5/7/94
HARRE

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 164 OF 1992

BETWEEN:	JOHN MITCHELL REA	PLAINTIFF
AND:	DETECTIVE INSPECTOR BRIAN GIBBS	FIRST DEFENDANT
	COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE FORCE	SECOND DEFENDANT
	THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS	THIRD DEFENDANT

For the plaintiff: Ramon Alberga QC instructed by Mr. S. McCann of Bruce Campbell & Co.

For all the defendants: Pierre LaMontagne QC instructed by Mr. I. Archie of Legal Department of the Cayman Islands Government.

HARRE C.J. **JUDGMENT**

I shall indicate the nature of this case by referring in full to claims made in the indorsement to the plaintiff's writ of summons as amended. The production order referred to was obtained under section 16M of the Misuse of Drugs Law and the claims are these -

"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.".

The evidence on which those allegations are based is this: At the beginning of September 1991 the plaintiff was enjoying a successful and well rewarded banking career in the Cayman Islands. He was then, I think, 45 years old. By 1983 he was working for Bank of America in the Cayman Islands as second in command reporting directly to the local managing director and he had been granted Caymanian Status in 1982. He says that he left Bank of America in 1983 because he wanted to remain in the Cayman Islands rather than be transferred to Singapore. After what appears to have been a rather unsettled period during which he spent some six months with an

organisation called Inco Bank as manager, and subsequently with another called Cayman Corporate Services for a further six months or thereabouts, he was appointed as managing director of Pierson, Heldring, Pierson (Cayman) Ltd, ("PHP Cayman") which is part of a large and respected banking group with headquarters in Amsterdam.

Clauses 10 (d) and (e) of Mr. Rea's contract with PHP (Cayman) read as follows -

> "(d) During your employment with PHP (Cayman) you will not engage in any profession, trade or business either directly or indirectly as principal or agent unless you have first obtained permission from PHP (Cayman) in writing.
>
> (e) You will not become surety or guarantor or undertake personal liability on promissory notes or bills of exchange of a commercial nature unless you have first obtained permission from PHP (Cayman) in writing.".

I shall now have to read some correspondence at possibly tedious length. It is important as showing the development of relations between between Mr. Rea and his employer at the material time.

On the 26th of April 1985 Mr. Rae wrote a letter to a Mr. Van Marken whom he described as his boss in Amsterdam. It is of considerable importance in this case -

> "26th April 1985
>
> Dear Tony,
>
> Re: JMR contract of employment
>
> I refer to Andre's letter to me, copied to you, dated April 18 and I now have pleasure in enclosing one signed copy of my employment

contract.

In doing so I need to make reference to page 4, number 10 d and e. Since I have an existing interest as a 50% share holder in a sports shop here; this interest dates back to March 1984. It developed out of a friendly relationship with the previous outright owner and now 50% owner who sought my advice from time to time outside normal office hours. Obviously, I am not involved actively with the day to day running of the business, although, outside of normal office hours, I would expect to offer advice and management guidance. However, you may rest completely assured that there will be no question of any possibility of a conflict of interest arising. Furthermore, Piersons will be my first calling, whilst I am employed by them, even outside of normal business hours as the occasion warrants it.

Having said that, I believe that your main concern probably relates to the possibility of mental pressure, possibly arising out of financial problems with the business. In this connection, I am attaching working copies of balance sheets as at 31 March 1984 and as at 31 March 1985 so that you may review the comfortable progress being made by the business.

Regarding the bank overdraft which you will see on the statements, the share holders have an outstanding joint and several guarantee in support of a floating debenture over the company's assets.

I trust this satisfies any concerns which you may have but, if you do require any additional information, please let me know. Assuming there are no additional questions to be answered, I shall appreciate it very much if you will indicate appropriate approval for the existing situation and I undertake to act entirely in accordance with the terms of my contract.

With kind regards.

Yours sincerely,
John M. Rea

cc. A. Sypkens.

P.S. Yesterday I have completed my medical examination and I enclose the practitioner's letter for your personal files.".

Mr. Van Marken replied as follows -

"10th May 1985

Dear Mr. Rea,

We herewith acknowledge receipt of your letter dated 26th April 1985 together with one fully executed copy of your employment contract.

Duly note was taken of the reference made to the existing interest you have in a sport shop on Cayman. We herewith establish that we have no objections in this respect.

With kind regards,

Sincerely yours,
Pierson Heldring & Pierson N.V.
A. van Marken J. Schenk.".

After that all went very well for a number of years. With the satisfactory growth of the bank, Mr. Rea's salary increased from US$65,000.00 when he joined to a total remuneration package which he estimated as being US$227,200.00 in 1991.

On the 12 September 1991 Mr. Rae received some unexpected visitors in his office. Three bank officials arrived unannounced to conduct an internal audit. Their names will recur so I mention them now. They were a Mr. de Haas who led the team, Mr. Oosterholt legal counsel and Mr. Wijnholt, chief auditor of the bank. They said that they had come to conduct an internal audit, the first of its kind within the bank.

Following the audit Mr. Rae thought it necessary to writ a follow-up to his letter of the 26th of April 1985 concerning his 50% interest in a local business and resultant contingent liability for the bank debt of the company. It is dated 17th September 1991 and in it he describes various corporate changes and concludes as follows -

"In this connection, I repeat my revelation during 1985 concerning that I am not involved actively in the day to day running in the --- business although, outside of normal office hours, I fulfil a financial management role. However you may continue to rest completely assured that there will be no question of me putting my personal interests ahead of those of Pierson. In this connection, Pierson plays no formal role in any of the companies in which I am involved; for example, registered offices are maintained elsewhere. Furthermore, I repeat that Pierson will always be my first calling, whilst I am employed by them, even outside of normal business hours as the occasion warrants it.
If anything, whilst the figures of the company have grown my involvement has become less having established a self-sufficient going concern together with a day to day management.
I would hope that the attached up-to-date figures as at 31st August, 1991 could be for your eyes only and destroyed thereafter. Of perhaps particular note for Pierson is the bank loan for which the shareholders have an outstanding joint and several guarantee in support of a floating debenture over the company's assets. However, my effective responsibility is again diminished from my last report inasmuch as the company is in much healthier financial position overall and each of the shareholders have taken out life insurances which each more than cover the company's gross debt to the bank.
I trust that this up-date is satisfactory but, if you do require any additional information at any time, please let me know. For now, perhaps you will kindly indicate approval of my aforementioned situations in order to up date my personal file.".

On 20th September 1991 Mr. de Haas sent a fax transmission to Mr. Rae. After some introductory matter it went to the following -

"Yesterday I gave an oral presentation to the Chairman, deputy Chairman and Tony van Marken about our general conclusions on the audit. I stressed that it is - for Pierson and yourself - of great importance that the only point of difference be clarified as soon as possible. You will be contacted about that in due course.
We have instructed the external auditors to execute an audit on the issue of cheque traffic and the recording thereof. We also asked for an opinion

on the amount of profit made related to the time involved.".

This was, in my view, a clear hint of the seriousness with which the bank in Amsterdam regarded the situation in Cayman, and it was soon followed up. On the 24th of September Mr. van Marken sent him this -

"Based on the first reporting of the surprise audit team and the contents of your above captioned memorandum, I can but state that I was quite shocked when realising that, what you described in 1985 as "an 50% interest in a sports shop with no active involvement with the day to day running", apparently has developed into a major operation (with a yearly turnover nearing US$3 million, consisting of a number of companies requiring active attention from you) without you ever even hinting to me (or others) that this development took place. I had the same reaction when being confronted with the information that Pierson Cayman was heavily involved in the international check traffic (without audit trail) of the company and that you were initially very reluctant in providing information on the extent of your involvement.
These developments are certainly not in line with the mutual trust and understanding which I thought had developed between us during the last years and puts me in difficulty with our Board, which is asking for explanations.
While you stated, during our telephone conversation on September 18th, 1991 that you consider this "outside interest" in line with normal practice on Cayman, I think that you could have realised that the Pierson group has a different attitude in this respect. To my knowledge you case is unique within the Group and certainly quite different from passive investments as some our colleagues are holding.
In general terms staff members who have a position as representative of the Pierson Group should not expose themselves, their colleagues and the Group by being actively involved with (non passive) outside interests. If such "interest" would run into financial problems, fail to meet financial obligations or in more extreme circumstances get involved in legally unacceptable transactions such as money laundering, infringement of foreign exchange or fiscal regulations (see our Policy Guidelines and Rules) it would not only reflect on the Pierson staff member concerned but drag down

> colleagues and the Pierson Group as a whole.
> I am quite worried about your circumstances in this respect. This having in mind that there is doubt on your maintaining an appropriate distance from the company's activities (including same of [a named company] that despite the substantial increased turnover apparently the administration is not regularly reviewed by independent auditors and that little information can be produced on the background and standing of your co-shareholders and directors.
> It would be quite helpful in the process of clearing the actual situation if audited financials of [another named company] and subsidiaries could be produced. It is my understanding however that you are not in a position to require from your co-directors co-shareholders to accept the costs related to hiring an audit firm to proceed with an audit. In this respect I can inform you that our Board would be prepared to cover those costs when the audit itself and the auditors would meet our standards. Please let me have your views.
> As soon as the audit of the cheque traffic has been rounded off it is necessary that you come to Amsterdam in order to establish where we stand and how to proceed.".

On the same day 24th September 1991 Mr. Rae wrote to Mr. de Haas, with a copy to Mr. van Marken, a memorandum entitled "Internal Audit - Point of Difference". It is a lengthy document and gives personal profiles of the fellow shareholders with whom Mr. Rea's relationship was in question and an assessment of the value to Pierson of the flow of drafts and cheques pertaining to the companies from 1st January 1990 to the date of the memorandum.

It was on the 26th September that Mr. Rae replied to Mr. van Marken's communication of the 24th, as follows -

> "I am extremely hurt by the contents of your fax to me dated 24th September and my grief extends to the situation foisted upon you.
>
> Clearly my private nature has been misconstrued and

certain aspects have been taken out of context. However, I want to assure you that I have absolutely nothing to hide and whatever needs to be examined in order to dispel the fears which anybody connected with Pierson may have should be done immediately. In this connection a visit to Amsterdam will be valuable although the external auditors have not yet begun to audit the cheque traffic. Perhaps they could be encouraged to give this matter more urgency.

With regard to my outside interests, local businesses are not audited. There is no legal requirement and, apart from the incidence of cost, the over-riding consideration concerns confidentiality especially when you consider that a number of senior partners of the auditing firms are involved in competing businesses - and have the best opportunity of gleaning all they need to know. Nevertheless, my fellow shareholders and I understand that my situation has developed a consideration of even more importance, namely reinstatement at the earliest possible time of mutual trust and understanding with Pierson. As a result, please authorise a review of whatever you consider is necessary. Relating to this, access will be made available to anything anybody deemed to be pertinent.

In this connection, my partners (shareholders) will always be available as will all of my personal bank statements and, of course, access is available to Pierson's attornies, auditors and staff regarding views concerning my day-today conduct.

I repeat that I have nothing to hide whatsoever but, in view of the fact that this situation has grown out of all proportion, I am anxious tht the air is cleared immediately so that we all continue to focus upon promoting Pierson in the best possible way and to generating income for our shareholders.

Tony, my future is with Pierson, Cayman. We have grown up together from inception with a staff of 1 to a staff of 16, from zero business to considerable quality business, from a loss of US$190,000 for the first 10 months to a profit close to US2 million during this year. My personality would not dare to claim all of the credit but it is ludicrous to suggest that my substantial activities with Pierson as the record shows (and which has extended as necessary well beyond the normal call of duty) have been

embellished with activities have no value to Pierson and/or which have interfered with Pierson. I am not superhuman.".

The next communication to which I need refer is a fax message from Mr. Van Marken to Mr. Rae dated 14th October 1991. It was this -

"1. Ernst & Young New York (responsible partners Jim Fanning and Emanuel Chirico) have been briefed by our internal audit department on terms and objectives of their engagement with respect to a special audit of the financial statements of "[a named company and another named company].

The scope will include applying agreed upon procedures to the financial records of the company, and issuing a report to us based upon those procedures. The specific procedures to be performed will be agreed to with us to ensure that they are sufficient for our purposes. The fees and out of pocket expenses will be billed to and settled by us.

Please arrange as soon as practicable a shareholders resolution for each of the companies, effectively signed by yourself, "[and three other named shareholders]" establishing the confirmation of the acceptance of the audit described.

2. The October 23rd visit planning will follow shortly.".

I regard this communication as being very significant. It can only be a very unusual course, in my view, for senior management of a large international bank to instruct a New York firm of accountants (which I notice judicially to be one of international renown) to audit a business operation in the Cayman Islands which by international standards is quite small and seek a shareholders resolution accepting the audit. That again indicates to me that the matter was very seriously regarded in Amsterdam.

The October 23rd visit which was referred to in Mr. van Marken's fax dated 14th October was rescheduled to October 28 - a change which, as will become apparent, was momentous.

Ernst and Young carried out an audit of cheque traffic in PHP(Cayman) itself. They found nothing procedurally untoward in the recording of any transaction and certainly no absence of audit trail in the bank. In his evidence Mr. Rae said that he "jumped for joy" at the report and thought it was conclusive concerning the point of difference which had arisen on the internal audit. Indeed he told the Court tht he believed that PHP did not still have a problem on 28th October 1991 with the fact that he had outside business interests, and that the meeting with his Chairman and Mr. van Marken in Amsterdam on that date would clear the air. I find such naivete surprising, so surprising indeed that I do not believe it. In my view it is obvious from the correspondence that the concern of those in Amsterdam arose at least as much from the fact that the transactions had taken place at all as from the question whether or not they had been properly recorded in the bank itself and that the "lack of audit trail" refers to the procedures of the companies rather than the bank.

Mr. Rae left the Cayman Islands on the 21st October. He planned to make business and family visits in England and travel on to Amsterdam for the meeting which had been arranged for the 28th October and which was to be followed by a management meeting on the 29th. He was in England when he first saw the text of the Ernst and Young

report and was unaware of events which were unfolding in Cayman.

Those events were these. On the 25th October the first defendant, Det. Inspector Gibbs, laid three informations in support of applications for search warrants under section 16 (M) of the Misuse of Drugs Law. The relevant parts of section 16 (M) read as follows -

> "16M. (1) A constable may for the purpose of an investigation into drug trafficking, apply to the Grand Court for a warrant under this section in relation to specified premises.
>
> (2) On such application the court may issue a warrant authorising a constable to enter and search the premises if he is satisfied that -
>
> ...
> ...
> (c) the conditions in subsection (4) are fulfilled.
>
> (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 tht 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 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 information stated that there were reasonable grounds for suspecting that John Mitchell Rae had carried on or had benefitted from drug trafficking, went on to recite the provisions of subsection (4) paragraphs (b) and (c) (iii) of section 16M of the Misuse of Drugs Law and particularised the premises to which the application related.

Unfortunately that was not all. Having indicated that the material in respect of which a search warrant was sought could not at the time of the application be particularised, the drafter of the informations, sought to do just that. One refers to various items in relation to five business entities. Another refers again to four of the same five business entities and another of similar name, together with two additional companies and one individual. The third mentions only the one individual to whom I have just referred.

Those references are, in my judgment, quite superfluous in an information in support of an application under section 16M or a warrant issued in response to it. The situation is quite different from that which exists in relation to an application under section

16L, which is for production of or access by a constable to particular material or material of a particular description. I shall be reverting to that in my finding with regard to the warrants, but I now return to the evidence of the events which followed the applications under section 16M on 25th October.

On the same day a Judge of the Grand Court issued three warrants to search the premises of a company, of PHP (Cayman) and Mr. Rea's residence.. The warrants also made reference, again quite unnecessarily in my view, to specific items. The references did not agree in a number of particulars with those in the informations laid before the judge. A further warrant relating to safe deposit boxes at Cayman National Bank & Trust was issued on 1st November, following an application by Det/Inspector Gibbs on that date.

Detective Inspector Gibbs did not give evidence at the trial. He did, however, answer interrogatories. They show that he had a telephone conversation with Mr. Oosterholt on the 27th October which, he says, was strictly for the purpose of arranging an orderly obedience to the warrant for a search of the premises of PHP (Cayman). Mr. de Haas and a Mr. de Reijter were informed of the existence of the warrant on the 28th of October, and the intention to enforce it on that day. Whether Mr. Oosterholt informed De Haas or De Reijter on the 27th October I do not know. It will be remembered that Mr. Oosterholt was the legal counsel of the bank in Amsterdam and Mr. de Haas had been the leader of the surprise audit team the previous month and there is no evidence either of the reason for their presence in

Cayman on 27th and 28th October. It is a reasonable inference that there was some arrangement on foot before then between them and Gibbs.

Oosterholt and Gibbs had agreed on the 27th October that the search should begin before the arrival of PHP (Cayman) employees at its premises on the morning of the 28th and Gibbs went with other police officers in a police vehicle from the Hyatt Regency Hotel accompanied in another vehicle by Oosterholt, De Haas and De Reijter to the home of the acting manager of PHP (Cayman) Mr. Bromley. The party then went to the premises of PHP (Cayman) which were opened up by Bromley, and Gibbs together with other Police Officers entered and searched the premises and Mr. Rae's offices in the presence at times of Oosterholt, De Haas, De Reijter and Bromley and at times in the presence of one or some of them. The entry took place at approximately 7 a.m. on the 28th October and the search extended over a period of days.

I now return to the events in Amsterdam, where Mr. Rea had by then arrived, on the same day. Because of the time difference the day would have been well advanced there by the time of the early morning events in Cayman which I have just described. Mr. Rea's account of what happened in Amsterdam was not challenged.

After waiting in an anteroom he entered the office of the chairman, Mr. Kleiterp, about 1 p.m. and was shown an unsigned letter in the following form -

"28th October, 1991

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"

He was told by the Chairman that he could either resign or be dismissed and that he had one hour to make up his mind. He was ushered out to another room with Mr. van Marken. He asked van Marken what was going on and was told that he would know all about it when he got back to Cayman. Even without that I would have found it inconceivable that Mr. Kleiterp and Mr van Marken were not being kept fully informed about what was going on here.Mr. Rea accepted that he was being faced with a fait accompli and that there was no room for argument and he was handed a letter in the form of the draft signed by Mr. Kleiterp and Mr. van Marken. He was not asked to sign anything and left the meeting. During the meeting he had attempted to raise the topic of the audit of the bank and the forthcoming New York audit of the companies but the other participants showed no interest

whatever in that.

He considered himself fired and after a further spell in England returned to Cayman on 4th November. The defendants accept that what happened amounted to constructive dismissal.

I shall summarise Mr. Rea's evidence of what happened next, and the later documents, in a few words. It is that he was met with a wall of silence with regard to the reasonable grounds for suspicion put forward as the basis for the applications to the judge. After his lawyer received a dismissive letter from the Commissioner of Police dated 23rd March 1992 he began this action.

The wall of silence has been maintained in the Defence, to which I shall now refer, and from the outset Mr. Rae has vigorously denied having carried on or benefitted from drug trafficking.

The defence, in its re-re-amended form, amounts simply to this. It admits (apart from formal matters) only 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 Defendant and that the premises were entered and searched in obedience to the warrants. It denies that the first defendant invoked the process of the court wrongfully falsely and/or maliciously the warrants were obtained wrongfully, falsely or maliciously, that the First Defendant had no reasonable or probable cause for asserting the matters in the information laid in respect of the plaintiff's residence and that the

entry and search amounted to a trespass. They say that the First Defendant carried out certain investigations prior to, on and after 25th October 1991 concerning the plaintiff in the discharge of his duty as a police officer and they deny the plaintiff's allegations of loss or damage. It was expressly denied that the applications made by the First Defendant under section 16M and/or the warrants did not comply with the provisions of the Misuse of Drugs Law.

At the outset of the trial Mr. Lamontagne indicated that in so pleading he relied on s. 27 of the Police Law, subsection (1) of which reads as follows -

> "27. (1) 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.".

- 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 s . 27 does not protect a constable in relation to acts committed before the issue of the warrant.

So, the issues on the pleadings can be formulated thus and indeed were so formulated by Mr. Alberga -

First, did the first defendant invoke the process of the Court on the 25th October, 1991 and procure the warrants under which he purported to act without reasonable and probable cause and without having reasonable grounds to suspect -

(a) that the plaintiff had carried on drug trafficking or benefited from drug trafficking; or

(b) that there was likely to be on certain named premises material likely to be of value to the investigation of which the plaintiff was the target?

Secondly, did the first defendant invoke the process of the Court maliciously?

Thirdly, apart from acting without reasonable and probable cause and maliciously, were the orders obtained invalid and therefore unlawful?

Fourthly, if the answers to questions one and two are in the affirmative, or the answer to question three is in the affirmative, is the plaintiff entitled to damages?

Lastly, if the plaintiff is entitled to damages, what amount should be awarded and what principles should be applied in their assessment?

The plaintiff's case is this -

1. The first defendant invoked the powers of the court on the 25th October 1991 and procured warrants for seizure and entry and in so doing abused the process of the court either by lying to or deceiving the judge into concluding that there were reasonable grounds for suspecting that the plaintiff had carried on or benefited from drug trafficking or that there was material at the places named which was likely to be of substantial value to the investigation within the terms of section 16 (M) when there was no real basis for suspicion and no truthful or reliable evidence on which such suspicion could possibly be based.

2. As a result of what the first defendant did on the 25th October 1991 the plaintiff has a well established right in tort for malicious abuse of legal process and for maliciously obtaining the warrant.

3. On the evidence the plaintiff has discharged on the burden of proof the legal burden of showing -

   (a) the first defendant instituted the process;

   (b) the first defendant obtained warrants of entry and search pursuant to the process and orchestrated the entry and search;

   (c) the first defendant acted without reasonable and probable cause and maliciously in so doing and as a result of the malicious process the plaintiff suffered substantial damage;

   (d) further or alternatively to the plaintiff's claim

in tort he has an action in damages for trespass and illegal seizure of property because the warrant was, on its face, invalid because the description of material did not fit into the categories required by law. Additionally, the first defendant, in embarking on search and seizure took material other than that justified by the warrant.

For the defendants, Mr. Lamontagne, while not conceding that there exists a tort of falsely or maliciously obtaining a warrant argued the law on the basis that there was. Both he and Mr. Alberga presented me with a wealth of authority on tht matter from the last century onwards.

The first is Elsee v Smith (1822) 2 Chit 304 which established that an action on the case lay against a person who caused a warrant of a justice to search premises and apprehend a person on suspicion of felony, if that is done maliciously and without reasonable or probable cause.

The second case, from later in that era, is Hope v Evered (1886) XVII QBD 338. It appears that in 1886 the detention of women and girls for immoral purposes was an evil which the legislature sought to meet by an enactment giving unusual powers, just as in modern times the drug menace has been so addressed. By s. 10 of the Criminal Law Amendment Act 1885 it was 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 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". -

An action was brought for maliciously and without reasonable cause procuring such a warrant. Lord Coleridge CJ said this in the course of finding that there was no ground for leaving the case to the jury -

" The Act of Parliament ... 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. It is not because people are sometimes illogical, and parents unreasonably anxious, and the wrong house occasionally searched, that the salutary operation of an Act (salutary I mean in the view of the legislature) is to be checked by actions of this description; otherwise it would not be safe to put

> this Act in force. There is no question here of the infringement of the liberty of the subject; it is merely provided that there shall be a right to search a house in order to effect what in the view of Parliament is a great good.".

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 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 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.

Elsee v Smith was referred to in the House of Lords in Roy v Prior (1971) AC 470 at 477H-478A is as follows -

> "The essence of the complaint" [which in that case was of malicious arrest] is that criminal actions have been instituted not only without reasonable and probable cause but also maliciously. So also in actions based upon illegal abuses of the process of the court it will often have happened that the court will have been induced to act by reason of some false evidence given by someone. In such cases the actions are not brought on or in respect of any evidence given but in respect of malicious abuse of process. (See Elsee v Smith (1822) 2 Chit 304.".

With regard to search warrants, Waller LJ stated the position as follows in Reynolds and anor v. Commissioner of Police of the Metropolis (1984) 3 All ER 649 -

> "There is no dispute that to procure the issue of a search warrant without reasonable cause and maliciously is an actionable wrong (see Clerk and Lindsell on Torts 15th Edition 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) 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.".

That is to say it is for the judge - meaning, of course, the judge before whom the issue of the warrant is called into question - to decide whether the facts which operated on the alleged tortfeasors' mind in procuring the grant of the search warrant afforded reasonable and probable cause, applying an objective test.

In my judgment 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, based on the case as a whole, which unfortunately in the present matter, includes a complete absence of evidence on which to establish

the facts on which the application was based.

At the risk of being trite I shall repeat the salutary analysis of burden of proof which is to be found in the judgment of Bowen LJ in Abrath v North Eastern Rly Co -

> "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 deciding on whom the obligation of going further, if he wishes to win, rests.".

The plaintiff claims that he has achieved his objective of proving his negative assertion to the extent of putting the defendants to their answer. He has, he says, to borrow the words used in Cotton v James (1830) 1 B & Ad 128 "done all that rested with him to call on the defendant for a reply, and none has been given". In that case it was held that in a case where a plaintiff is called upon to prove a negative (absence of probable cause for suing out a commission in

bankruptcy) very slight evidence of the want of probable cause was sufficient to throw the onus of proof on the defendant.

Taylor v Willans (1831) 1 B & Ad 845 was an action for maliciously indicting the plaintiff for perjury. The defendant was brought to court as material witness in the perjury matter but did not give evidence and the plaintiff was acquitted. The present importance of the case is the conclusion arrived at in it that 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.

I now look at several English malicious prosecution cases from which I was invited to seek guidance. Upjohn LJ said this in Abbott v Refuge Assurance Co Ltd (1962) 1 QB 433 at 454 -

> " The following propositions are now clearly settled: The reasonable man would take the following steps: (1) he or his advisers would take reasonable steps to inform himself of the true state of the case, Abrath v. North Eastern Railway Co. (supra): (2) he or his advisers would finally consider the matter upon admissible evidence only, Meering v Grahame-White Aviation Co. Ltd 122 LT 44 CA (3) in all but the plainest cases, he would lay the facts fully and fairly before counsel of standing and experience in the relevant branch of the law and receive the advice that a prosecution is justified. ... In addition, of course, the defendant must bona fide accept and act on the advice and, though that is part of a subjective test, it cannot be wholly removed from consideration at this stage.
>
> If the plaintiff can prove that the defendants have failed to take any of these steps, then that will be evidence from which the judge may infer absence of reasonable and probable cause.".

I look next at the tests applied by Lord Denning in Glinski v Mc Iver (1962) 1 All ER 696. This was another malicious prosecution case.

" ... 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 193at 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 tht 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 MacKintosh (1824) 2 B&C 693; Taylor v Willans (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".

It is convenient to deal with the Glinski v McIver and Abbott 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.

I have found the following in the judgment of Lord Devlin in the Privy Council case of Shaaban Bin Hussein and ors v Chang Fook Kan and another (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.".

Lord Devlin was speaking there of powers of arrest but that observation, and what follows, apply in my judgment with at least

equal force to powers of entry and search -

> "There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control.".

Indeed, the executive discretion under s. 16M of the Misuse of Drugs Law is the subject of direct rather than indirect judicial control.

Lord Devlin also said this -

> "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 McArdle 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.".

The police are not called on before acting on suspicion to have anything like a prima facie case for conviction.

Other Courts have recognised the distinction between suspicion and belief. In Canada it was said in Gifford v Kelson

(1943) 51 Man R 120 that "suspicion and belief cannot exist together. Suspicion is much less than belief; belief includes and absorbs suspicion.". See also Wills v Bowley (1982) 2 All ER 654 per Lord Bridge at 681.

As for the test itself, I refer to two local cases.

In R v. Darwin McLean Cr 15 of 1979 Sir John Summerfield C.J. said this -

> 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. Melvin Spragg 23 W.I.R. 371.".

I also adopt these reasonings and conclusions, adding that the following passage from the judgment of Wooding CJ in Cedeno v O'Brien 7 W.I R. 192, a decision of the Court of Appeal of Trinidad and Tobago was referred to with approval by Georges J.A. in G. v. S. 1992 -93 CILR 203 at 215 -

> "It was contended that [the] procedure is in essence inquisitorial. So it is. And from that it was next contended that by its provision of an inquisitorial procedure the legislature must be presumed to have intended to grant the right to invoke it upon the merest suspicion or, alternatively, upon the bona fide suspicion of any immigration officer or constable. But the subsection does not so provide. By its terms he should have reason to suspect, which is very

> different from saying that he should suspect-- without more. It is notorious, I am sure, that some people's suspicions are easily aroused. Any hint or conjecture, however tenuous, will move the credulous to suspect although it be utterly devoid of reason to found a suspicion. Any attempt to alter the character of the statutory stipulation must therefore be firmly rejected.".

That affirms the objective nature of the test of reasonableness. See also Denning LJ in Tempest v Snowdon (1952) 1 KB 130.

And in the same case Georges JA also said this -

> " 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 of 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.".

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

To take one example to which I have already referred, the facts in Reynolds v Commissioner of Police on which the application was based, were established, and the police evidence showed that those were sufficient grounds to seek the warrant and that they had sought the advice of the DPP. That last factor was considered relevant though not conclusive in establishing the necessary grounds to seek

the warrant. But the foundation upon which Waller LJ considered that the judge could base his decision was there.

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.

I now turn and rely heavily on in reaching my conclusions to the case in which the Queen's Bench and Court of Appeal proceedings are to be found as R. v. Inland Revenue Commissioners et al ex parte Rossminster Ltd et al (1979) 3 All ER 385; and the proceedings in the House of Lords as Inland Revenue Commissioners et al v Rossminster Ltd (1980) A All ER 80. It is a very important case on search and seizure, the final outcome of which was that the House of Lords restored the judgment of the Divisional Court which had dismissed an action for judicial review in relation to warrants obtained by the Revenue on the authority of a Circuit Judge on the basis of "reasonable ground for suspecting" a tax fraud. The relevant statute provides that the appropriate judicial authority must be satisfied on information on oath.

It was submitted, among other things, in support of the application for judicial review that when the seizure is challenged, or alternatively if a prima facie case of irregularity is shown then it is incumbent on the Revenue to justify their behaviour.

I will go first to the judgment of the Divisional Court, which finally prevailed. The judgment was delivered by Eveleigh LJ and it dismissed the application for judicial review. From the judgment I identify and extract the following principles as applying no less to an information and warrant under our s16M as to the proceedings under the English statute -

> "We are concerned" said Eveleigh LJ "with an allegation of abuse of executive power, so it is the abuse of power which has to be demonstrated to

this court".

So it is in our case, in the context of laying information maliciously and without reasonable or probable cause.

> "It seems to me that what they have to disclose will depend on the case that is made against them. Consequently, each case will depend on its own facts and on its particular presentation. That being my view of the law, what is the result of the present case?" - that is to say the Rossminster case - "In so far as the warrant is concerned, we do not know what evidence was given on oath to the learned judge. What we do know is that it was sufficient to satisfy him that a warrant should issue. I see no grounds in this whatsoever for concluding that he acted on any wrong principle. That conclusion I would have reached in any event, whatever had been my opinion as to the necessity for an offence to be specified. There simply is not the evidence in this case to enable this court to say tht the learned judge exercised his discretion improperly. ---
> As I have said I do not find it possible to say in this case that there was an abuse of power. It is said that one should go further into the allegation of reasonable cause. One should ask for details of that and, as I say, in some cases that may be necessary because the evidence adduced by the applicant may only be answerable by such detailed information coming from the Revenue, but that is not, as I see it, this case. The case that falls to be answered is not such a case.".

That was Lord Eveliegh.

I was taken very interestingly through passages from the judgments in the Court of Appeal. Although they come unanimously to a conclusion which was reversed they did not seek to delve into what material was before the judge or question its sufficiency. As Lord Justice Goff put it -

> "We do not know what was the evidence on oath on which the learned circuit judge authorised the issue of the warrants in this case, and therefore, in my judgment we cannot consider whether it was

sufficient, and we must I think proceed on the assumption that it was and that he acted regularly.".

From there I move on to the House of Lords. There Lord Wilberforce described the erosion of the privacy of a man's home and place of business by many statutory powers. He went onto say this -

> "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, i.e. of increasing Parliamentary intervention and of the modern power of judicial review. Futhermore, 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. It is necessary to be clear at once that Parliament, in conferring these wide powers, has introduced substantial safeguards.".

One such safeguard was the following, and we better it here by giving the duty to a judge of High Court standing -

> "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 tht the learned Common Sergeant did in the present case) he must carefully consider for himself the ground 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.".

It is the requirement that a judge should be satisfied which is the final safeguard against abuse of power, for it is he not the person laying the information who has to be satisfied. An important issue - indeed a fundamental one in the present case - is the question of the stage, if any, of particular proceedings at which person is entitled to know the grounds on which a search warrant is based. The reference by Mr. Lamontagne to the following passage in the speech of Lord Reid in Conway v. Rimmer (1968) AC 910 is very much in point -

> "'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.'"

Now we are not dealing in our present case with questions of privilege and immunity. None has been claimed. We are dealing with the inferences, if any which should be drawn from the reluctance of an officer who heads the Drug Profit Confiscation Unit of the Royal Cayman Islands Police to come to this Court to be asked about his work. The phrase "War against Drugs" may have an element of rhetoric about it. But the enemy is rich, powerful and ruthless and I am reminded of a slogan from my childhood in the Second World War - "Careless talk costs lives." It may be that the the justification for deep secrecy in relation to particular activities of drug enforcement officers will last for a very long time, not only for the reason which

I have mentioned but because an operation may well continue over a long period of complex international investigation.

At this stage of judicial review, their Lordships in Rossminster, were considering with anxiety - anxiety which I have shared in the present case - what Lord Scarman described as a breathtaking inroad on the individual's right to privacy and right to property. And he goes on to say this -

> "The judge must himself be satisfied. It is not enough that the officer should state on oath that he is satisfied, which is all that the warrants say in the present case. The issue of the warrant is a judicial act, and must be preceded by a judicial enquiry which satisfies the judge that the requirements for its issue have been met.".

And then -

> "It is not to be supposed, in the absence of evidence, that a circuit judge will have been so careless of the rights of citizens as to fail to carry out his duty, when a statute plainly requires him to act as the protector of those rights.".

- and he goes on to say this -

> "it is therefore necessary to approach the case on the basis that the judge did satisfy himself on the matters on which he was required to be satisfied before issuing the warrants.".

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

should draw by not, at the trial of this action, having more, and indeed from the conduct of the defendants throughout.

That is the essence of the matter, which the plaintiff has dealt with by reference to a number of specific points which I have attempted to synthesise as follows and, to the extent to which I have not dealt with them already, give my conclusions.

1. No legal advice was taken before the procedure was instituted. That was one of the judicial tests set out by Upjohn L.J. in Abbott v Refuge Assurance Ltd (supra). But that was a malicious prosecution. Of course grounds for prosecution are matters for legal advice, but I have referred at some length in this judgment to the nature of suspicion and the extent to which it must be distinguished from belief, evidence and proof. Those are the stock in trade of the lawyers, on which it is prudent to seek his advice. Suspicion and its investigation are the stock in trade of a policeman. He is not a lay person without training or experience. I do not regard D/Inspector Gibbs' omission to take legal advice before asking for the warrants as itself tending to show absence of reasonable or probable cause, although he could have profited from it in relation to unnecessarily prolix form of the application which he made.

2. No claim for public interest immunity or privilege was ever made and the assertion that the first defendant's belief was based on information from an authoritative and normally reliable source upon which he was entitled to rely was removed by amendment of the defence.

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.

3. 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. Again I refer to what I have already said on the nature of suspicion. The complete absence of any relevant file or document about Mr. Rea which might either have been the subject of discovery or a claim for public interest immunity or privilege, and the cryptic nature of the correspondence sent on behalf of the defendants is a matter on which I feel some concern. But it is not conduct after the event which can be related back to the events of October and November 1991 as an indication of malice or absence of reasonable or probable cause on the part of Detective Inspector Gibbs. And 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.

4. Then there is the matter of the proceedings before the judge. There is no requirement for the applicant to swear a supporting affidavit. As far as my knowledge goes it is never done here. He

gives sworn oral testimony. The absence of the judge's note is most unfortunate, but it is not a matter which can be laid at the door of Detective Inspector Gibbs or any of the defendants.

I now refer again to the judicial tests set out by Lord Denning in Glinski v Mc Iver. These tests, like those of Lord Justice Upjohn are directed to a criminal charge. Lord Denning concludes the passage to which I hve already referred with the following comment -

> "But these cases must be carefully watched so as to see that there really is some evidence from his conduct that he knew it was a groundless charge.".

If "suspicion" is substituted for "charge" in that passage, we have the present case and, of course, a higher test.

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.

Costs will follow the event.

G. E. Harre
Chief Justice

5th July 1994.