THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2015-03532

BETWEEN

RAMKISSOON AND SONS PARTS LIMITED

RATTAN RAMKISSOON

RICHARD RAMKISSOON

Claimants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr Justice Frank Seepersad

Appearances

1. Mr J Singh instructed by Mr Tacklalsingh for the Claimants.
2. Ms K Bellow instructed by Ms Simmons for the Defendant.

Date of Delivery: 19th February, 2018

DECISION

1. Before the Court for its determination is the Claimants' claim for malicious prosecution. In determining this claim the Court had to address its mind as to whether the second and third named Claimants were proper Defendants to the charge which was preferred. The Court also had to consider the purport and effect of Section 213(a) of the Customs Act Chap 78:01 and had to determine if the elements of the tort of malicious prosecution had been established.
2. The first named Claimant is a long-established company engaged in the importation of used cars and car parts from Japan and Singapore for resale in Trinidad. The second and third named Claimants were directors of the first named Claimant.
3. Based on information received, police and customs officers attended the premises of the Claimant and examined the containers which were imported. Upon examination of the shipment, officers discovered illegal drugs in one of the containers.
4. The second and third named Claimants were subsequently arrested and taken to the Organized Crime and Narcotics Unit ('OCNU') on Richmond Street, Port of Spain. Approximately one hour later, the second and third named Claimants were moved to the St. Clair and Woodbrook Police Stations respectively. They were subsequently returned to the Criminal Investigation Division ("CID") in Port of Spain where they each gave exculpatory statements.
5. Some thirteen months afterward, the Claimants were charged under Section 213(a) of the Customs Act.

Relevant Legislative Provisions

6. Section 2 of the Customs Act provides:

> ""'importer" includes the owner of any other persons for the time being possessed of or beneficially interested in any goods at and from the time of the importation thereof until the same are duly delivered out of the charge of the Officers, and also

any person who signs any document relating to any imported goods required by the Customs laws to be signed by an importer."

7. Section 213 (a) of the Customs Act creates an offence where any person imports or brings or is concerned in importing or brining into Trinidad and Tobago any prohibited goods.
8. Section 2 of the Bill of Lading Act Chap 50:03 provides:

> "2. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself."

9. The first named Claimant was named on the Bill of Lading and the Claimants advanced, that having regard to the aforesaid statutory provisions as well as the case law, that there was no legal justification for the preferring of any charge as against the second and third named Claimants, as only the first named Claimant was the importer.
10. The Court considered the aforementioned legislation sections as well as section 20 of the Interpretation Act Chap 1:01 which provides that:

> "Where an offence committed after 31st December 1979 [that is, the date of commencement of the Law Revision (Miscellaneous Amendments) (No.1) Act 1979] by a body corporate under a written law is proved to have been committed with the consent or connivance of a director or other officer concerned in the management of the body corporate or any person who is purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly."

11. In **Tesco Supermarkets Ltd v Nattrass [1972] AC 153**, Lord Reid said:

> The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.

12. The second and third named Claimants filed witness statements. They were directors of the first Claimant and when asked by the Court, they both indicated that they were also shareholders of the first Claimant. During cross examination they did not deny that the drugs

were found in the container on the 23rd July, 2007 but advanced that they had no knowledge of same.

13. Both Claimants gave exculpatory statements to the Customs Officer, Mr Murray on the 24th July, 2007. In his statement dated 24th July, 2007, Mr Rattan Ramkissoon sought to distance himself from the day to day operations of the first Claimant and stated that Richard Ramkissoon was normally responsible for the day to day running of the first Claimant. Although Mr Rattan Ramkissoon sought to distance himself from the day to day operations of the business, his answers to Counsel for the Defendant during cross examination with regard to his involvement with the imported items demonstrated that he was more involved than he initially professed.
14. The Defendant filed three witness statements made by Mr Winston Cooper, Mr Kerrol Murray and Mr Gerard Chrichlow. All three men attended court and were cross examined. Mr Kerrol Murray testified that before charging the Claimants for the offence, he perused documents and conducted interviews. The witness stated that he interviewed the second and third Claimants and that based on the apparent discrepancy with the seal numbers, he sought and obtained information from the shipping line Zim Integrated Shipping Services Ltd. He testified that the seal on container FSCU– 9194708 was an authentic Zim seal. However, his evidence was that Zim could not provide any explanation for the discrepancy in the seal numbers.
15. The Claimants submitted that the approach to Section 213(a) of the Customs Act required, inter alia, evidence to establish that the Claimants had knowledge of the drugs as knowledge is required to establish the offence.
16. In **Mag Appeal No. P068 of 2015 Darren Bhola [Customs and Excise Officer II] v Canserve Caribbean Limited, Darren Nurse and Cindy Gibbs** (decision dated 29th June, 2017), the Court of Appeal departed from the principles stated in **Customs and Excise Officer Clarence Walker v Iveren Lucy Feese Mag Appeal No. 96 of 2009** and reaffirmed the principles stated in **Glendon Gale v United Hatcheries Mag Appeal No. 155 of 1996** which was that section 213(a) of the Customs Act created a strict liability offence. While the entire judgment and the discussions contained therein are insightful and relevant, the Court noted that at paragraphs 95 and 96, the Appellate Court stated –

"Application of the Strict Liability Principle to the Evidence in the Case

95. The Court of Appeal in ***Feese****105 did not have the benefit of the very extensive and exhaustive arguments on both sides that we have had in the case at bar. We must respectfully disagree with and disapprove of the decision in* ***Feese*** *where it was held that* ***sections 213 and 214 of the Customs Act*** *required proof of knowledge or mens rea. As a panel of three judges sitting in this magisterial appeal, unanimous on the issue, we respectfully depart from that position and are of the view that the ratio of Hamel-Smith J.A. in* ***Glendon De Gale v United Hatcheries Ltd.****106 remains a valid one.*

96. The magistrate erred in finding that ***sections 213 and 214 of the Customs Act*** *required proof of knowledge and in concluding that the charges against the respondents under those sections had not been made out. Accordingly, the respondents ought to have been called upon to answer the charges against them.*

There is merit in this ground of appeal."

17. This Court, guided by the Court of Appeal is of the view that the Claimants' contention in relation to section 213(a) of the Act is devoid of merit and holds that section 213(a) of the Customs Act does establish a strict liability offence so that proof of knowledge of the prohibited goods is not required.

The law in relation to malicious prosecution

18. In **Alistaire Manzano v Attorney General of Trinidad and Tobago Civil Appeal No: 151 of 2011**, Mendonca JA laid out the applicable principles to be applied in the determination of what amounts to reasonable and probable cause and at paragraphs 22-30 the Court stated as follows:

"[22]What is reasonable and probable cause in the context of the tort of malicious prosecution was defined in Hicks v Faulkner (1881-1882) L.R. 8Q.B.D 167 (which

received the unanimous approval of the House of Lords in Herniman v Smith [1938] A.C. 305) as follows:

> "...an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.""

[23] It is readily apparent from that definition that reasonable and probable cause has both a subjective element and an objective element. Reasonable and probable cause must appear objectively from the facts but also must exist in the mind of the defendant."

[24] The question that therefore arises in a case such as this, where the defendant was a police officer acting on information provided to him by others, what is the honest belief he must have."

19. In **Glinski v McIver [1962] A.C. 726** the required belief was expressed in this way (per Lord Denning at p 758-759):

> "In the first place, the word "guilty" is apt to be misleading. It suggests that, in order to have reasonable and probable cause a man who brings a prosecution, be he a police officer or private individual must, at his peril, believe in the guilt of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield that there is a probable cause "to bring the [accused] to a fair and impartial trial"; see Johnstone v Sutton. After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him... the truth is that a police officer is only concerned to see there is a case proper to be laid before the court."

20. In **Coudrat v Commissioners of Her Majesty's Revenue and Customs [2005] EWCA Civ. 616**, it was determined that the correct test when considering whether there was reasonable and probable cause to prosecute was whether there was a case fit to be tried.
21. The honest belief must be based objectively on reasonable grounds and the test is whether it is reasonable having objectively reviewed the evidence to form the view that there was reasonable and probable cause for the prosecution. In **Dallison v Caffery [1965] 1 QB 348, 371** Diplock LJ (as he then was) said:

> "The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe there was reasonable and probable cause."

22. In **Abbott v Refuge Assurance Co. Ltd [1961] 3 All ER 1074** Upjohn L.J. outlined (at p. 1087) three propositions which he said were clearly settled in relation to steps that a reasonable man would take. The failure to take any of these steps will provide evidence from which the Judge may infer an absence of reasonable and probable cause. One of those steps which is particularly relevant in this case is whether the Complainant or his seniors took reasonable steps to inform themselves of the true state of the case.
23. The Court also considered the following passages from **A v State New South Wales (2007) 3 LRC 693**:

> "[86] It is, nonetheless, important to recognise what, standing alone, may not suffice to show a want of objective sufficiency. It is clear that absence of reasonable and probable cause is not demonstrated by showing only that there were further inquiries that could have been made before a charge was laid. When a prosecutor acts on information given by others it will very often be the case that some further inquiry could be made. Lister v Perryman (1870) LR 4 HL 521, where a charge was preferred on account of what had been reported to the prosecutor, is a good example of such a case. And as Lord Atkin rightly said in Herniman v Smith [1938] 1All ER 1 at 10:

"It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution.'

[87]For like reasons it cannot be stated, as a general and inflexible rule, that a prosecutor acts without reasonable and probable cause in prosecuting a crime on the basis of only the uncorroborated statements of the person alleged to be the victim of the accused's conduct. Even if at trial of the offence it would be expected that some form of corroboration warning would be given to the jury, the question of absence of reasonable and probable cause is not to be decided according to such a rule (see Bradshaw v Waterlow & Sons Ltd [1915] 3 KB 527 at 534). The objective sufficiency of the material considered by the prosecutor must be assessed in light of all of the facts of the particular case."

24. It is therefore not sufficient to establish reasonable and probable cause to rely only on the fact that there were further enquiries that could have been conducted. The objective sufficiency of the material must be assessed in light of all of the facts of the particular case, which might include, in an appropriate case, the failure on the part of the prosecutor to conduct further enquiries to inform himself of the true state of the case.
25. In **Harridath Maharaj v The Attorney General of Trinidad And Tobago CV2011-04213 at paragraph [5-8]** this Court in relation to the issue of reasonable and probable cause stated:

"5. Hawkins J in Hicks v. Faulkner (1878) 8 QBD 167 at page 192 stated that: -

"The question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of... It is not essential in any case that facts should be established proper and fit and admissible as evidence to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts necessary to establish actual guilt

and those required to establish a reasonable bona fide belief in guilt should never be lost sight of..."

6. In the text **Civil Actions Against Police 3rd Edition** at paragraph 8-044 it was stated that the test involves four separate questions, the first two being subjective and the second two objective. The questions to be considered are as follows:

   a. Did the prosecutor have an honest belief in the guilt of the accused?

   b. Did the prosecutor have an honest conviction of the existence of the circumstances relied on?

   c. Was the conviction based on reasonable grounds?

   d. Did the matters relied upon constitute reasonable and probable cause for the belief in the accused's guilt?

7. The law does not mandate or require that a Complainant has to engage in investigations that are perfect and flawless, however, as articulated by Mendonca JA in **Allistaire Manzano v. The Attorney General of Trinidad and Tobago C.V No. 151 of 2011**, the complainant must be satisfied that the essential elements of the offence can be established on the evidence that is available. In that case, the learned Judge found that there was a lack of honest belief in the guilt of the accused because the complainant did not have evidence so as to establish that the owner did not give consent to the person charged for the removal of the item.

8. Accordingly, this Court had to consider the evidence that was available to the complainant Harold Phillip and had to determine whether he had the requisite evidence to establish the elements of the offences for which the Claimant was charged. If he did, then the requirement of "an honest belief in the guilt of the accused" would be satisfied, if he did not, then he could not have been

reasonably satisfied that there was a case that was fit to be tried and he could not therefore have had "honest belief" in the guilt of the Claimant."

26. In **Kevin Stuart v. Attorney General of Trinidad and Tobago CV2012-00113**, Charles J noted that the failure of senior officers to adequately acquaint themselves with the full contents of the file against the putative accused after which an instruction is given to a junior officer may lead to a finding that the senior officers committed a gross dereliction of duty and may show that the junior officer acted without reasonable and probable cause in acting on the instructions of his seniors.
27. In relation to the requirements needed to establish malice, the Court in *Alistaire Monzano supra* further noted at paragraphs 47 and 48 that:

> "47. The proper motive for a prosecution is a desire to secure the ends of justice. So in the context of malicious prosecution a defendant would have acted maliciously if he initiated the prosecution through spite or ill-will or for any other motive other than to secure the ends of justice. It follows therefore that even if a claimant cannot affirmatively establish spite or ill-will or some other improper motive, he may still succeed in establishing malice if he can show an absence of proper motive.
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> 48. Malice may be inferred from the absence of reasonable and probable cause because if there is no reasonable and probable cause for the prosecution it may be inferred that there was an absence of proper motive and hence malice. In A v State of New South Wales the Court however interjected this caution when inferring malice from the absence of reasonable and probable cause (at para. 90):
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> > "No little difficulty arises, however, if attempts are made to relate what will suffice to prove malice to what will demonstrate absence of reasonable and probable cause. In particular, attempts to reduce that relationship to an aphorism - like, absence of reasonable cause is evidence of malice (cf Johnstone v Sutton (1786) 1 TR 510 at 545 per Lord Mansfield and Lord Loughborough: 'From the want of probable cause, malice may be, and most commonly is, implied'; Varawa v Howard Smith Co Ltd (1911) 13 CLR 35

at 100 per Isaacs J: '[T]he want of reasonable and probable cause is always some, though not conclusive, evidence of malice...' but malice is never evidence of want of reasonable cause (cf Johnstone v Sutton 91786) 1TR 510 at 545 per Lord Mansfield and Lord Loughborough [99 ER 1225 at 1243]: 'From the most express malice, the want of probable cause cannot be implied...') - may very well mislead. Proof of particular facts may supply evidence of both elements. For example, if the plaintiff demonstrates that a prosecution was launched on obviously insufficient material, the insufficiency of the material may support an inference of malice as well as demonstrate the absence of reasonable and probable cause. No universal rule relating proof of the separate elements can or should be stated."

It may therefore be a question of degree whether malice should be inferred from the absence of reasonable and probable cause. If the prosecution was launched on "obviously insufficient material" that may suffice to support the inference of malice."

28. The Privy Council in **Sandra Juman v the Attorney General of Trinidad and Tobago and Another [2017] UKPC 3** noted that: -

"18. The essence of malice was described in the leading judgment in Willers v Joyce at para 55:

"As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation … But the authorities show that there may be other instances of abuse. A person, for example may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the

proceedings instituted by the defendant were not a bona fide use of the court's process"

19. A failure to take steps which it would be elementary for any reasonable person to take before instituting proceedings might in some circumstances serve evidentially as a pointer towards a deliberate misuse of the court's process, but sloppiness of itself is very different from malice"

Application of the law to the facts

29. The Court noted that Mr Murray testified that he formed the view that Ms Lelawatee Maharaj was an agent or employee of the Claimants, whom he considered to be the importers and proffered this as the reason why he did not charge Ms Maharaj.
30. In cross examination Mr Murray stated that the seals on the container in question would have 'played a part' in the bringing of this action. He accepted that the 'prefix of the seal was different' and acknowledged that the PLIPDECO documents had different prefixes.
31. There was evidence from which the Complainant could have reasonably formed the view that the second and third Claimants were more than mere directors and/or shareholders of the first Claimant. The third Claimant in particular admitted to Mr Murray that he imported used cars and parts from Japan and Singapore and that his brother Juan Ramkissoon, who lived in Japan acted as an agent. The third Claimant also informed Mr Murray that he usually signed the C75 Forms that were sent to him by his broker. Although he stated that he was not aware that the container was going to be transhipped, on the bill of lading had endorsed the fact that the container would first be shipped to Jamaica and thereafter unto Point Lisas.
32. There was also evidence from which the Complainant could have concluded that the third Claimant was not an uninvolved and/or disinterested shareholder but rather he, his brother (Juan) and sister collectively took an active part in the selection of goods for shipment and the inescapable inference is that he participated in the selection of the good which were imported from Japan.

33. It was established during cross examination that Mr Murray failed to place before the Court any of his contemporaneous notes. At paragraph 10 of his witness statement he stated that in the course of his investigations he discovered that there was a discrepancy in the seals but notwithstanding the apparent discrepancy which could not be explained, having conducted his investigations, the charge was laid against the Claimants. This decision was made after he consulted with his seniors and upon receipt of instructions.
34. On the facts before it, the Court was not prepared to make any adverse inference against Mr Murray with regard to his failure to turn over all his files and notes relative to the investigation. Ultimately, the Court found him to be a forthright witness and the Court was impressed by his evidence and found that his testimony was characterised by candour.
35. Having considered the evidence the Court felt that the matter was properly investigated and in the context of the offence being one of strict liability, the issue with regard to the seal, was a matter of fact, to be determined by the tribunal of fact.
36. The Court concluded, on a balance of probabilities, that there was sufficient evidence available to the Complainant for him to form an honest belief in the guilt of the Claimants. Mr Murray also had reasonable and probable cause to view all the Claimants as importers as there was evidence that the first Claimant was the owner of the goods and that both the second and third Claimants, though not in possession, each reasonably had a beneficial interest in the goods at the time of importation and until same was delivered.
37. **This society is plagued with the disturbing reality that prohibited goods which include narcotics and firearms are imported with impunity. These prohibited items do not fall from the sky and the reasonable inference is they are either smuggled through porous areas along the nation's coastline or they are allowed in by complicit and/or complacent officials who fail or refuse to detect same hidden among *inter alia* items such as bales of cloth, carpets, furniture, car parts, machinery and food. The discovery of the drugs, by virtue of the manual check of the container in this case should be applauded but it is foolhardy to expect that manual searches of containers can be effective, especially having regard to the inordinately large number of containers that are shipped to the nation's ports. The need to have functional scanners is critical to the nation's security and every effort should be made to have such a system implemented with dispatch and urgency.**

38. Stringent security systems need to be implemented not only at the established ports but also along the south-western coast. In addition, Parliament may be well advised to consider the implementation of increased strict liability provisions to regulate the importation of goods and in particular, a legislative review should be engaged with the objective of curtailing the activities of complicit individuals who hide behind the veil of incorporation and engage in their illicit pursuits under the veneer of corporate legitimacy. Companies cannot be incorporated and commissioned to conceal criminal conduct.

39. In the event that the Court's finding that reasonable and probable cause existed is deemed to be erroneous, the Court proceeded to consider the evidence with a view of determining the issue as to whether the complainant acted with malice.

40. The Court noted that there was some degree of conflict as to whether or not the second and third named Claimants remained silent after the container was opened. When asked, Mr Crichlow stated that they did not and he testified that when the narcotics fell out of the container, both the second and third Claimant stated that they knew anything about that. Mr Murray however, in his witness statement at paragraph 7 stated, 'I then informed the Claimants of my suspicion that the plant like material was marijuana and they remained silent.' In cross examination, when the contradictions were highlighted he said: 'They did not respond to me…' The witness admitted that the Claimants responded to Gerard Crichlow but not to him. The Court accepted Murray's explanation and found same to be reasonable and did not form the view that there was a deliberate manufacturing of explanations or prevarication under cross examination.

41. The Court carefully considered what was stated at paragraphs 32 and 38 of **The Attorney General v Kevin Stuart A/C Kevin Stewart Civil Appeal No. P 162 of 2015**, where it was stated that -

> *[32] Further, the judge seemed to think that the results of PC Phillips' investigations needed to be closely supervised because of his inexperience. Hence ASP Mohammed should have asked for a written report. But even if PC Phillips' inexperience produced a deficient investigation it does not follow that there was an*

improper motive. Indeed, the finding by the judge that PC Phillips was inexperienced should lead naturally to the conclusion that any deficiency in his investigation was due to inexperience rather than an improper motive. Further, the production of a written statement by PC Phillips would not guarantee that its contents were not fabricated. The judge's imputation of an improper motive to ASP Mohammed and ACP Fredericks was without foundation. There was nothing on the evidence to justify it, neither did she find or indicate what the improper motive was. The contention that a police officer is actuated by an improper motive is quite a serious allegation. There must be a proper evidential basis upon which to do so, especially when such a finding is made by inference. Secondly, even if there was such evidence ascribed to ASP Mohammed and ACP Fredericks (and there was none) the test is whether the charging officer (PC Phillips) was actuated by such a motive. The motives of ASP Mohammed and ACP Fredericks are irrelevant. I shall return to this fact finding of improper motive at paragraph 38 when I address the question of malice."

....

[38] I can find no basis for doubting that PC Phillips had an honest belief that there was a sufficient basis upon which to charge the respondent, however wrong he might have been. His actions bear out this belief. He conducted surveillance of the respondent's premises for several months. After the respondent's arrest he conducted further investigations in the Marabella area. Prior to charging he sought the advice of his senior officer who himself consulted with ACP Fredericks. It cannot be objectively said that when PC Phillips preferred the charge his dominant purpose was a purpose other than the proper invocation of the criminal law.

42. Given the facts which were adduced, this Court is resolute in its view, that that the factual matrix does not indicate that the complainant acted with malice. There exists no operative circumstance from which malice can be inferred and the Court is unable to find that the Complainant acted with /or under an improper motive.

43. For the reasons which have been outlined, the requisite elements of the tort of malicious prosecution have not been established and the Claimants claim must be and is hereby dismissed.

44. The Parties shall be heard on the issue of costs.

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FRANK SEEPERSAD

JUDGE