridge's approach had been correct. Trenchant criticisms of that approach are to be found in Feldman's Law of Entry Search and Seizure 15.68 in particular where it is said to be undesirable to deprive an innocent occupier of redress if his property is entered under a warrant obtained on an information which does not

show reasonable cause, whatever the magistrate may think. There have also been suggestions that the decision in Reynolds v Commissioner of Police, already referred to and in which Hope v Everard was never cited, are inconsistent with it.

Hope and Everard as an English decision at first instance is not binding on this Court and affords at best persuasive authority. After full consideration I have concluded that we ought not to follow it here and to the extent that it might suggest that the decision of the Grand Court Judge to issue the warrants in this case affords a complete answer to the appellant's contention based on malice and absence of reasonable or probable cause, I think it cannot be regarded as good law. Even if it were to be so regarded, there is a strong case for saying that the case made by this appellant brings it within the exception allowed by Lord Coleridge where powers are used for purposes of oppression, mala fide and with knowledge that no reasonable grounds for suspicion actually existed, as counsel for the appellant contends.

I turn now to the authority upon which the Learned Chief Justice in his own words 'heavily relied' in reaching a decision adverse to the appellant. That is the case of Inland Revenue Commissioners v Rossminster, reported in the Divisional Court and Court of Appeal at (1979) AER 385 and the House of Lords at (1980) 1 AER 80. As has been pointed out to us, that was an application for a judicial review of the decision of a circuit judge to issue search warrants under a section of the U.K. Taxes Management Act 1970 which empowered him to

do so if satisfied information on oath given by an officer of the Board of Inland Revenue that there is reasonable ground for suspecting that any offence involving tax fraud has been committed and that evidence of it is to be found on premises specified in the information. In that case as in this it was held that the relevant section casts upon the judicial officer the obligation to satisfy himself that such reasonable grounds have been made out.

Evidence was given before the divisional Court as is usual in such cases by affidavit. It was submitted, on behalf of the applicants, in that case that it was incumbent upon the Revenue to give details both of the specific offences suspected and of the grounds of the cause for suspicion but that contention was resisted by the Revenue who also claimed immunity from disclosure upon the grounds of public interest in the confidentiality of the information which led to the application being made for the warrants. The judicial review proceedings had been launched only a few days after the issuance of the warrants and the Divisional Court upheld the contentions of the Revenue and refused the relief sought.

On appeal to the Court of Appeal that decision was reversed but in the House of Lords their determination was in turn reversed and the decision of Divisional Court restored, upon the basis that the Revenue were entitled to refuse to give any reason for the decision of their officers to seize particular documents, a decision which could only be attacked if the applicant could show that there was in fact no reasonable cause to believe that what had been seized might reasonably

be required as evidence of a tax fraud offence. In coming to that decision, however, their Lordships expressly disclaimed any suggestion that, in a civil case claiming damages for abuse of process, after any subsequent criminal proceedings had been concluded or after a decision not to prosecute had been taken, the same principle could be invoked to defeat the applicants claim.

Lord Wilberforce at page 85 of the Report declared -

> "At some stage which cannot be particularised now with precision but which broadly would be when criminal proceedings are over or within a reasonable time are not taken, the immunity which exists at the stage of initial investigation will lapse. Then the Revenue will have to make good and specify the existence and cause of their belief that the things removed might be required for the purpose of 'tax fraud' proceedings and the issue will be tried in a normal manner."

Lord Dilhorne likewise stated at page 89 -

> "If this appeal is allowed it will not prevent the respondents continuing their action for damages for wrongful seizure of documents though, if there is a prosecution, it may well be desirable that that action should not be tried until after the

conclusion of the criminal case."

Lord Diplick made observations to the same effect and, at page 94, added -

> "The court in the civil action could and should be vigilant to see that the Inland Revenue proceeded with their investigations with reasonable dispatch and reach their decision whether to prosecute or not without unreasonable delay. If this were not done the court could properly hold continuation of the immunity to be no longer justified in the public interest and allow discovery to go ahead."

This observation of Lord Diplock was in turn concurred by Lord Scarman at page 104.

A close reading of all the speeches in the House of Lords decision in Rossminster leads one to a conclusion that much reliance was placed there upon the early stage at which the judicial review proceedings had been heard and that the decision affords little guidance as to the likely result of civil proceedings based upon an alleged abuse of process and heard after no further criminal proceedings might be pending. Moreover, it is of the essence of such a judicial review that the decision of the judicial authority invested with the power of issuing the warrant is of itself in question. By contrast in an action of the kind with which we have to deal in this appeal, the

point of attack is not the decision of the Judge to issue the warrant but rather the precedent action of the applicant in moving the Judge to issue the warrant and the state of mind of that applicant as well as the nature of the evidence which he laid before that Judge in order to attain it. Nothing in Rossminster leads me to suppose that, if the evidence led in the concurrent civil proceedings when it eventually came to trial had disclosed an absence of any reasonable grounds to suspect the commission of a tax fraud offence and the presence of improper motives in applying for the warrant, the applicants in their role of plaintiffs in the action might not have eventually succeeded in securing a judgment in their favour.

I have, therefore, concluded that in placing so heavy a reliance upon the Rossminster case in reaching his decision to dismiss the appellant's claim, the learned Chief Justice was in error. It remains to approach the present case to determine whether or not the appellant was entitled to succeed upon the issue of liability in reliance upon the evidence which he gave and called at the trial, given the total absence of any evidence in rebuttal coupled with any inferences which may properly be drawn from the conduct of the Respondents in relation to the action and prior to its inception.

Here is the case of a man of good repute to all appearances totally innocent of any involvement in or with drug trafficking who has seen his offices and residence invaded and his papers removed by police officers under the authority of warrants procured upon the sworn statement that he is reasonably suspected of such involvement. No

evidence is produced of a serious prior investigation of his activities or of any statements recorded from third parties which might reasonably lead to the forming of such suspicions. The officer concerned has not sought legal advice as to the adequacy of any grounds he might have had for such evidently mistaken suspicions. At the trial that officer has not come forward to testify as to those grounds or as to their source regardless of the patent circumstance that no other means are available to the appellant to ascertain them or to the court of trial to evaluate their weight. The court as has been said has been literally starved of evidence.

We are invited by counsel for the appellant in this circumstances 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 SA v Edmunds (1985) 2 AER 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 QB 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. What was the motivation for the targeting of the appellant here is, of course unknown, but it is conceivable that it lies in the direction of reputed money laundering activities on the part of a company which formerly employed of the appellant in 1984 before he moved to the Pierson Heldrig and Pierson Bank. Such a suspicion could, if it were entertained, have afforded no proper grounds for any suspicion of the appellant's personal involvement in drug trafficking if only because the applicable definition of that term in the Misuse of Drugs Law in 1981 did not embrace money laundering activities - by contrast to definition in the comparable United Kingdom statute. This however, is pure speculation and must be dismissed from mind. 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. Accordingly, all the elements necessary to establish liability for that tort apart from the issue as to damages are made out so that the Grand Court should have found on that issue in the

appellant's favour instead of dismissing his claim.

This brings one to the final remaining ingredient of the tort, namely the question of damages. That issue was never finally determined by the learned Chief Justice because of his findings on the issues of liability; but in this Court we have been urged by counsel for the appellant, without dissent from counsel for the respondents, to determine it ourselves rather than to order a retrial of it by the Grand Court in the event that we should find merit in the appeal on the liability issues. The actual computation of special damages was not disputed at the trial but the consistent position of the respondents has been that the damages claimed by the appellant were not in fact caused by the procurement or execution of the search warrants but rather by independent acts of the appellant's employers for which they cannot be held responsible.

The appellant had been employed for some 6 years by the Bank as the managing director of their Cayman Islands subsidiary, during which time he had established it as a profitable offshore banking business and had significantly expanded its turnover, scale of operations and profit. His initial contract of employment had contained a clause restricting his right to engage in outside business activities, but he had disclosed to the Bank and received this permission at that time to retain a single outside part-time business interest. Over the years the scale and diversity of that interest had also significantly increased, apparently without him having sought or obtained any further permission from his employers to engage in that expanded

activity.

A surprise audit of the subsidiary in mid 1991 disclosed this situation to the employers and it caused them concern since it appears to have been the Bank's policy not to allow extensive outside business interests to its staff. The appellant sought to reassure them and appeared to have gone some towards doing so when the Bank appointed outside accountants at its own expense to audit the books of the appellant's outside companies, with his co-operation, to establish whether a satisfactory state of accounts existed from the Bank's perspective. Part of that process has been completed and a further part of it was in active progress when the appellant's meeting in Amsterdam with the directors was re-scheduled for 28th October, 1991.

The appellant's case on this issue is that, after considering the evidence of what transpired at the meeting and the correspondence which proceeded it, the only reasonable conclusion to be drawn is that a traumatic event had intervened to alter the attitude of the Bank towards him from one of active co-operation in the removal of the circumstances which had ruffled their relationship to one of insistence upon his total and immediate departure and the severance of it for good and all. That event, the appellant maintains, could only have been the news that the police in Cayman had obtained a warrant to search the offices of the Bank there as well as the appellant's residence and that the search was imminent.

Having considered this evidence and the time factors involved, the

Chief Justice found as a fact that directors in Amsterdam had been informed of the impending search before it took place and my own reading of that evidence confirms that this was the correct inference to draw. The question remains, 'post hoc propter hoc'; was this event indeed the reason for the appellant's enforced departure or had the bank decided independently to get rid of him because of his, to their eyes, unauthorised business interests, as they subsequently gave out as the reason?

Several pieces of evidence point to a resolution of that issue. The first is the tenor of the correspondence between the Bank and the appellant before the meeting. It does not disclose any pre-disposition by the former to sever the relationship summarily but rather to try to resolve their differences amicably. Secondly, the Bank had arranged for the appellant to stay in Amsterdam to attend a meeting of its branch managers the day following the critical meeting of 28th - a course of action incomprehensible if they had already decided to dispense with his services. Thirdly, there is the significant remark made to the appellant when he sought to ascertain the reasons for the Bank's changed attitude, that these reasons would be apparent to him on his return to Grand Cayman. If the true reason was the existence of the outside interests or dissatisfaction with the auditors' report, the reasons would have been available in Amsterdam and there would have been no reason to withhold them from him on that occasion or to refer him to events in Cayman.

For all these reasons it is an inescapable conclusion that the

procurement of the warrants rather than any other cause sealed the appellant's fate as an employee of Pierson Heldrig and Pierson Bank and, on the evidence it has also led to his inability from that day to this to obtain any other position in the Cayman Island's banking sector. Evidence by Ms. Jennifer Dilbert, the Islands' Inspector of Banks, shows that, so long as the investigation following the execution of these warrants is considered as ongoing, the appellant will not be able to resume his banking career in the Cayman Islands and this is a relevant factor to be taken into account in assessing general damages for loss of good reputation as well as the special damages computed for loss of employment remuneration and benefits forfeited since his enforced retirement from his former post.

These special damages were computed at a figure of CI$566,281 and evidence of that figure at the trial went unchallenged. That computation seems reasonable on its face - even moderate. To that must be added general damages for loss of reputation. It is difficult to imagine a greater slur upon the reputation of an off shore banker than to accuse him falsely of having been implicated in drug trafficking. Moreover the manner in which the respondents persisted and apparently still persist in maintaining that allegation is an aggravating factor, since it must have been evident to them in a matter of months at the outside after these search warrants were executed that no real foundation for their previous suspicions actually existed. Yet no retraction was forthcoming, no apology and no redress. This is an aggravating factor in a situation where aggravated damages are appropriate. In all the circumstances my

assessment of damages for loss of reputation is an additional figure of CI$50,000 making a total of $616,281 in all.

I cannot part with this case without commenting upon the procedure which was apparently followed in this case in applying for these search warrants. The learned Chief Justice himself in his judgment commented adversely upon the absence of any note of the proceedings by the judge who issued them. These comments I fully endorse: whatever may be the usual procedure followed in the United Kingdom when search warrants are issued by Justices of the Peace upon on an information laid by police officer, such a procedure is entirely inappropriate to an application in this jurisdiction before a Judge of the Grand Court under Section 44 of the Misuse of Drugs Law (Revised). There may be no statutory rules laid down to govern the procedure in a criminal as contrasted with a civil cause before the Court, nevertheless it has been universal practice in such applications, as for instance for bail or for extension of time in which to appeal a Summary Court conviction, for an ex parte notice of motion or summons as a minimum to issue. That is usually accompanied by an affidavit. If security considerations preclude the filing of an affidavit in the usual way, oral evidence can be given of the circumstances by an officer or officers of the Police, but in such cases it should, as in all other cases, be noted in narrative form by the Judge, and so constitute an official record.

One further observation. There is no reason why a legitimate application by a police officer under section 44 should be presented

by him in person, since the assistance of an legally qualified officer of the Attorney General's Chambers can always be made available. This course would have the twin advantages of filtering such applications before the Judge is approached so as to ensure that they fall within the ambit of the statute and of ensuring that the facts are placed before the Judge 'fully and fairly' to employ once more the language of Coleridge C.J. Such a practice would to a great extent ensure that the circumstances which have unhappily prevailed in the present case are not repeated and I commend it to all those charged with responsibility for future such applications in this jurisdiction.

In the result I would allow this appeal, set aside the Judgment of the Grand Court and in its place give judgment for the appellant in terms of the declaration claimed in paragraph 1 of the Re-Amended Writ of Summons together with an award of damages in the sum of CI$618,281 and costs here and in the Court below.

JUDGE

Services, he was appointed manager of Pierson Cayman. Under his management the bank prospered, increasing in volume of business and annual profits and resulting in a commensurate increase in his remuneration to an annual package of US$227,200 in 1991. Notwithstanding, there was the unexpected and unannounced visit on September 12, 1991, by a team of three officials, a Mr. de Haas, accompanied by legal counsel, Mr. Oosterholt, and Mr. Wijnholt, chief auditor of the bank, with the declared intent to conduct an internal audit. The internal audit was followed by an audit by external auditors of the New York firm of Ernst & Young. The result of both audits were favourable as regards procedure but there remained outstanding the accusation that the plaintiff was in breach of a term of his contract in that he had extended his participation in a number of business enterprises in Cayman when permission was granted in respect of only one - a sports shop - in which he had a 50% interest. On October 21, 1991, he set out to attend a meeting at headquarters in Amsterdam. On the appointed day, October 28, he arrived at the head office in Amsterdam expecting that the outstanding matters would be discussed and resolved favourably to him. Instead, he was presented with what the Learned Chief Justice described as a "fait accompli"; in reality, it was a Hobson's choice - resign or be dismissed. He declined to resign and in the words of Harre, C.J., there was a "constructive dismissal".

Harre, C.J., in his judgment dealt carefully and at some length with the evidence of the appellant and the correspondence between the plaintiff and the officers at Piersons Amsterdam in relation to this aspect of the matter. The issue whether or not the contemporaneous execution of the search warrants and the pending investigations provided the sole or a contributory cause of the appellant's dismissal is clearly more relevant to damages than liability and at this stage detailed reference to the relevant evidence is deferred. Here, it is enough to note that the first defendant obtained the warrants and carried out the search while the appellant was abroad and through the first defendant the pending execution of these search warrants was communicated to the officers of Piersons here and inferentially to Amsterdam while the appellant was unaware of the events in Grand Cayman. The plaintiff strongly and categorically denied any involvement in breaches of the Misuse of Drugs Law. He attributed his dismissal to the pending criminal investigations.

The three search warrants were sought by the first defendant on the basis of an application in the form of an affidavit in respect of each warrant and were granted by Schofield, J., pursuant to section 16M of the Misuse of Drugs Law, the relevant provisions of which read:

> "(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.

(3) ...

(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 which the application is made, but that the material cannot be at the time of the application be particularised; and

(c) (i) ...

(ii) ...

(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.

(5) Where a constable has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, 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 warrant was issued."

Each of the first defendant's affidavit on which the relative search warrant was grounded stated, inter alia, that there were reasonable grounds for suspecting that John Mitchell Rae had carried on or had benefited from drug trafficking and included verbatim the provisions of section 4(b) and (c)(iii). The warrants authorised the search of the following premises: Pierson's back premises at Cayside Galeries, George Town, the appellant's office at the bank, the appellant's home and certain other places.

The entry and search of the premises described in the warrants were first effected on October 28 before the employees arrived at the bank's premises in accordance with prior arrangements made between the first defendant and the legal counsel, Oosterholt, and in the presence of Oosterholt and other officers, including the acting manager, Mr. Bromley. The search was conducted over a period of days. Of the documents taken during the search none was found relevant to the police investigations and they were eventually returned.

Before us Mr. LaMontagne maintained the same unusual stand as in the Court below, namely, that while not conceding the existence of the tort of the wrongful procuring of a search warrant maliciously and without reasonable and probable cause, he was prepared to argue on the basis that it did exist.

From the "wealth of authority" presented to him the Learned Chief Justice considered relevant statements from

cases of respectable antiquity such as **Elsee v Smith** [1822] 2 Chit 304, **Hope v Evered** [1886] XXII QB 338, **Lea v Charrington** [1899] XXIII QBD 45 p 272 and of more recent vintage, **Roy v Prior** [1971] AC 470 and quoted with evident approval the following passage from **Reynolds et al v Commissioner of Police of the Metropolis** [1984] 3 ALL ER p 652:

> "There is no dispute that to procure the issue of a search warrant without reasonable or probable cause and maliciously is an actionable wrong (see **Clerk and Lindsell on Torts** (15th edn. 1982) para. 18-08 and **Everett v Ribbands** [1952] 1 ALL ER 823 at 826 [1952] 2 QB 198 at 205, per Denning LJ) and the burden of proof is on the plaintiff who is asserting that there was no reasonable or probable cause (see **Abrath v North Eastern Rly. Co.** [1886] 11 App Cas 247). When the facts on which the application was based are established, it is then for the judge to decide whether it has been proved that there was no reasonable and probable cause for the issue of a search warrant".

In my view, he correctly concluded that "an action of the same nature and subject to the same burden and standard of proof lies under the different statutory provisions which we have under the Misuse of Drugs Law. The plaintiff must prove absence of "reasonable and probable cause". The existence of this specific tort is now beyond debate.

Based upon the re-re-amended form of the pleadings, the defence was accurately summarised by Mr. Alberga in his submissions thus:

"(1) that the premises were entered and searched in obedience to warrants issued by a Judge of the Grand Court and that the Respondents were absolutely protected by Section 27(1) of the Police Law;

(2) a denial that the First Respondent invoked the process of the Court falsely and maliciously and that the First Respondent had no reasonable or probable cause for asserting the matters in the informations which he laid;

(3) a denial that the warrants were illegal and/ or invalid on their face;

(4) no admission that to falsely and maliciously obtain a search warrant is an actionable tort."

At the close of the plaintiff's case, no evidence was tendered on behalf of the defendants and the defence rested upon submissions.

As I understand them, the consistent submissions of the defence were to the effect that on the authority of **Hope v Evered** (supra) when a search warrant is issued pursuant to statutory powers similar to those of **Hope v Evered** as in the instant case, there is a presumption of regularity which protects the applicant from an action of this kind where the

plaintiff has the burden of proving not only that it was procured maliciously but also without reasonable and probable cause and that the only exception was an action for abuse of process of the court, in which the primary essential element, is that the process was obtained for an improper purpose.

Alternatively, in any event, the plaintiff had not dishcarged the burden of proving the essential elements of the tort in the instant case, namely, the absence of reasonable and probable cause and malice and, consequently, there was no case for the defence to answer. On the execution of the warrant reliance was placed on section 27(1) of the Police Law.

After an industrious examination and consideration of dicta from a number of cases Harre, C.J., concluded his judgment thus:

> "Detective Inspector Gibbs persuaded a Grand Court judge that he had the necessary reasonable suspicion. That judge, unless he gravely neglected his duty (which has not been suggested) acted judicially. 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.

There remains the matter of the warrants themselves. The plaintiff says that they are bad on their face for two reasons:

(a) because the material included was not "particular material" or "material of a particular description". As I have already said, my view of section 16M is that there is no requirement for the inclusion of such material under that section, which is different in character from 16L;

(b) because there are major discrepancies between what was asked for in the information and what was granted in the warrants, and no evidence, in view of the absence of judge's notes, as to why this was. But my view is that the inclusion of any of this matter in the informations and the warrants was entirely unnecessary for the reason which I have already given. It does not invalidate, in my judgment, the rest of the warrant which exactly followed the statutory requirements.

So the plaintiff has failed in his action and I do not have to go into the question of damages."

In the opening segment of his submissions, Mr. Alberga adverted to the fact that the informations in application for the warrants contain a very general and unspecific material to which the application related and that there was absolutely no indication in the pleadings from the evidence or in any document tendered, the reasonable grounds for suspecting that the appellant was involved in drug trafficking or benefited from drug trafficking or what was the basis for suspecting that there were in the premises named in the informations material of value to the investigations. He contrasted this position with that in the case of **G v S** [1992-1993] CLR 203 where the grounds on which the order was made were disclosed for consideration by the Court.

Mr. LaMontagne in reply pointed out that there are no rules regulating application or procedure in relation to the application and issue of search warrants under section 16M of the Misuse of Drugs Law and in the absence of such statutory requirements there was no obligation on an applicant to set out therein the grounds on which he relied. He sought support from the opinions expressed in paragraphs 4.11 and 4.12 of **Feldman** on the law relating to **Entry Search and Seizure** [1986 Ed.].

Now the case of **G v S** (supra) was in relation to a Production Order under section 16L of the Misuse of Drugs Law. Although this order, as in the case of a search warrant, was granted on an application ex parte, it is fundamentally different in nature and purpose from a search warrant.

A production order requires the person against whom it is made to produce certain evidence relevant to the proceedings including evidence which may be against interest to the extent of being self-incriminating. The order is effective until and unless successfully challenged and set aside at an inter partes hearing. It, therefore, provides an opportunity for challenge and to that end adverts the person against whom it is issued by setting out in the supporting affidavit the grounds on which the application rested. By contrast, the purposeful intent of the search warrant is to authorise the unheralded and expeditious invasion of certain private premises named therein and to take therefrom such evidential material as may be relevant to the investigations. It is clear from certain special provisions in section 16M that with apparent awareness of the secrecy and ramifications of drug trafficking, the legislation intended the search warrant to permit a swift, sudden and surprising invasion of the particular premises and on entry to search and seize "any material (other than items subject to legal privilege) which is likely to be of substantial value (whether by itself or together with other material) to the investigations for the purpose of which the warrant was issued". I am, therefore, of the view that on this point G v S is unhelpful to the appellant. Equally so, would be cases from the other Commonwealth jurisdictions where the statutory provisions require the grounds on which the application is grounded to be set out therein.

Accordingly, in my opinion, in the absence of specific provisions there is no obligation on an applicant for a search warrant under 16M of the Misuse of Drugs Law to include in his application the grounds for his suspicion nor need the search warrant itself contain such grounds and it would be sufficient if the form of the warrant followed the wording of the statutory provision. I am fortified in so holding from the following statement of **Lord Wilberforce** in **Inland Revenue Commissioners and another v Rossminster Ltd** (the Rossminster case) [1980] 1 ALL ER at p 84:

> "The warrant followed the wording of the statute, 'fraud in connection with or in relation to tax', a portmanteau description which covers a number of common law offences (cheating) and statutory offences (under the Theft Act 1968 et al). To require specfication at t his investigatory stage would be impracticable given the complexity of tax frauds and the different persons who may be involved (companies, officers of companies, accountants, tax consultants, taxpayers etc). Moreover, particularisation, if required, would no doubt take the form of a listing of one offence and/or another or others and so would be of little help to those concerned. Finally, there would clearly be power, on principles well accepted in the common law, after entry had been made in connection with one particular offence, to seize material bearing on other offences within the portmanteau. So, particularisation, even if practicable, would not help the occupier.
>
> I am unable, therefore, to escape the conclusion, that adherence to the statutory formula is sufficient."

However, the absences of an obligation to include in the search warrant the grounds for suspicion, does not eliminate or minimise the necessity that the requisite suspicion should exist and be based on reasonable grounds as required by the statute; a fortiori when no document or exhibit relevant to the investigations was found. In due course, I will deal with the effect which the absence of any record of the grounds on which the search warrants were issued will have on the plaintiff's requisite burden of proof.

Turning to the main plinths on which the judgment of the Learned Chief Justice rested, Mr. Alberga contended that having found that the tort of wrongfully procuring a search warrant existed he nevertheless erred in law and in principle in concluding that:

(i) there was a complete absence of evidence on which the appellant's case was based;

(ii) because the judge of the Grand Court had concluded that there was reasonable grounds for the first respondent's suspicion and issued the warrants, there was an answer to the appellant's action on the **Hope v Evered** principle;

(iii) in the light of the evidence adduced by the appellant it was not incumbent on the first respondent to adduce evidence at the trial that he had reasonable grounds; and

(iv) the provisions of section 27(1) of the Police Law was applicable and afforded the respondent an answer to the appellant's action.

It is, therefore, necessary to examine these contentions against the dicta in the cases relied on by the Learned Chief Justice. It is fair to say that the proposition in **Hope v Evered** is the fulcrum of the reasons for judgment.

The headnote in that case reads (p 308):

> "By 48 & 49 Vict. c 69 (Criminal Law Amendment Act, 1885), s. 10, it is provided that "if it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl or any other person, who in the opinion of the justice, is bona fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such a woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorizing any person named therein to search for ... such woman or girl"."

In the course of his judgment Lord Coleridge said (p 340):

> "The Act of Parliament therefore casts on the magistrate (and if legislation of this nature is to be effective, most properly so) the onus of its being made to appear to him that there is reasonable cause that the girl is being detained for immoral purposes. If the person who puts the magistrate in action only states the grounds of his suspicion and says that on those grounds he reasonably suspects that the girl is improperly detained, and if the magistrate agrees with him and thinks that it has been made to appear to him that a person acting bona fide has reasonable cause for his suspicion, then that decision of the magistrate is an answer to such an action as the present. The magistrate has to act judicially. 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 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; but where bona fides is present, and the matter is stated fully and fairly to the magistrate and he concludes that there is reasonable ground for the applicant's suspicion, then his conclusion is an answer to any proceeding."

In that passage Lord Coleridge expressly recognized as an exception the existence of an action in tort for the wrongful obtaining of a search warrant. I do not agree with Mr. LaMontagne that the exception was limited to an action for "Abuse of Process". An action for malicious prosecution and maliciously procuring a search warrant on the one hand and the "Abuse of Process" (a term usually used in relation to civil process), on the other, are species of the same genus - the wrongful invoking of the process of the court - and I would interpret the exception recognized by Lord Coleridge as including obtaining a search warrant maliciously and without reasonable and probable cause.

Accordingly, to what extent did this proposition in **Hope v Evered** provide a protective screen for the procurer of a search warrant? The Learned Chief Justice was clearly aware of reservations and doubts as to whether the statement in **Hope v Evered** was intended to provide the sort of cover to a procurer of a search warrant as to render this type of action well nigh unmaintainable for said he:-

"In **Lea v Charrington** [1889] XXIII QBD 45 p 272 (CA) Lord Esher MR is reported as saying that the Court of Appeal would some day have to decide whether it agreed with **Hope v Evered.** Concerns have been expressed about that case. See **Feldman, Law of Entry, Search and Seizure** paragraph 15.67-15.69 where it is suggested that **Reynolds v Metropolitan Police Commissioner** [1984] 3 ALL ER 649 is inconsistent with it. But there are passages in the speeches of their Lordships in the **Rossminster** case - a case to which I shall be referring in detail later - which may be an indication (though the point was not decided) that there is life in **Hope v Evered** yet."

The **Rossminster** case had run the gamut of the **Divisional Court, the Court of Appeal** [1979] 3 ALL ER 385 and the **House of Lords** [1980] 1 ALL ER 80.

Counsel on both sides have referred to dicta of the judges in all three jurisdictions seeking support or comfort for their respective submissions. However, the devil has been reported as quoting scripture to support his temptations. To avoid dicta appropriate to the circumstances of a particular case being used as a general proposition or being applied inappropriately to distinguishable circumstances, it is but prudent in applying dicta in the cited cases as appropriate or helpful to do so in context and against the background of the factual circumstances of the instant case, the nature of the proceedings and the questions of law arising.

In the **Rossminster** case the applicant sought an order for certiorari to quash the warrants as being invalid and a declaration that the seizure of documents was unlawful.

The following questions arose from the applicant's cause of action: (a) were the warrants invalid because they did not specify the offence? and (b) was the seizure unlawful, the articles being so numerous and inspection so cursory that the officers could not at the time have had reasonable grounds for believing that they may be required in evidence? while, from the respondent's response: (a) were the warrants sufficient if they set out the wording of the statute? (b) were the revenue officers entitled to refuse disclosure of the nature of the offence as this would be detrimental to the investigations? and (c) were the revenue officers sole arbiters of reasonable cause to believe the articles seized were required for evidence and were, therefore, entitled to refuse to disclose their grounds for seizure?

The Court of Appeal allowed the appeal on the grounds: (i) that the warrants were invalid for failing to specify the offence and for want of particularity; and (ii) even if the warrants were valid, it was for the court to decide whether there was reasonable and probable cause.

In the House of Lords it was otherwise. It was held that:

(i) the warrants were valid and in proper form (see passage quoted ante);

(ii) "Although a revenue officer was required, under s 20c(3), to have 'reasonable cause to believe' that what was seized under a warrant might be required as evidence of a tax fraud, on an application for judicial review made prior to the criminal prosecution public interest immunity entitled the officer to refuse to give any reason for his decision to seize particular documents and his decision could only be attacked if it was shown to be ultra vires because he had no reasonable cause to believe or did not believe that what was seized might be required as evidence and the respondents' case fell short of doing that. Therefore, although in the respondents' action for wrongful interference with goods the Revenue officers would have to disclose and substantiate the grounds of their belief, the respondents' application for judicial review failed" (see **Rossminster** case p 81).

(iii) In any event because there was a substantial conflict of evidence as to the manner in which the searches were carried out, the Court of Appeal had been wrong to make a final declaration, since such a declaration should not be made unless there was no dispute as to the material facts or the dispute as to those facts had been determined after an enquiry in the nature of a trial".

This summary, in the headnote, is derived form the following amongst other statements:

"I accept that some information as regards the person(s) alleged to have committed an offence and possibly as to the approximate dates of the offences must almost certainly have been laid before the Board and the judge. But the occupier has no right to be told of this at this stage nor has he the right to be informed of the 'reasonable grounds' of which the judge was satisfied. Both courts agree as to this: all this information is clearly protected by the public interest immunity which covers

investigations into possible criminal offences. With reference to the police, Lord Reid stated this in **Conway v Rimmer**[1] in these words:

> "The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities; and it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution, but after a verdict has been given, or it has been decided to take no proceedings, there is not the same need for secrecy.' " - per Lord Wilberforce [1980] 1 ALL ER p 83.

and

"The public interest in immunity from disclosure of the grounds of the officer's belief that a document that he seized may be required as evidence in a future prosecution for an offence involving a tax fraud is thus, in general, temporary in its nature, except as regards identity of informants (cf **D v National Society for the Prevention of Cruelty to Children**[4]) and possibly new and unusual methods of investigation used by the Inland Revenue. This, as it seems to me, provides an obvious method of reconciling the two conflicting public interests where an ordinary civil action is involved. If there is to be a criminal prosecution it is, in my view, clearly in the public interest in the proper administration of justice, both criminal and civil, that the civil action should not proceed to trial until the criminal trial is over; so discovery, whether of documents or by interrogatories, directed to eliciting the factual grounds for the officer's belief can be deferred at least until the Inland Revenue have had a reasonable time to complete their investigations into suspected tax frauds and to decide whether to bring criminal proceedings at all and, if so, for what offences. If they decide to bring proceedings the public interest immunity would

> continue to apply until the conclusion of the criminal trial; if they decide not to bring any criminal proceedings the public interest immunity would come to an end with that decision. The court in the civil action could and should be vigilant to see that the Inland Revenue proceeded with their investigations with reasonable dispatch and reached their decision whether to prosecute or not without unreasonable delay. If this were not done the court could properly hold continuation of the immunity to be no longer justified in the public interest, and to allow discovery to go ahead" - per Lord Diplock at p 93.

The following passages from the **Rossminster** case quoted in the judgment of the Learned Chief Justice evidently found favour with him. First:

> "The courts have the duty to supervise. I would say critically, even jealously, the legality, of any purported exercise of these powers. They are the guardians of the citizens' right to privacy. But they must do this in the context of the times, ie of increasing Parliamentary intervention, and of the modern power of judicial review. In my respectful opinion appeals to 18th century precedents of arbitrary action by Secretaries of State and references to general warrants do nothing to throw light on the issue. Furthermore, while the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power, to restrict or impede the working of legislation, even of unpopular legislation: to do so would be to weaken rather than to advance the democratic process" - per Lord Wilberforce at p 82.

In my view, this is but a commentary on this type of legislation and the proper judicial approach to even unpopular legislation. Strictly speaking, this is not part of the ratio decidendi.

Secondly:

> "No warrant to enter can be issued except by a circuit judge, not, as is usually the case, by

> a magistrate. There has to be laid before him information on oath, and on this he must be satisfied that there is reasonable ground for suspecting the commission of a 'tax fraud' and that evidence of it is to be found in the premises sought to be searched. If the judge does his duty (and we must assume that learned Common Serjeant did in the present case) he must carefully consider for himself, if the grounds put forward by the Revenue officer and judicially satisfy himself in relation to each of the premises concerned, that these amount to reasonable grounds for suspecting etc. It would be quite wrong to suppose that he acts simply as a rubber stamp on the Revenue's application" - p 83.

but this should be read with the sub-paragraph following:

> "The courts retain their full powers of supervision of judicial and executive action. There is nothing in s 20c which cuts these down; on the contrary, Parliament, by using such phrases as 'is satisfied' and 'has reasonable cause to believe', must be taken to accept the restraints which courts in many cases have held to be inherent in them" - p 83.

In addition to the validity of the warrants, their Lordships in the **Rossminster** case made the positive ruling to the effect that the prayer for a declaration was premature. Thus, the application would be: (i) a pre-emptive endeavour by the applicants to have certain documentary evidence ruled inadmissible before the investigations were closed and the question of criminal prosecution determined; and (ii) implicitly, a finding of liability in the officers without a proper trial and determination of issues in contention.

The **Rossminster** case is clearly distinguishable from the instant case in the following important particulars: (i) the declaration was sought while the criminal investigations were

in progress and, accordingly, the application in the circumstances was not entertainable. In the instant case the writ was filed some six months after the entry and search; the plaintiff's documents seized were irrelevant to the investigations [the letter of the Commissioner of Police of the 23rd March, 1992, to the plaintiff's attorney stated that the plaintiff's documents may be returned] and the investigations terminated without the institution of any criminal proceedings; and (ii) the request for certorari to quash the validity of the warrant was denied on the grounds that as the provisions of the statute did not require the inclusion of the grounds for suspicion, refusal by the officers to disclose those grounds was upheld on a public interest claim that disclosure would be detrimental to the criminal investigations then in progress. In the instant case there was no claim for public interest and the investigations were at an end. While the common factor in both limbs of the **Rossminster** judgment was the pending investigations, it was manifestly absent in the instant case.

However, although there was no reference to **Hope v Evered** in the **Rossminster** case, as incidental to their Lordships' decision on the validity of the warrant, the presumption of regularity was recognized in the following amongst other dicta:

> "In the instant case the search warrant did not purport to be issued by the circuit judge under any common law or prerogative power but pursuant to s 20c(1) of the Taxes Management Act 1970 alone. That subsection

> makes it a condition precedent to the issue of the warrant that the circuit judge should himself be satisfied by information on oath that facts exist which constitute reasonable ground for suspecting that an offence involving some form of fraud in connection with or in relation to tax has been committed, and also for suspecting that evidence of the offence is to be found on the premises in respect of which the warrant to search is sought. It is not, in my view, open to your Lordships to approach the instant case on the assumption that the Common Serjeant did not satisfy himself on both these matters, or to imagine circumstances which might have led him to commit so brave a dereliction of his judicial duties. The presumption is that he acted lawfully and properly; and it is only fair to him to say that, in my view, there is nothing in the evidence before your Lordships to suggest the contrary; nor, indeed, have the respondents themselves so contended" - per Lord Diplock at p 91.

Rather than support the concept that the presumption of regularity provided a fixed and impenetrable screen for the procurer of the search warrant, the following passage, amongst others, indicates that an action may be maintainable in certain circumsatnces at the close of the investigations or termination of the criminal proceedings thus:

> "--- I would wish to make it clear that the failure of the respondents at this stage is not necessarily the end of the matter. They can proceed with an action against the Revenue for, in effect, excess of power and for trespass and any aggravation can be taken into account. At some stage, which cannot be particularised now with precision but which broadly would be when criminal proceedings are over, or, within a reasonable time, are not taken, the immunity which exists at the stage

> of initial investigation will lapse. Then the Revenue will have to make good and specify the existence and cause of their belief that things removed might be required as evidence for the purpose of 'tax fraud' proceedings and the issue will be tried in a normal manner" - per Lord Wilberforce at p 85.

From the dicta in the cases, I extract the following propositions, namely, that the grant of a search warrant under statutory powers similar to section 16M of the Misuse of Drugs Law, is a judicial determination and there is the presumption of regularity that the judicial officer exercised his discretion correctly. It is consonant with common sense that the higher the officer in the judicial hierachy, the stronger will be the presumption. But the presumption is the judge's not the procurer of the process. However, from the very nature of the presumption it will incidentally afford the applicant for the search warrant a measure of protection but it does not present an impenetrable screen and although Mr. LaMontagne relies heavily on **Hope v Evered** he has declined to go so far as to say the presumption of regularity is irrebuttable. Therefore, the pivotal question must be whether in the instant case, the plaintiff has made out a case for the defence to answer. To determine that question, due consideration must be given to the burden of proof which lies on the plaintiff and which involves proof of the essential elements constituting the tort and the probative worth of the evidence tendered to that end.

On this question, the Learned Chief Justice correctly held that the plaintiff must prove absence of reasonable and probable cause based on the case as a whole. He, however, went on to hold that "in the present matter there was a complete absence of evidence to establish the facts on which the application was based". This finding was strongly challenged by Mr. Alberga on the ground briefly put that there was sufficient evidence to call upon the defence to answer. It is necessary to review the dicta from the cases cited and referred to and relied on in support of that finding.

The following statement by Bowen, L.J., in **Abrath v The North Eastern Railway Company** [1883] 11 QB 440, on the general burden of proof and the shifting burden of adducing evidence was accepted as correct by both sides and quoted by the Learned Chief Justice with evident approval:

> "Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a prima facie case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have

> stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests." - p 456.

Abrath's case was referred to in the following statement of Lord Denning in **Glinski v McIver** [1962] 1 ALL ER 696:

> "... there are cases where the prosecutor is not himself personally involved but makes the charge on information given to him by others. The issue again appears simple. If the information was believed by him to be trustworthy, there was good cause for the prosecution. If it was known by him to be untrustworthy and not fit to be believed, there was no cause for it. Here again much depends on the state of mind of the prosecutor. If there is evidence to show that he did not believe the information to be trustworthy, the question may properly be put to the jury as Cave, J., put it in **Abrath v North Eastern Ry. Co.:** Did he honestly believe in the case which he laid before the magistrates?, for that is the crucial point. But it should not be put unless there is some evidence of his want of belief, see **Cox v Wirrall** [1607] Cro Jac 193 at the end; **Haddrick v Heslop** [1848] 12 QBD 267; **Abrath v North Eastern Ry. Co.**
>
> Fourth, there are cases where from the conduct of the defendant himself it may reasonably be inferred that he was conscious that he had no reasonable or probable cause for the prosecution. That is how it was put by a strong Court of Exchequer Chamber in **Panton v Williams** [1841] 2 QB 169. Thus a man may trump up a charge in order to bring pressure to bear on another. He may put forward plausible evidence and use all sorts of means to give it an air of propriety, even to the

> extent of getting counsel's opinion in support of it. He may even conceal facts which he knows would furnish an answer to the charge. When it comes to the trial, he may not be prepared to support it in the witness-box. Clearly such a man has no reasonable or probable cause for prosecution. But the only way of establishing it may be to look at his conduct and see whether it can reasonably be inferred therefrom that he was conscious he had no good cause to prosecute. If so the question can properly be put to the jury: Did he honestly believe that the accused was guilty?, or, as I would prefer, did he know there was no good ground for the charge he made? See **Ravenga v MackKintosh** [1824] 2 B&C 693; **Taylor v Williams** [1831] 2 B&Ad 845; **Broad v Ham** [1839] 5 Bing NC 722. 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".

On this the Learned Chief Justice in his judgment commented thus:

> "It is convenient to deal with the **Glinski v McIver** and **Abbot v Refuge Assurance Co Ltd** tests, as I have only just made reference to those cases. While the general objective of the tests to be applied in malicious prosecution cases is similar to those which I apply in the present case the nature of that which is to be tested is quite different. It is suspicion, not proof or evidence, or indeed even positive belief. "Reasonable and probable cause" in the context of section 16M of the Misuse of Drugs Law means "reasonable grounds to suspect", "reason to suspect", of "reasonable grounds for suspecting" - the terms mean the same thing."

He sought support for the distinctions which he sought to draw in that passage by considering the following definition of suspicion by Lord Devlin in **Shaaban Bin Hussein and ors v Chang Fook Kan and other** [1969] 3 ALL ER 1626 at 1630-1:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.".

and later -

> "There is another distinction between reasonable suspicion and prima facie proof. Prima facie consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in **McArdie v Egan** [1933] ALL ER 611. Suspicion can take into account also matters which, though admissible could not form part of a prima facie case.".

It was accepted as correct the test for determining reasonable grounds to suspect in the Cayman Islands cases in **R v Darwin McLean** CLR 15 of 1974 per Summerfield, C.J.;

> "In my view the test for determining whether "reasonable grounds to suspect" within the meaning of section 5(1) [of the Misuse of Drugs Law 1973] exist is an objective one. All known circumstances of the case have to be examined dispassionately and assessed objectively according to the standards of a reasonable man to determine the existence or absence of such grounds. I respectfully adopt the reasonings and conclusions in this regard of their Lordships in the case of **Bodoo v Joseph** 7 W.I.R. 373, applying the

> principles on **Cedeno v O'Brien** 7 W.I.R. 192 in relation to the interpretation of a substantially similar provision. These cases were quoted with approval in **R v Spragg** 23 W.I.R. 371."

and that of Georges, J.A. in G v S [1992-1993] CILR 203:

> "The suppression of the drug trade in these Islands is a matter of priority and the powers granted under s. 16L permit a necessary intrusion into the privacy of homes and offices of persons who may well be innocent or any wrongdoing. They also permit prying into confidential relations which would normally be shielded from scrutiny. There must be awareness of the importance of achieving a balance and this can best be achieved by ensuring that the suspicions on which the exercise of these powers is based is shown to be reasonable.".

The Learned Chief Justice then concluded thus:

> In all these cases the judge had evidence of facts upon which suspicion was founded and reached a conclusion upon them."

and later said:

> "In this case I am faced with a quite different situation. There is no evidence at all, either in the form of a written note by the judge or other documentary evidence, or of testimony by Detective Inspector Gibbs or anyone else at the trial, as to what transpired between him and the judge on the 25th October 1991. I am asked to come to a conclusion entirely by inference and the plaintiff is faced with the formidable task of having to prove a negative."

The Learned Chief Justice apparently saw the definition of suspicion, the dicta in these cases and the absence of any record of the grounds upon which the applications and issue of the search warrants rested only as factors favourable to the defence and rendering proof of the absence of reasonable and probable cause by the plaintiff well nigh impossible.

Mr. Alberga challenged the correctness of that approach in the following grounds:

> "Insofar as he held that the plaintiff had failed to discharge the burden of proof which was initially on him the Learned Chief Justice wrongly applied and/or misunderstood the principles to be extracted from the authorities cited to him viz **Abrath v The North Eastern Railway Company** [1883] 11 QB 440; **Cotton v James** 108 E.R. 733; **Taylor v Williams** 100 E.R. 1357; and **Halsbury's Laws of England** 4 Edn. Vol 45 paragraph 1364 on this aspect of the matter and erred in law in finding as he did."

> "The Learned Chief Justice failed to appreciate that where a plaintiff is called upon to prove a negative (such as absence of reasonable and probable cause) that only very slight evidence of the want of probable cause was sufficient to throw the onus of proof on the Defendant to prove that he did have reasonable and probable cause."

These grounds are strongly supported by the following statement by Lord Tenterden, C.J., in **Cotton v James** 108 ER at p 737:

> "This was an action for maliciously suing out a commission of bankrupt against the plaintiff without probable cause. At the trial before me, the defendant's counsel urged that there was no evidence of the want of probable cause, that it was incumbent on the plaintiff to give such evidence, and that, having failed in doing so, he ought to be nonsuited. I declined to nonsuit, and a verdict was found for the plaintiff. A rule was afterwards granted to shew cause why the verdict should not be set aside. Cause was shewn during the present term, and the same points were insisted upon. It may be conceded that, according to the authorities referred to in the argument, the question of probable cause, arising upon the facts proved or admitted, is a question for the Court, and that in general the plaintiff must give some evidence shewing the absence of probable cause. But such evidence is, in effect, the evidence of a negative, and very slight evidence of a negative is sufficient to call upon the other party to prove the affirmative, especially where the nature of the affirmation is such as to admit the proof by witnesses, and cannot depend upon matters lying exclusively within the party's own knowledge, as in some cases of criminal prosecution -----".

In my view this statement of Lord Tenterden described the evidential requirement of the plaintiff to shift the evidential burden in this particular issue to the defence and this reasoning is consonant with the practicalities. Indeed it is in accord with the practicalities of human affairs that when a party is required to prove a negative averment (which the absence of reasonable and probable cause clearly is) to

borrow mutatis mutandis from Archibalds Thirty Seventh Ed - #1146, p 431 and with parity of reasoning that it ought "to be [inferred] all the more readily, in proportion to the difficulty of proving it by positive evidence and to the facility of disproving facts inconsistent with it, if it really never occurred". I would adopt this approach as applicable to a civil case where the burden of proof is less onerous.

In the instant case, the following circumstances render proof of the affirmative considerably easier than normally:- (i) notwithstanding that the grounds of suspicion are subject to the objective assessment of the judge who issued the search warrant, the suspicion remains personal to the applicant; (ii) the accepted definition of 'suspicion' indicates how bona fide suspicion may rest on information which may be inconclusive, indefinite or even false but reasonably credible to the applicant; (iii) assuming for the purposes of argument that there were grounds for suspicion, the absence of any written record for those grounds had the following results: (a) the grounds are now entirely within the knowledge of the applicant; and (b) if the applicant gave evidence it would be extremely difficult to establish inconsistency or contradict that evidence; and (iv) the applicant for the search warrant would have nothing to fear from giving evidence because although public interest or qualified privilege was not