SUPREME COURT OF QUEENSLAND

CITATION:	*Seabrook v Allianz Australia Insurance Limited & Ors* [2005] QSC 344
PARTIES:	**MARK LEONARD SEABROOK** (plaintiff) **v** **ALLIANZ AUSTRALIA INSURANCE LIMITED** (first defendant) **CLUB MARINE LTD** (second defendant) **TROY ERIN LUCK** (third defendant) **BRIAN ERNEST ASHER** (fourth defendant)
FILE NO/S:	BS 9379 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2005
JUDGE:	White J
ORDER:	**Judgment for the fourth defendant against the plaintiff pursuant to r 293 of the *Uniform Civil Procedure Rules* 1999**
CATCHWORDS:	TORTS – MALICIOUS PROCEDURE AND FALSE IMPRISONMENT – MALICIOUS CRIMINAL AND CIVIL PROCEEDINGS – ESSENTIALS OF CAUSE OF ACTION GENERALLY – INSTITUTION OR CONTINUANCE OF PROCEEDINGS BY DEFENDANT – DEFENDANT PROSECUTOR OR INSTIGATOR OF PROSECUTION – where complex matter with a number of sources of evidence – whether fourth defendant influenced the prosecuting authority by false testimony, dishonest prejudice or counselling *Uniform Civil Procedure Rules 1999* (Qld), r 171, r 293 *Balson v State of Queensland* [2002] QSC 419, cited *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989]

NZLR 187, cited
Commonwealth Life Assurance Society Ltd v Brain (1934-1935) 53 CLR 343, cited
Davis v Gell (1924) 35 CLR 275, applied
Mahon v Rahn [2000] 1 WLR 2150, cited
Martin v Watson [1996] AC 74, cited

COUNSEL: Mr R Perry SC for the applicant fourth defendant
Mr P Favell for the respondent plaintiff

SOLICITORS: Thynne & Macartney for the applicant fourth defendant
Hemming & Hart for the respondent plaintiff

[1] The applicant/fourth defendant, Brian Asher, has applied to have the plaintiff's further further amended statement of claim ("statement of claim") dated 8 November 2004 struck out pursuant to r 171 of the *Uniform Civil Procedure Rules* on the ground that it discloses no reasonable cause of action against him. Alternatively he seeks judgment pursuant to r 293 of the Rules.

[2] The plaintiff, Mark Seabrook, was the owner of a boat named *Brendan Mark*. In May 1996 he insured his boat against the risk of loss by fire with MMI General Insurance, the predecessor of the first defendant, Allianz Australia Insurance Limited ("Allianz"). MMI's insurance agent, through whom the contract of insurance was affected, was the second defendant, Club Marine Ltd. It is convenient for this application to refer to them collectively as the insurer where appropriate. The third defendant, Troy Luck, was an employee of Club Marine. Asher is a loss adjustor retained by Club Marine who investigated the fire.

[3] Under the terms of the policy in the event that the boat was damaged or destroyed by fire, the insurer could choose whether to repair or replace the boat or pay the sum of $500,000, its insured value, to Seabrook.

[4] On Thursday 24 April 1997 the boat was damaged by fire at Southport. On 26 April Seabrook made a claim on his policy of insurance. Repairs to reinstate the boat were estimated at $330,000. The insurer did not pay out the value of the boat nor agree to the repairs or replacement of the boat and on 14 September 1998, some 17 months after the fire, Seabrook commenced proceedings against his insurer to compel it to indemnify him under the contract. On 30 October 1998 Seabrook's motion for judgment was adjourned at the insurer's request until 18 December 1998. On that date Seabrook was charged by Plainclothes Constable Nicole Lawrence with wilfully and unlawfully setting fire to the boat and attempting fraudulently to obtain $500,000.

[5] After a committal hearing in the Magistrates Court at Southport in May 1999 the Magistrate found that Seabrook had no case to answer and dismissed both charges. Seabrook instituted these proceedings for damages for malicious prosecution against the defendants on 19 October 2001. The progress of these proceedings has been slow, punctuated by numerous amendments to the statement of claim as well as amendments to the defences. The trial of the matter was due to be heard in February 2004 but was adjourned after lengthy argument about the sufficiency of the pleadings which ultimately led to a Court of Appeal hearing. It is not relevant to

this application to recite the detailed chronology which is set out in the affidavits of each party's solicitor.

[6] If the application to strike out is successful it is unlikely that any new pleading could be delivered which would keep summary judgment at bay.

The pleadings

[7] The allegations concerning Troy Luck's contact with police after the fire and prior to Seabrook being charged are extensive. He is alleged to have told Constable Lawrence falsely that

- Seabrook was insisting on being paid $500,000 rather than seeking repairs or replacement;
- Seabrook never indicated that he wanted the boat repaired but always wanted the half million pay out.

These statements to Constable Lawrence are pleaded to be false because Seabrook had not demanded $500,000. He had advised the insurer that the boat needed urgent repairs. Other statements of a similar kind were allegedly made to Constable Lawrence after Seabrook had been charged and these are set out in paras 25 and 32 of the statement of claim.

[8] Luck is alleged to have known the statements were false because he knew that pursuant to the policy the insurer could choose whether to repair, replace or make a payment of $500,000 and was aware of the contents of the claim file in which Seabrook had not demanded only the payment of the insured value of the boat.

[9] The allegations against Asher are contained in paragraphs 20-23 and 24(c) and (d) of the statement of claim.

> "20. On 8 October, 1997, Asher falsely said to Lawrence, words to the following effect:
>
> > 'Although repairs were put at $330,000, Seabrook stands to get a cheque payable to him for $500,000 because this is what the boat was assessed at.'
>
> 21. In fact, if the boat could be repaired for $330,000, MMI had a right to choose to repair it for that sum rather than to pay any money whatsoever to Seabrook.
>
> 22. On 7th August, 1998, Asher falsely verbally informed Lawrence that he had received anonymous information that Crosby, a valuer who had valued the boat for Seabrook at $500,000 for insurance purposes had 'definitely received under-counter payment to up the value of the boat.'
>
> 23. In fact Asher had not received the information referred to in paragraph 22 of the [Statement of Claim].
>
> 24. ... Asher made the statements referred to in paragraphs 20 and 22 of the [statement of claim] knowing that the

statements were false or recklessly indifferent as to whether they were true or false.

...

24(c) Asher made the statements knowing that they were false because Asher:

(i) knew that pursuant to the terms of the insurance policy, MMI could choose either to repair the boat, replace the boat or pay Seabrook $500,000.00; and

(ii) did not receive the information referred to in paragraph 22 of the [statement of claim].

24(d) Asher was recklessly indifferent as to whether the statement [sic] were true or false because Asher:

(i) knew or ought to have know that MMI could choose either to repair the boat, replace the boat or pay Seabrook $500,000.00; and

(ii) did not receive the information referred to in paragraph 22 of the [statement of claim]."

[10] It is not asserted in the defence that the statements attributed to Asher were true. Nor is it asserted that he corrected the false statements to Constable Lawrence or any police. There is a positive assertion in the statement of claim that he did not do so. The failure to correct is alleged against each defendant to be malicious, para 42.

[11] The core of the allegation of malicious prosecution against Asher is contained in para 41A of the statement of claim.

"41A. By making the statements referred to in paragraphs 20 and 22 of the [statement of claim] to Plainclothes Constable Lawrence Asher maliciously:

(a) counselled and persuaded her; and/or

(b) procured her; and/or

(c) misled her prosecutorial discretion; and/or

(d) dishonestly prejudiced her judgment;

to bring and/or to continue the charges against Seabrook. ~~One of the main reasons for the decision of the Police to charge Seabrook was the belief gained from acts or omissions of the fourth defendant referred to herein that Seabrook wanted $500,000 pursuant to the insurance policy.~~

Particulars

(a) Seabrook repeats and relies upon paragraphs 20, 21, 22, 23, 24(c), 24(d), 40, 42, 43A, 45B and 45D of the [statement of claim];

(b) Seabrook relies upon paragraph 41A.1 below.

41A.1 One of the main reasons for the decision of the Police to charge Seabrook was the beliefs [sic] gained from the acts or omissions of Asher referred to in paragraphs 20, 22, 24 and 40 of the [statement of claim] that:

(i) the boat was insured for an amount that was greater than the value of the boat; and
(ii) if the insurer indemnified Seabrook pursuant to the terms of the insurance policy, Seabrook would receive a cheque from the insurer for $500,000 irrespective of whether the boat could be repaired or replaced for a lesser amount of money.

Particulars

(a) the decision of the Police to charge Seabrook was made by Lawrence;
(b) the main reasons that Lawrence decided to charge Seabrook were that:

(i) Lawrence considered that Wayne Sharpe had been eliminated as a suspect in relation to the fire on the boat;

(ii) Lawrence considered that Seabrook had wanted to sell the boat prior to the fire on the boat despite the fact that Seabrook had told Lawrence that he loved the boat;

(iii) A loan application by Seabrook for $500,000 had been rejected one month before the fire on the boat;

(iv) Lawrence considered that the boat was overinsured;

(v) Lawrence considered that Seabrook stood to make a lot of money from the insurance claim;

(c) Lawrence believed the matters referred to in paragraphs 41A.1(i) and (ii) above;

(d) The only information that Lawrence had in her possession prior to the bringing of the charges about the value of the boat was the statement referred to in paragraph 22 of the [statement of claim], the opinion expressed by Tom Howard in the valuation provided to Seabrook dated 14 May 1996 and the opinion expressed by Denis Crosby in the valuation provided to Seabrook dated 12 November 1996;

(e) Lawrence did not make any independent enquiries in order to ascertain the truth or otherwise of the statement referred to in paragraph 22 of the [statement of claim];

(f) Lawrence did not obtain any qualified opinions as to the market value of the boat;

(g) Lawrence relied upon the statement referred to in paragraph 22 of the [statement of claim];

(h) But for the statement referred to in paragraph 22 of the [statement of claim], Lawrence would not have formed or acted upon the belief referred to in paragraph 41A.1(i) above;

(i) The only information that Lawrence had in her possession prior to the bringing of the charges about the obligations of the insurer in relation to indemnity pursuant to the insurance policy was the statement referred to in paragraph 20 of the [statement of claim] and the statement made by Luck as referred to in paragraph 34 of the [statement of claim];

[34. On 14 January, 1999, in a written statement provided to Plainclothes Constable Lawrence, Luck said:

> "The nature of the policy being an agreed value one, meant that Seabrook would be paid $500,000 – no more no less – if Club Marine settled."

Particulars

Statement signed by Luck and date 14 January 1997 and provided to Queensland Police Service.]

(j) But for the statements referred to in paragraphs 20 and 34 of the [statement of claim], Lawrence would not have formed or acted upon the belief referred to in paragraph 41A.1(ii) above;

(k) The beliefs referred to in paragraphs 41A.1(i) and (ii) above were significant to Lawrence when she made the decision to charge Seabrook."

[12] Seabrook alleges in the alternative against Allianz and Club Marine that an employee or agent of either or both falsely told Constable Lawrence that Seabrook was insisting on being paid $500,000; and that he had never indicated that he wanted the boat repaired, that is, the same allegations as against Luck. Seabrook pleads that "one of the main reasons for the decision of the police to charge Seabrook" were these beliefs gained from the employee/agent of Allianz and/or Club Marine.

[13] In para 45B Seabrook alleges that Asher had "no reasonable or probable cause" for his prosecution of Seabrook on the charges. He alleges in para 45D that on each occasion when Asher communicated with Constable Lawrence as set out in para 20

and 22 of the Statement Claim, he sought improperly to advance the interests of the insurer to avoid the policy by having Seabrook charged and convicted by giving false information to the police. Particulars which need not be set out here are given from which that inference might be drawn.

[14] The issue here is whether Asher can be characterised as the prosecutor as that person is understood in the authorities.

The investigation

[15] Constable Lawrence and other police, particularly Senior Detective Constable Aubort, undertook a lengthy investigation into the fire on the *Brendan Mark*. From the outset arson was suspected. The police "running sheet" of the investigation covers some 36 typed pages from 24 April 1997 to 18 December 1998 when Seabrook was charged and continues for a further 10 pages to the committal proceedings.

[16] Many people including in the boating industry, banks and other financial organisations as well as friends and associates were interviewed. A business competitor, Wayne Sharpe, with whom Seabrook had a falling out, was nominated as a suspect by Seabrook. On 1 May 1997 police first spoke to Asher

> "Speak with Brian ASHER of Beaka Investigations. He is the loss assessor for Club Marine. States he has spoken with Vince BENTHAN the previous owner of the boat and is flying down tomorrow to meet with him. At this stage BENTHAM has informed him that he sold the boat to SEABROOK for $150,000 and not $300,000. States the deal involved exchanging blocks of land for the boat. States this is currently in arbitration (ASHER not exactly sure what he meant by that) ie problem re the payment for the boat. Arrangements made to meet with ASHER Monday at 8am to view statement of BENTHAM and documents re insurance policy. Also states SEABROOK has told him he had difficulty in locating invoices etc re work done to boat.
> AUBORT"

[17] A further reference is made to contact with Asher on 7 May 1997

> "Ring Brian ASHER (Loss Assessor) who has photos of the boat pre-sale; he will supply same to police over next few days. Also ASHER is to supply details of Tom HOWARD (valuer who put the boat at presale value $245000) as well. Spoke with ASHER regarding the $500000 valuer – CROSBY stated he is very unethical operator.
> LAWRENCE"

[18] Asher attended the CIB on 15 May with photographs of the *Brendan Mark*.

[19] Constable Lawrence spoke with Asher on 6 July 1997

> "Speak with Brian ASHER at length. Believes evaluator CRAWFORD to be ok, but CROSBY dubious and very concerned. Stated that when CROSBY was shown paperwork indicating boat was sold for $150 000 – he was shaken, knowing that he valued the

> boat at 12/11/96 at $500 000. CRAWFORD valued boat on 14/05/96 at $245 000 (but previous owners still only sold for $150 000)."

[20] There were contacts with Asher from time to time but on 8 October 1997 the following appears

> "Speak with Brian ASHER. States SEABROOK is starting to hint at civil proceedings because insurance won't pay out. ASHER also stated that although repairs were put at $330 000, SEABROOK stands to get a cheque payable to him for $500 000 because this is what the boat was assessed at."

[21] On 24 November 1997 Wayne Sharpe was informed by police that he was not a suspect. By 23 June 1998 Constable Lawrence was consulting with the DPP after liaising with Detective Senior Constable Aubort about charging Seabrook.

[22] On 7 August 1998 Constable Lawrence spoke with Asher

> "Speak with Brian ASHER – on his way to interview Lee SEABROOK after Susan PEYTON (Club MARINE) ASHER received anon Info that CROSBY definitely received under counter payment to up the value of the boat."

[23] On 17 December 1998 police notified Club Marine's solicitors that Seabrook was to be charged. Seabrook's solicitor accepted service of the summons on 18 December 1998.

[24] On 15 January 1999 Constable Lawrence took a statement from Seabrook's stepson who spoke about Seabrook advocating small insurance "scams".

The committal proceedings

[25] The committal proceedings proceeded over eight days in the Magistrates Court at Southport. Seabrook was represented by Mr Glynn SC. He cross-examined Constable Lawrence over almost 100 pages of transcript. Early in the cross-examination he asked her the factors which caused her to charge Seabrook. She answered

> "Basically at the time of the night of the fire, I took a notebook statement. He indicated to me the boat was worth half a million dollars. It was insured with Club Marine, and he indicated he paid 300 and something odd thousand for it, and spent between 140,000 and 150,000 – off memory – on a re-fit. A very recent re-fit. And I thought, "Great." Next day he's come in with his mobile phone – he'd actually been in the morning – I worked at 2 p.m. that afternoon, I started work – I was told that the defendant had come in with his mobile phone. He had a message taped on his phone, indicating someone had won a battle – some swear words thrown in there as well, and so, he's come in that evening with Brit Baker, who's now his wife – Brit Seabrook, John Grounds and Kerry Nelson. All these people said they knew that that – whose voice it was, and it was Wayne Sharp. Also on the night of the fire, he actually ---

> Sorry. Did all of those people identify the voice to you as being ---?--- Well that's ---
>
> --- that of Wayne Sharp? --- That's what the defendant said, yeah.
>
> All right, and they were present? --- Pardon me?
>
> They were present at the time? --- Yeah, yeah.
>
> So, in their presence, he said they've identified the voice also ---?--- Yeah.
>
> --- as that of Wayne Sharp? --- Yeah.
>
> Okay? --- Now, on the night of the fire, he said that he had had a falling out with Wayne Sharp, and that he thought it might be possibly linked. Anyway, so, the next day, there's actually this voice on the mobile phone. Any reasonable person would think because it was – the call was made at the time of the fire 'cause it was date and time stamped – any reasonable person would think, you know, "Here we go, we've got something here", and so I obtained a full statement from him, but it was at this time, and I mean, you might – you might think, "What the – what's she talking about", but this industry – the boating industry – as such, has a lot of rumours and sort of things that go around, and a few rumours started to come up, namely that the boat wasn't worth anything near half a million dollars. That was ---" t/s 73-74.

[26] However Constable Lawrence established that Sharpe had an alibi for the evening of 24 April and the weekend following. Shortly after she learnt that

> "... the boat was actually purchased for $150,000 in a contractual agreement, not 300 and something odd thousand. And as well, there was – with regard to this re-fit, it was – the exact figure I couldn't tell you, but it was becoming clear that that much money wasn't spent on the re-fit, and ----
>
> So, is that – is that a significant factor ..." t/s 78.

[27] Constable Lawrence went on to say

> "Well, the main thing was that Wayne Sharpe could not have made that phone call, and that his voice was recorded on that message bank. When we did a reverse CCR to get a full list of all calls that were made and received – the defendant had indicated to me that he's actually turned his phone off, because he didn't want to be disturbed during dinner, and he turned it on first thing the next morning, and this is what he heard. But when we did the reverse CCR, we could see that he'd actually been making and receiving calls --------"

She acknowledged that someone else could have used his phone.

[28] Constable Lawrence said that she eliminated Sharpe and

> "When I spoke to all the companies involved in the boat refit, there were a couple of people who – he had made it clear too, it just wanted the boat to look aesthetically pleasing so he could sell it within two years. He had told me that he wasn't wanting to sell it at all, that he loved it. He even named it after his dead son. And so, I found a person who actually had looked at the boat when it was sale, and he said, "It is for sale, you can have it in the new year, I just want it over Christmas." He actually got to see it just moored at Tipplers, and he told me it looked like a done up harbour ferry, so he wasn't interested in buying it. Then I was just – like obviously that, that he had told me he loved the boat, but he'd made it clear to a few people that he was looking to sell the boat." t/s 80.

[29] Constable Lawrence said that another factor was Seabrook's application for a $500,000 loan from Citibank rejected a month before the fire. She did not conclude that he was in financial difficulties but that he wanted half a million dollars for a project.

[30] Constable Lawrence said that she had received information involving allegations that Seabrook had "done something like that in the past" t/s 83 but said that that information was not a factor in her decision to prosecute.

[31] She was asked again was there anything else that she had taken into account and answered

> "No. Just when – like, obviously speaking with the previous owner and everything like that about the boat. The boat was over-insured.
>
> On what basis do you say the boat was over-insured? -- That's just after speaking with everyone who's had any -----
>
> Who? -- The previous owner of the boat. The people involved in the refit of the boat.
>
> How did you identify the people involved in the refit? -- That was through Bartercard invoices.
>
> Right. Did you assume that the only people employed were those who were paid through Bartercard, did you? -- Not at first, because the defendant was actually saying he'd spent a lot of cash and credit on it. But it was when you actually – when I went through and I saw exactly who had done what, there was hardly any room for any – like all of the major refit was done through Bartercard." t/s 83

[32] Towards the end of the lengthy cross-examination Mr Glynn again asked Constable Lawrence to indicate the evidence on which she relied when deciding to charge Seabrook. She said

> "It was in relation to him – the mobile phone message, the reversed CCR that we did, all of the work carried out on the boat plus the value of the boat, the fact that the boat was over-insured, and the fact that he had gone to such lengths to narrow it down to one person who had an alibi." t/s 169.

[33] Constable Lawrence did not at any time say expressly that she regarded as significant or relied upon the statements pleaded against Asher in the statement of claim. It can be inferred that Asher's comments about over-insurance may very well have been added to the number of comments from others in the boating industry to that effect to which Constable Lawrence referred. The allegedly untrue allegation that Seabrook wanted $500,000 attributed to Asher is attributed solely to Troy Luck by Constable Lawrence.

The law

[34] The starting point for a consideration of the tort of malicious prosecution is the judgment of Isaacs ACJ in *Davis v Gell* (1924) 35 CLR 275 where he enumerated the circumstances which would support proceedings for malicious prosecution at 282

> "(1) The defendant must be the prosecutor. (2) The prosecution must have been groundless. (3) It must have produced damage. (4) It must have terminated favourably to the plaintiff, so far as such termination was possible. (5) It must have been without reasonable and probable cause. (6) It must have been malicious."

His Honour made it clear that a person other than the prosecuting authority can be regarded as the prosecutor if that person influences the prosecuting authority to institute proceedings against an innocent person by false testimony, dishonest prejudice or counselling at 283. See also *Commonwealth Life Assurance Society Ltd v Brain* (1934-1935) 53 CLR 343 per Dixon J at 379 and *Balson v State of Queensland* [2002] QSC 419 per Muir J at [23].

[35] These principles have recently been reviewed by Lord Justice Brookes in the Court of Appeal in *Mahon v Rahn* [2000] 1 WLR 2150 commencing at 2199. That was a case for damages for libel and malicious prosecution arising out of complaints made by a private Swiss bank to the Serious Fraud Squad and The Securities Association in the United Kingdom about certain stockbrokers who had acted on transactions which the bank concluded were fraudulent. The Serious Fraud Squad after extensive investigation instituted criminal proceedings for fraud against the stock brokers which were dismissed after the judge had ruled that there was no case to answer.

[36] Lord Justice Brookes examined the House of Lords decision in *Martin v Watson* [1996] AC 74. That case, however, concerned a rather straightforward dispute between neighbours where a false allegation of sexual indecency was made to a police officer who charged the neighbour, solely on the complaint of the neighbour. Lord Justice Brookes, after considering four Commonwealth authorities, including *Brain* and *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] NZLR 187 concluded that a distinction needed to be drawn between a simple case like *Martin v Watson* and a more complex case where the prosecuting authority is in receipt of evidence from a variety of sources and has to decide, in the exercise of its discretion, whether it is in possession of sufficient evidence to justify setting the law in motion.

[37] His Lordship suggested that it would be unwise to be overly prescriptive in setting out the circumstances in which a lay informant may properly be regarded as the

prosecutor or as one of the prosecutors for the purposes of the tort of malicious prosecution and concluded at 2206

> "269 In a simple case it may be possible to determine the issue quite easily by asking these questions. (1) Did A desire and intend that B should be prosecuted? (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment? (3) Has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?
>
> 270 In the more complex case it is likely to be more difficult to apply these tests, but I would adopt the approach suggested by Richardson J in *Commercial Union Assurance Co. of N.Z. Ltd. v. Lamont* [1989] 3 N.Z.L.R. 187, 199 when he said that the tests should be the same when the police had conducted an investigation and decided to prosecute, but that they should be cautiously applied. The reason, of course, is, as he also took into account, that prosecuting authorities are trained and accustomed to consider the evidence placed before them with an appropriately critical eye. Crown prosecutors, for instance, have to be satisfied that there is enough evidence to provide a realistic prospect of conviction ..."

[38] Richardson J's approach is to be found in the following passage from his judgment in *Lamont* at 199

> "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."

Conclusion

[39] A perusal of the investigation running sheet demonstrates the wide range of potential witnesses police interviewed. There is little or nothing to suggest that the statements attributed to Asher in the statement of claim were instrumental in Constable Lawrence preferring the charges against Seabrook. Rather it supports Constable Lawrence's evidence at committal that Seabrook's own conduct, accusing Sharpe so promptly after the fire and the "oddness" of his statement about the mobile phone message together with an apparent "need" for $500,000 and the widespread information which she received about the value of the boat were the factors which influenced her decision to prefer charges.

[40] There is no realistic chance that Constable Lawrence may give different evidence at the trial. Mr Glynn conceded before Mullins J on 17 February 2004 that Constable Lawrence would be Seabrook's witness at the trial and that she was declining to speak to his solicitors. He mentioned delivering interrogatories to Constable Lawrence but, as her Honour observed, it was unlikely that leave would be granted

to do so, not the least because she is not a party. Neither is there any support for the possibility that Constable Lawrence may give different evidence at the trial. Mr Glynn's statement that his cross-examination of her at committal might have been differently structured had he had in mind these proceedings can hardly set to one side her answers to his clear question about the factors which caused her to bring the charges and this he asked not once, but twice.

[41] In my view Seabrook has no real prospect of proving at trial that Asher is to be regarded as the prosecutor. Since there is no possibility of delivering a pleading which would satisfy that requirement it follows that there should be judgment for Asher against Seabrook.