SUPREME COURT OF QUEENSLAND

CITATION:	*Cosentino v Kent & Anor* [2009] QCA 355
PARTIES:	**ANGELA CARLA COSENTINO** (plaintiff/applicant) **v** **MARTIN KENT** (first defendant/first respondent) **QUEENSLAND CRICKETERS CLUB** (second defendant/second respondent)
FILE NO/S:	Appeal No 5341 of 2009 DC No 3116 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	12 October 2009
JUDGE:	McMurdo P, Chesterman JA and A Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**The application is refused with costs to be assessed, if not agreed**
CATCHWORDS:	TORT – MALICIOUS PROCEDURE AND FALSE IMPRISONMENT – MALICOUS CRIMINAL AND CIVIL PROCEEDINGS – ESSENTIALS OF CAUSE OF ACTION GENERALLY – TERMINATION OF PROCEEDINGS IN PLAINTIFF'S FAVOUR AND INNOCENCE – where Director Public Prosecutions did not proceed on the indictment – where accused was discharged from indictment – where applicant commenced proceedings against respondents for malicious prosecution – where claim dismissed – whether the trial judge erred as a matter of law – whether there was a miscarriage of justice APPEAL AND NEW TRIAL – APPEAL GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION WITH COURT BELOW – IN GENERAL – JUDGE MISTAKEN OR MISLED – GENERALLY – where applicant seeks two alternative forms of relief – where applicant seeks order setting aside decision of trial judge or new trial – whether trial Judge erred as a matter of law – whether there was a miscarriage of justice

A v New South Wales (2007) 230 CLR 500; [2007] HCA 10, followed
Cosentino v Kent & Anor [2009] QDC 134, affirmed
Praxis Pty Ltd v Hewbridge Pty Ltd [2004] 2 Qd R 433; [2004] QCA 79, followed

COUNSEL: J M Springer for the applicant
C Wilson for the respondent

SOLICITORS: Herd Law for the applicant
Moray and Agnew for the respondent

[1] **McMURDO P:** As is clear from the reasons of A Lyons J, the applicant has failed to establish any grounds to warrant the granting of her application for leave to appeal. The application should be refused with costs.

[2] **CHESTERMAN JA:** As the reasons for judgment of A Lyons J demonstrate, the learned trial judge dealt accurately with the facts and impeccably with the law. The applicant's claim was rightly dismissed and the application for leave to appeal should be refused with costs.

[3] **A LYONS J:** In April 2006 Ms Angela Cosentino (the applicant) was an apprentice hairdresser. She had also worked for two years as a casual bar tender at the Queensland Cricketers Club (the second respondent). On 3 April 2006 an amount of $300 went missing from the bar area when the applicant was working in the vicinity of the bar. The first respondent, who is the manager of the Cricketers Club, instigated an internal investigation which then resulted in the matter being referred for a police investigation. The evidence against the applicant consisted mainly of motion sensitive closed circuit television (CCTV) coverage of her in the bar area on the night in question, where she was observed to be acting suspiciously.

[4] The applicant was subsequently charged with stealing as a servant. During the committal hearing in the Brisbane Magistrates Court, defence counsel elicited evidence from the first respondent that the CCTV camera could "probably"[1] be turned off by pulling out the plug and that all staff had access to the room in which the video camera was positioned. The first respondent also gave evidence that the reason there was no vision during a certain time period was because there was "no movement in the vision". During cross-examination however, he conceded that whilst he did not have the requisite technical knowledge, he could not "exclude the possibility"[2] that a period of two and a half hours, for which there was no vision, was due to the fact that the plug was pulled out, rather than a lack of actual movement in front of the camera. The Director of Public Prosecutions subsequently announced that they would not be adducing any further evidence and would not be proceeding any further on the indictment. The applicant was discharged from the indictment, but she was not given any further shifts at the club. Her father who also worked at the club was not given any further shifts either.

The District Court action

[5] The applicant commenced proceedings in the District Court against the respondents for malicious prosecution, essentially claiming that the first respondent, on behalf of

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1 Record Book at A268, ll 1-25.
2 Record Book at A280, ll 1-32.

the second respondent, had maliciously and without reasonable cause instigated a police investigation. The applicant claimed that as a result of the malicious prosecution, she had suffered the following injuries:

(i) loss of reputation;
(ii) emotional distress; and
(iii) embarrassment.

[6] The applicant claimed general damages as well as exemplary damages on the basis that the first and second defendants' conduct showed a contemptuous disregard for her rights. She also claimed that she suffered special damages as a result of the malicious prosecution and claimed loss of income in the amount of $4,872 and legal costs to defend the charge in the amount of $13,367.50.

[7] A two day trial was conducted in the District Court at Brisbane in March 2009 and on 24 April 2009 the claim was dismissed by the learned trial judge.

[8] His Honour's reasons set out the extensive factual background, before turning to an examination of the legal principles.

The circumstances surrounding the allegations

[9] On 3 April 2006, the appellant was working behind the bar and there was a function being held in the adjoining dining room. Behind the bar, in a cupboard, there was one tin containing $500 in cash and a plastic bottle containing $500 in one dollar coins. This money was referred to as bulk cash tins and was used to make small payouts on the poker machines.

[10] It was the responsibility of the first respondent to prepare the tins each morning and the supervisor or duty manager would reconcile the tins at the end of the day. When the tins were reconciled at the end of the night in question, there was a $300 shortfall in the amount. The reconciliation showed an amount of $700 when, in fact, there should have been $1,000 in the tins. Since December 2005 there had been motion sensitive CCTV security cameras in the Club, which covered the area of the bar where the applicant worked.

[11] After being informed of the discrepancy, the first respondent examined the security footage and became suspicious of the applicant's behaviour, particularly the footage which showed her going to the cupboard and spending quite a lot of time in the cupboard, whilst getting out a first aid tin. The first respondent gave evidence that he spoke personally to staff members Mauger, Plant and possibly van Praag and that he asked another employee to speak to all other staff who worked in the bar area on the day in question. The first respondent also asked his assistant Ms Taylor to view the footage and her evidence was that she considered the applicant's behaviour to be furtive and she similarly had concerns.

[12] When first spoken to, the applicant said she did not know about the cash tins but knew where the first aid kits were kept. She said that on the night in question she had needed a band-aid and had gone to the cupboard on two occasions to get one. She had noticed other tins in the cupboard but did not know what they were for. She said she did not open the tins and did not take any money. An interview was then conducted by the first respondent with the applicant on 6 April 2006 in the presence of Ms Taylor. Prior to the interview, the first respondent had written out a series of questions which he intended to ask and then he recorded the applicant's

answers. The applicant again denied going to the cupboard where the change was kept but indicated that she had obtained a band-aid from the first aid kit during the evening. She stated that the answers would not change, even if she knew that her actions had been recorded on security tape. She also indicated that it was "probably" coincidental that she was the only person on staff, apart from the supervisor, who was on every one of the shifts, where money had been stolen in the previous year.

[13] The applicant's father had also been a casual employee of the club for four years. When the first respondent indicated that he would involve the police and her father, the applicant had indicated that there was no need to involve her father and had indicated that she did not need "this hanging around" and offered for the first respondent to "take the $300 out of my pay so you don't have to worry any further".

[14] The reasons record that the evidence of the applicant at trial was that, prior to the incident she and the first respondent had never had a cross word and she was not on bad terms with anyone at the club. The first respondent had also given evidence that he had spoken with the applicant's father as a courtesy and indicated that in his view the applicant's actions were suspicious, but that he hoped she was not responsible. He also indicated that he would be referring the matter to the club's Board, which met on 20 April 2006.

[15] After the Board's approval was obtained, the matter was referred to the Dutton Park CIB. The investigating officer Kitto visited the club on 26 April 2006 and the first respondent gave him four compact security disks, the auditor's documentation, and the cash count of the poker machines. He was also shown around the bar area and where the tins were kept. He prepared a statement for signing by the first respondent and obtained statements from staff members Mauger, Plant and Lundin. Kitto's evidence was that at the time those names were given, he was not aware of whether they were suspects and the first respondent had not told him what his views on the matter were. Senior Constable Kitto prepared a statement for signing by the first respondent, which was dated 10 July 2006 and saw him twice to have the statement signed. On the first occasion, the first respondent made some amendments which required him to attend a second time.

[16] Significantly, the decision records that Kitto's evidence was that the first respondent had not told him to prosecute the plaintiff, but that on reviewing the security footage he considered she might be a suspect. He considered that, among other things, it was significant that the applicant walked past the cupboard, went about her duties and as she walked back she reached down for the door handle, appeared to open it slightly and continued out and walked straight through the bar area to the cupboard again. She declined to be formally interviewed on the advice of a solicitor and was subsequently charged.

The elements of the tort of malicious prosecution

[17] The decision then set out the four elements of the tort of malicious prosecution as follows:

> "[26] The elements of the tort of malicious prosecution relied on are:-
> (1) The prosecution of the plaintiff by the defendants;

(2) That the proceedings complained of terminated in the plaintiff's favour;
(3) That the prosecution was instituted without any reasonable or probable cause; and
(4) That the defendant instituted or continued the proceeding maliciously."

[18] His Honour concluded that that there was no issue that the second element had been satisfied, as halfway through the committal the DPP had offered no further evidence and the charge was consequently dismissed by the magistrate. His Honour then turned his attention to the first element of the tort and the question as to whether the respondents had, in fact, been the real prosecutors, as follows:

> **"Third party as prosecutor**
>
> [27] The Court of Appeal in *Seabrook v Asher* recently reviewed the authorities on this issue and delivered a unanimous decision. I can do no better than set out some extracts from the judgment of Holmes JA who wrote the judgment with whom the Chief Justice and Helman J agreed. Her Honour said:-
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> > '[12] Malicious prosecution is an action for "setting the criminal law in motion" (*Davis v Gell* (1924) 35 CLR 275 at 284 per Isaacs ACJ). It has long been established that a defendant to such an action need not be the prosecutor in a formal sense:
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> > > "…the law looks beyond theory and regards the person in fact instrumental in prosecuting the accused as the real prosecutor. It enables the person innocently accused to treat his virtual accuser as party to the criminal charge …" - (*supra* at 282 per Isaacs ACJ).
> >
> > Provision of information to investigating authorities in good faith cannot occasion liability, but:-
> >
> > > "…if the [prosecutorial] discretion is misled by false information, or is otherwise practised upon in order to procure the laying of the charge, those who thus brought about the prosecution are responsible" - (*Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343 per Dixon J at 379)
> >
> > [13] In Commercial Union Assurance of *NZ Ltd v Lamont*, Richardson J expanded on that qualification:
> >
> > > "In the difficult area where the defendant has given false information to the police that in itself is not a sufficient basis in law

> for treating the defendant as prosecutor. That conduct must at least have influenced the police decision to prosecute." (1989) 3 NZLR 187 at 196.

He went on to review authorities from other jurisdictions, and observed there were two important considerations in the modern New Zealand context. The first was that given the training, experience and professionalism of police investigators, it was not to be assumed that the provision of false information rendered a proper exercise of the discretion to prosecute impossible. The other was that members of the public should not be regarded as having instigated a prosecution, except in rare and exceptional circumstances, because of the public interest in encouraging the provision of information to police.

[14] Richardson J concluded his observations with a passage set out in the judgment of the learned judge at first instance:

> "The core requirement is that the defendant actually procured the use of the power of the State to hurt the plaintiff. One should never assume that tainted evidence persuaded the police to prosecute. In some very special cases however the prosecutor may in practical terms have been obliged to act on apparently reliable and damning evidence supplied to the police. The onus properly rests on the plaintiff to establish that it was the false evidence tendered by a third party which led the police to prosecute before that party may be characterised as having procured the prosecution." – (1989) 3 NZLR 187 at 199)

In the same case, McMullin J put the matter thus:-

> "A person may be regarded as the prosecutor if, inter alia, he puts the police in possession of information which virtually compels an officer to lay an information; if he deliberately deceives the police by supplying false information in the absence of which the police would not have proceeded or if he withholds information in the knowledge of which police would not prosecute." – (*supra* at 207-208)

[15] Lord Keith of Kinkel, with whom the other members of the House of Lords agreed, in

> *Martin v Watson* (1996) 1 AC 74 at 84) adopted those passages from *Lamont* as embodying a correct statement of the relevant principles. He went on to add:
>
> > "Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant." – (*supra* at 86-87).'"

[19] Having reviewed the authorities and the legal principles involved in the first element of the tort, his Honour then examined the evidence before him to determine whether the respondents (defendants) were actually the prosecutors such that the first element of the tort was satisfied.

> "**Were the defendants in truth the prosecutors?**
>
> [28] The plaintiff says that the following evidence establishes this element:-
>
> (a) that not only did the defendants contact the police but the first defendant continued to contact the police to enquire about the progress of the complaint thus evidencing the defendants' desire and intention that the plaintiff be prosecuted;
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> (b) the defendants influenced the police prosecutor by conducting their own investigation and providing the results of that information to SC Kitto;
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> (c) the first defendant dishonestly prejudiced SC Kitto's judgment by stating at the first meeting that he had spoken to all of the other staff involved on the day in question when he had not spoken to Mr Rotta and could not be sure whether he had spoken to Ms Van Praag;
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> (d) the defendants furnished information to SC Kitto that they knew to be false in asserting that all of the staff involved had been spoken to by the first defendant; and

(e) the defendants withheld information from SC Kitto which they knew to be true namely that the video surveillance cameras could be turned off and that any staff member had access to the technology to switch it off.

[29] By reference to the authorities reviewed in *Seabrook* I do not think it could be said that the prosecutorial discretion was misled by false information provided by the first defendant. Nor that he ever provided false information to the police thus influencing the police decision to prosecute or that he did in any way procure the use of the power of the State to hurt the plaintiff. Further, in my view, the information provided by the first defendant did not compel SC Kitto to charge the plaintiff. The facts were never solely within the knowledge of the first defendant so as to make it virtually impossible for the police to exercise any independent discretion or judgment.

[30] In my view the evidence clearly shows that Mr Kent, as CEO of the Club, was carrying out his functions genuinely and diligently as he understood them. He held suspicions in relation to the conduct of the plaintiff but clearly from his conversations with her father was rather hoping that a full investigation would not bring those suspicions to reality. The evidence does not support any finding that he ever bore any ill will towards the plaintiff, or that he acted at any time with any malice towards her or anyone else. Neither does it show that he acted other than with the legitimate purpose of having the matter investigated by the appropriate authority, the Queensland Police Service. He was simply doing his job. Minds may differ as to whether or not the evidence relied upon by the first defendant and Ms Taylor to found their suspicions of the plaintiff's conduct was sufficient to support the views they formed but that is not to the point. The suspicions were genuinely formed and held and there is no room for any inference that the first defendant acted other than appropriately.

[31] It is true that he did not personally interview all the staff who were on duty at the relevant time as he said in his statement he had done. I am referring here to Chanel Van Praag who he was not sure whether he interviewed and Sergio Rotta who he did not interview. But the important thing is that he put the matter in the hands of the police as the appropriate authority to carry out investigations. SC Kitto was in no way thereby overborne by the first defendant nor could it be said that the facts of the matter were solely within the knowledge of the first defendant so as to deprive SC Kitto of any independent discretion or judgment in the course of his investigation. Whereas [the] first defendant's statement did say that he had spoken to all

> staff involved on the date of the incident when that was not correct, that is a far cry from establishing that there was any evidence that the first defendant deliberately set out to deceive SC Kitto by supplying false information. That did not happen. The language, that of SC Kitto as the author of the statement, was loose but, as I have said, the first defendant had asked Mr. Lundin to speak to all staff on duty on the day. A more careful reading of it by him prior to execution should have identified the error but the oversight was, in my view, no more than that, an oversight, lacking any sinister overtone contended for by the plaintiff. The failure of the first defendant to mention the availability of staff access to the camera housing room is in the same category. The first defendant was not, and did not purport to be, an experienced investigator so his failure to mention matters which may occur to such an investigator as important is not surprising. The important feature is that I consider he acted at all times in good faith without any dishonest or improper purpose. Honest mistakes are not sufficient to elevate the first defendant to the status of prosecutor.
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> [32] SC Kitto was an experienced detective. In my view there is no support of the evidence that he blindly relied on the first defendant's statement that he had spoken to all relevant staff or any information provided to him by the first defendant and decided thereby to limit his investigation. Such an inference would be insulting to an experienced investigator such as SC Kitto. In my view he conducted his own investigation and made his own decision to prosecute uninfluenced, in the relevant sense, by the first defendant but taking advantage of information supplied to him by the latter.
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> [33] In my view the plaintiff has failed to establish the first element of the tort, that the first defendant was her prosecutor so it is unnecessary for me to address the remaining elements in issue of whether the prosecution was instituted without any reasonable and probable cause or whether it was instituted maliciously. What I will say, as I have said above, is that there was no evidence of malice in all the conduct of the first defendant. The plaintiff's claim is dismissed."

The proposed grounds of appeal

[20] The appellant now seeks leave to appeal against that decision and seeks two alternate forms of relief, namely an order setting aside the decision of the trial judge and the grant of an award in favour of the applicant or alternatively an order for a new trial. The proposed grounds of appeal are as follows:

> (i) his Honour erred as a matter of law in ruling that the appellant could not ask a question of the witness, Kitto, in re-examination on a topic which had been opened up by both respondents during cross-examination;

(ii) had his Honour allowed the question in re-examination, there existed a reasonable probability that the answer could have led to a finding that the prosecution of the appellant was by the respondents and the failure by his Honour to allow the appellant's trial counsel to ask the question in re-examination has resulted in a miscarriage of justice;

(iii) his Honour failed to properly appreciate the principles of law involved in the appellant's cause of action and apply them correctly to the evidence before his Honour and this failure has resulted in a miscarriage of justice;

(iv) his Honour, in finding "nor could it be said that the facts of the matter were solely within the knowledge of the first defendant so as to deprive Kitto of any independent discretion or judgment in the course of his investigation", ignored the clear evidence before him to the effect that:

(a) Kitto had been led to believe by the first respondent on 26 April 2006 that the only persons working in the relevant area on the day in question were persons named Plant, Maugher and Lundin (other than the appellant), all of whom were then treated by Kitto as prosecution witnesses;

(b) the first respondent's statement to Kitto on the 26 April 2006 that the first respondent had interview all staff involved on the date in question led to Kitto concluding that the only people who could have had an opportunity to take the money had been spoken to by the first respondent;

(c) Kitto had no way of knowing of the existence of staff members Chanel Van Praag and Sergio Rotta as staff personnel who would have had the opportunity to access the money in the cash tins on the day in question and, in the absence of such information he did not attempt to interview either person;

(d) In the absence of such knowledge, Kitto would have had his suspicion of the appellant formed on the basis of his own viewing of the four compact disks strengthened significantly;

(e) Kitto was not informed by the first respondent that any member of staff had access to the control room and could have turned the cameras on or off. This meant that this strengthened his suspicion of the appellant even further and therefore deprived him of an ability to exercise independent discretion or judgment.

Grounds i and ii of the Notice of Application for Leave to Appeal

[21] This relates to a question counsel for the plaintiff wanted to put to Kitto during the trial in the District Court. Counsel for the plaintiff had Kitto recalled in order to put

to him that the total amount of time not recorded was a period of some two and a half hours. In re-examination by counsel for the plaintiff the following question was asked:[3]

> "If you had been told by Mr Kent that any member of staff could access the room and switch the cameras on and off-----"

[22] The question was objected to on the basis that it did not arise out of cross-examination. Counsel for the respondents also stated:[4]

> "But I take the objection further: (a) its hypothetical; (b) it is not pleaded. This case has not been pleaded or particularised on the basis of anything to do with Mr Ken ... It's not about whether Ms Cosentino did it, it's about what Mr Kent knew and what actuated Mr Kent. There is nothing in these pleadings about the possibility, as was put to Mr Kent at the committal, that someone else might turn it off."

[23] His Honour did not allow the question on the basis that "tampering" with the cameras was not one of the allegations pleaded and that:[5]

> "We're now moving into an area where it is going to be asked, or the area you're moving into is that the camera, apart from its normal operation activated by motion, was----Could have been interfered with by someone so that the –so that the two and a half hours missing could be explained on that basis".

[24] In my view, the question sought to be asked by counsel was in fact hypothetical. The question indeed assumed a fact which had not actually been proved. That is that the tapes could in fact be tampered with in this way and that turning the cameras off would appear "on screen" in exactly the same way as no motion before the cameras appeared. There had been no evidence that this was the case. The evidence was simply that Kent stated that he did not have the necessary technical expertise to answer the question but did not exclude the possibility that it *could* occur.

[25] In my view, the trial judge was correct in refusing to allow the question as it was hypothetical.

[26] Furthermore, the question was clearly being put so that counsel for the plaintiff could pursue the line that the absence of two and a-half hours' footage would have caused Kitto to change his mind as to who he investigated. It is clear that this question could only have been relevant if it had been established that Kent deliberately did not inform Kitto of the missing portions of the tape. This question however, had never been put to Kent.

[27] It is also clear from the evidence that Kitto knew that there were periods of time that were not recorded and he assumed that they were periods when nothing was moving in front of the camera. Furthermore, when Kitto had been asked whether the fact that there was two and a-half hours missing would have caused him concern, he had indicated that it would not because he indicated that his suspicions had been confirmed by what he had in fact seen on the tape he had viewed.

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3 Record Book at p A139, ll 38-40.
4 Record Book at p A141, ll 1-10.
5 Record Book at p A142, ll 55-60.

[28] Accordingly, I do not consider that the question was in fact relevant to an issue in the proceedings. Even if the question had been allowed, I do not consider that it would have carried any significant weight given the evidence Kitto had already given.

[29] I do not consider there is any basis for the leave to appeal to be granted on this basis.

Grounds iii and iv of the Application for Leave to Appeal

[30] Turning then to the more substantive bases for the application for leave to appeal which are set out in grounds three and four. The substance of these grounds would appear to be that the applicant submits that the trial judge made errors of fact and of law. In particular, the applicant argues that the findings of the trial judge were erroneous and that, if the facts had been found correctly, judgment would have gone to the applicant. In particular, the applicant submits that his Honour ignored or misapprehended the weight of the evidence and should not have come to the conclusions that the prosecutorial discretion was not misled, that false information was not provided and that the facts were never solely within the knowledge of the first defendant.

[31] The applicant submits that, the learned trial judge failed to properly appreciate the principles involved in her cause of action and apply them correctly to the evidence. Whilst the applicant contends that his Honour correctly found that the first element, the tort of malicious prosecution, was the prosecution of the plaintiff by the defendants, it is submitted that his Honour either clearly ignored or misapprehended the weight of the evidence in making his findings.

[32] The respondents submit, that when considering the first element of the tort of malicious prosecution, the trial judge erroneously concluded that malice was necessarily required to exist before the first element could be established. That conclusion was based on the factual findings made by his Honour. Those findings by his Honour included the findings that the first respondent did not deliberately set out to deceive Kitto by supplying the false information, that the language of Kitto, as the author of the first respondent's statement, was loose and that there was an oversight made by the first respondent in failing to identify the error in his statement when signing it. A further oversight was failing to tell the senior constable of the availability of the club staff to access the room housing the security camera and to turn the camera on and off, which could explain the large gaps in the security footage.

[33] The applicant also argues that Kitto's evidence was that the first respondent had personally told him that he had interviewed all of the staff involved, when this was not the case. This error occurred despite the fact that Kitto had warned the first respondent of the importance of the accuracy of his statement on two occasions. Further, the first respondent led Kitto to believe that the only people working in the area on the day in question were staff members Plant, Mauger and Lundin.

[34] The applicant submits that all of these factors were significant in determining whether the first respondent provided false information to the police and whether the prosecutorial discretion was misled. In particular, the applicant submits that the first respondent had led Kitto to believe that he had spoken to all of the persons who had an opportunity to take the money and therefore, Kitto had no way of knowing

the existence of other staff members, such as Van Praag and Rotta, who would have had the opportunity to access the money on the day. Kitto did not interview these persons. Accordingly, Kitto's suspicions were strengthened in respect of the video footage because he did not have this knowledge. Furthermore, Kitto had been advised by the first respondent that he had been told that the applicant had been working on all three previous occasions, during the preceding 12 months, when the money had gone missing.

[35] The essential submission of the applicant is that the provision to the Queensland Police Service by the first respondent of false and misleading evidence compelled the investigating police to charge the plaintiff. In relation to the issue as to whether the first respondent was activated by an improper purpose, the applicant submits this can be established circumstantially by showing that the prosecution could only be accounted for by imputing some wrong and indirect motive to the prosecutor.

[36] In particular, the applicant submits that it is more probably than not that the prosecutor acted without reasonable and probable cause and that the defendant prosecutor did not honestly believe that the case should be instituted or maintained, or that the prosecutor did not have a sufficient basis for such an honest belief.

The legal basis for the tort of malicious prosecution

[37] The High Court recently set out the essential requirements for the tort of malicious prosecution in *A v New South Wales*[6] as follows:

> "For a plaintiff to succeed in an action for damages for malicious prosecution the plaintiff must establish: (1) that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant; (2) that the proceedings were terminated in favour of the plaintiff; (3) that the defendant in initiating or maintaining the proceedings acted maliciously; and (4) that the defendant acted without reasonable and probable cause or continued without reasonable and probable cause."

[38] The High Court stated:[7]

> "Much of the development of the law concerning malicious prosecution reflects the attempts to balance the provision of a remedy where criminal processes have been wrongly set in train with the need not to deter the proper invocation of those processes. The two requirements of absence of reasonable and probable cause, and malice, represent the particular balance that is struck."

[39] Malice was then defined:[8]

> "For immediate purposes it suffices to describe malice as acting for purposes other than a proper purpose of instituting criminal proceedings. Purposes other than a proper purpose include, but are not limited to, purposes of personal animus of the kind encompassed in ordinary parlance by the word 'malice'. It also suffices to refer for the moment to what the prosecutor 'made' or 'should have made' of the available material without pausing to explore what is meant by those expressions."

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6 (2007) 230 CLR 500 at [2].

7 *A v New South Wales* (2007) 230 CLR 500 at [51].

8 *A v New South Wales* (2007) 230 CLR 500 at [55].

[40] And later:[9]

> "What is clear is that to constitute malice, the dominant purpose of the prosecutor must be a purpose *other* than the proper invocation of the criminal law – an 'illegitimate or oblique motive'. That improper purpose must be the sole or dominant purpose actuating the prosecutor."

[41] The High Court explained:[10]

> "However, this does not warrant any conclusion that a failure to take account of relevant considerations, or a taking account of irrelevant considerations, would necessarily constitute malice for the purposes of this tort. The tort of malicious prosecution is a private law remedy that is not available to all who have been prosecuted unsuccessfully. It is available only upon proof of absence of reasonable and probable cause *and* pursuit by the prosecutor of some illegitimate or oblique motive. Lord Goff of Chieveley and Lord Hope of Craighead said of the related but distinct tort of malicious procurement of a search warrant:
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> > 'The sole function of the tort is to enable the person to recover damages, and in regard to that private law remedy the guiding principle is that it is for the plaintiff to make out his case. It is for him to prove that the search warrant was obtained maliciously and that there was a want of reasonable and probable cause.'
>
> A like statement may be made in respect of the tort of malicious prosecution."

[42] In my view, there is no basis for the applicant's submission that the trial judge made errors of fact and of law. I consider that his Honour correctly set out the relevant authorities and applied the relevant tests to the circumstances before him. I do not consider that there is any basis for the submission that his Honour considered that it was a pre-requisite that malice exist before the first element of the tort could be made out but rather his Honour was carefully applying the principles set out in the authorities referred to above. Whilst his Honour did conclude there was no malice present in the current case, I do not consider he indicated that it was an essential pre-requisite to establish the first element of the tort but rather considered that this was, in fact, the substance of the tort as a whole.

[43] I consider that the authorities examined by his Honour establish the following as the essential questions which need to be satisfied in order to establish that the first element of the tort of malicious prosecution has in fact been established:

- Was there the provision of false information to the prosecutor?
- Did the provision of the false information influence the police decision to prosecute?
- Given the training and professional expertise of the police, did the provision of false information render the exercise of a discretion to prosecute impossible?

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9 *A v New South Wales* (2007) 230 CLR 500 at [91].

10 *A v New South Wales* (2007) 230 CLR 500 at [95].

- Did the defendant actually procure the use of power to hurt the plaintiff?
- Has the plaintiff satisfied the onus and established that it was the false evidence which led the police to prosecute?
- Has the provision of the information by the respondents compelled the prosecution?
- Have the respondents deliberately deceived the police by supplying false information?
- Have the respondents deliberately withheld information in the knowledge of which the police would not prosecute?
- Were the circumstances such that the facts relating to the offence were within the knowledge only of the complainant such that it became impossible for the police to exercise any independent discretion and the respondents falsely and maliciously gave such information?

[44] His Honour appropriately turned his mind to answering those questions. In answering those questions as they arose in relation to the evidence before him, his Honour did not specifically find that the provision of some of the information by the first respondent was false, although inferentially he did, as his Honour found that some of the information provided was "not correct" or resulted from "oversight". His Honour concluded:[11]

> "that is a far cry from establishing that there was any evidence that the first defendant deliberately set out to deceive Kitto by supplying false information."

[45] Significantly, what his Honour really focussed his attention on was not the question as to whether the information was false but the more important issues of whether there had been any deliberateness in the first respondent's conduct and whether it was that conduct which had in fact influenced the decision to prosecute.

[46] Deliberateness was a crucial issue and His Honour focussed on this aspect. I agree with the submission of counsel for the respondents in this regard that his Honour specifically referred to "the authorities reviewed in *Seebrook"* and then concluded that for the first element to be established it had to be established that the first defendant "deliberately" provided false information to the prosecutor or "deliberately" withheld true information.

[47] His Honour then focussed on what was really the causal link between the provision of the information and the actual decision to prosecute. I agree with the conclusion of his Honour that there was no evidence that the prosecutorial discretion was in fact misled by the information provided (quite apart from the question as to whether it was in fact false) or that the information provided was such as to influence the decision to prosecute. His Honour concluded that the police were not "overborne" by the defendants. It was clearly open on the evidence for his Honour to be satisfied that the defendant did not in any way procure the use of the power of the state to hurt the plaintiff. There was clear evidence from Kitto that having viewed the CCTV he formed an independent view that the plaintiff's behaviour was

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[11] *Cosentino v Kent & Anor* [2009] QDC 134 at [31].

suspicious and he also stated he was never told by the first defendant to prosecute the plaintiff.

[48] I also consider that the weight of the evidence indeed supported the finding his Honour made that the first respondent acted at all times in good faith and without any dishonest or improper purpose. His purpose was always to have the matter investigated by the Police Service. A review of the evidence indeed indicates that it was an oversight that led to the first respondent signing a statement some three months after the events occurred which indicated he had reviewed all the staff when it was clear there was at least one staff member he did not interview.

[49] I concur with the trial judge's conclusion that there was no evidence to establish a finding that the first respondent deliberately set out to deceive Kitto particularly about the possibility of staff being able to access the cameras. The transcript of the committal hearing in fact indicates that it would appear that this possibility really only occurred to the first respondent during questioning at the committal hearing by defence counsel. That cannot be the basis for establishing a deliberate intent on the part of the first respondent to "prosecute" the applicant for a dishonest or improper purpose. In my view, the trial judge correctly examined the evidence and concluded there was simply no basis for a finding that there was any deliberateness on his part to provide false information to the prosecutor or any indication that he deliberately withheld true information.

[50] I do not consider there is any basis to the submission that his Honour considered that malice was required to be present before the first element could be made out. His Honour was clearly working through the matters which the authorities have established need to be made out. When he came to consider the issue set out in *Martin v Watson*[12] as to whether the facts relating to the alleged offence were solely within the knowledge of the complainant information he concluded that the information was not solely within the knowledge of the first defendant. Clearly this was the case and as his Honour stated Kitto was an experienced detective and there was no evidence to support a finding that he relied on the first defendant's statement and thereby decided to limit his investigation. Clearly it was indeed open to him as an experienced investigator to further interview staff and make further inquiries about the CCTV system should he have considered it necessary. It would seem to me that when the critical information is solely within the knowledge of the complainant it is often the case that malice is found to be present in this first element but this may not always be the case.

[51] In relation to the first ground therefore his Honour concluded that he was satisfied that the plaintiff had failed to satisfy the onus on her to establish this first ground that it was the defendants who had in fact brought the prosecution. Only after coming to that conclusion did his Honour then state it was unnecessary to consider the other elements "of whether the prosecution was instituted without any reasonable cause or whether it was instituted maliciously". His Honour then said "What I will say, as I have said above, is that there was no evidence of malice in all the conduct of the first defendant." His Honour was not indicating that malice was required to be present in order to satisfy the first element but what he was indicating was that he had in fact analysed all of the behaviour of the defendants and he considered it was not in fact malicious. Whilst his Honour did not specifically turn to the all the other elements that were required to be satisfied before the tort could

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12 [1996] 1 AC 74 at 84.

be established he made a specific finding about malice. Given the fact that malice is such an essential component of the tort it was appropriate that his Honour made such a specific finding given he had analysed the defendant's actions in such detail.

[52] In my view an analysis of the authorities set out above and indeed the High Court decision of *A v New South Wales*[13] indicates that malice is an essential element of the tort. It would also seem clear that in many cases the first element of the tort is established by the fact that there has indeed been some malicious action by the plaintiff particularly in those cases where the information is solely within the knowledge of the complainant. I do not consider however that the state of the authorities is such that they indicate that malice is an essential prerequisite for the first element to be established although it may often as not be present at that very first stage. In my view it is essential that there be an element of at least "deliberateness" for the first element to be satisfied which may indeed be malicious however it would seem to me that this element may in fact be established in circumstances which may fall short of actual malice.

[53] I consider that no errors of fact or law have been established, nor do I consider there were any questions raise, which would be definitive in future appeals.

[54] I would refuse the application for leave to appeal. As was stated in *Praxis v Hewbridge Pty Ltd*:[14]

> "[12] In no respect in which it was suggested that the judgment is erroneous was anything identified that would lead this Court to exercise the discretion to give leave to appeal against it. The fact that an error of fact or law arguably has occurred in the reasons leading to the judgment is not itself necessarily enough: if it were, there would be no point in imposing the additional requirement of obtaining leave to appeal. No question is or would be raised here which, if decided by the Court of Appeal in the prospective appeal, is likely to prove definitive in any future case of this kind."

[55] The application should be refused with costs to be assessed, if not agreed.

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13 (2007) 230 CLR 500.

14 [2004] 2 Qd R 433 at [12].