

49/93

## SUPREME COURT OF VICTORIA

**WHITMORE and ANOR v GOLDEN**

Teague J

6 April 1993

**PROCEDURE – SEARCH WARRANT – ISSUED BY MAGISTRATE – WARRANT ENDORSED FOR PROCEDURE WHERE DOCUMENTS SEIZED AND PRIVILEGE CLAIMED – WHETHER ENDORSEMENT CONTRARY TO LAW: CRIMES ACT 1958, S465; CRIMES (FORM OF SEARCH WARRANT) REGULATIONS 1992, R5.**

A magistrate is required to issue a search warrant in conformity with the form of warrant specified in Regulation 5 of the *Crimes (Form of Search Warrant) Regulations 1992*. The placing of an endorsement or annexure on a warrant is contrary to the provisions of the Regulations and accordingly, contrary to law.

[NOTE: An originating motion sought orders in the nature of mandamus and declarations in respect of the issue of two search warrants. His Honour agreed with the outline of submissions by counsel for the plaintiffs. His Honour did not deliver a formal judgment but directed that a copy of the submissions be served with a copy of the order. Ed.]

**TEAGUE J:** The Court declares that:

1. The two search warrants issued by the Defendant to the Plaintiffs on 18 March 1993, insofar as they bear the following endorsement -

"If upon the execution of this warrant a reasonably based issue arises with respect to privilege, any documents seized hereunder should, in the presence of a representative of the occupier of the premises, be placed in a sealed envelope and as soon as practicable be delivered to the Registrar of this Court for his safe keeping pending determination by a Court of that issue. In the event that no application is made to a Court for the return of the documents within 14 days of the execution of the Warrant, the Registrar shall redeliver the sealed envelope or envelopes to the officer who executed the warrant.  
Graeme A. Golden  
Magistrate 18/03/93."

are contrary to law. The Court orders that:

2. In the nature of Mandamus that, in respect of all applications for search warrants made by the Plaintiffs, the Defendant issue such search warrant in conformity with the form of warrant specified in Regulation 5 of the *Crimes (Form of Search Warrant) Regulations 1992*.

Cases and Legislation to be referred to.

1. S465 *Crimes Act 1958*.
2. *Crimes (Form of Search Warrant) Regulations 1992*.
3. *Allitt v Sullivan* [1988] VicRp 65; [1988] VR 621.
4. *Posner v Collector of Interstate Destitute Persons (Vic)* [1946] HCA 50; (1946) 74 CLR 461 @ 490; [1947] ALR 61.
5. *Re Coldham; Ex Parte Brideson* [1989] HCA 2; (1989) 166 CLR 338; 84 ALR 165.
6. *Waterhouse v Gilmore* [1988] 12 NSWLR 270.

**Outline of Submission**

1. In determining whether to issue a search warrant or not a Magistrate is undertaking an administrative and not a judicial function - *Allitt v Sullivan* [1988] VR 621 @ 623.

2. The procedures and forms laid down by s465 of the *Crimes Act* and the *Crimes (Form of Search Warrant) Regulations 1992* establish a code for the grant, issue and return of search warrants.

a. The provisions of the regulations are mandatory and cannot be excluded. A warrant issued

contrary to the form of the regulations may be void - *Allitt v Sullivan supra @ 643*; s53 *Interpretation of Legislation Act 1984*; *Posner v Collector of Interstate Destitute Persons (Vic) supra @ 490*.

b. The placing of an annexure or endorsement upon a warrant, places the executing constable in the position of having a duty to perform and not knowing in any particular case whether perhaps his warrant of authority is invalid. Such an endorsement constitutes judicial legislation contrary to the provisions of the Act and regulations – *Allitt v Sullivan supra @ 630*.

c. The legislation in Victoria intends that questions of privilege should not be considered until the documents are taken before a Justice – *Allitt v Sullivan supra @ 643*. By implication His Worship was seeking to hold that it is not appropriate to issue a warrant in the usual form by reason of its failure to mention legal professional privilege. Such a proposition is contrary to law – *Allitt v Sullivan supra @ 643*.

3. In the context of the provision failure to issue a warrant in conformity with the form in the regulations constitutes an error of jurisdiction since it is only a warrant in proper form which may be granted – *Re Coldham; Ex Parte Brideson supra @ 349*; *Waterhouse v Gilmore supra @ 276*.

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