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FEDERAL COURT OF AUSTRALIA — VICTORIA DISTRICT REGISTRY

GROFAM PTY LTD v MACAULEY and ORS

Heerey J

3 August 1993 — (1993) 43 FCR 404

PRACTICE AND PROCEDURE – SEARCH WARRANT ISSUED – INTERROGATORIES SUBSEQUENTLY DELIVERED TO MAGISTRATE – QUESTIONS ASKED CONCERNING ISSUE OF WARRANT – WHETHER LEAVE TO DELIVER SHOULD BE GRANTED: *CRIMES ACT* 1914 (CTH), S10.

Where a party desires to ascertain what information was given and what matters a magistrate considered in deciding to issue a search warrant, it is generally undesirable that a magistrate should be required to answer interrogatories concerning the matter.

HEEREY J: [1] This application for leave to deliver interrogatories arises in a proceeding where, amongst other things, the applicants seek an order for review of a decision made by the sixth respondent, Mr Robert Tuppen, M (the magistrate), to issue search warrants. The application alleges that contrary to s10 of the *Crimes Act* 1914 (Cth) at the time of issuing the warrants the magistrate "was not or ought not to have been satisfied by the information on oath before him that the offences alleged in the third condition of the search warrants had been committed or that there were reasonable grounds for suspecting that such offences had been committed".

There are further more detailed complaints about the material in the information to which I do not think I need to refer at this stage. The magistrate has entered an appearance but **[2]** otherwise has indicated that he submits to such order as the court may make, and has not taken part in the proceedings as an active protagonist. In adopting this course the magistrate has acted in compliance with the firm indication given by the High Court in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13 at 35; 29 ALR 289; (1980) 54 ALJR 314:

> "There is one final matter. Mr Hughes was instructed by the Tribunal to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general be limited to submissions going to the powers and procedures of the Tribunal".

The magistrate has voluntarily made an affidavit of documents but resists this application for interrogation. The interrogatories themselves are formidable. I am told that including parts of questions and alternatives they extend to over 150 separate questions. They annex the information which itself is a substantial document and ask the recipient questions as to what other information was received prior to the issue of the warrant from various persons, and also questions going to his mental processes, as for example, the following:

> **[3]** "Did the draft or drafts of the search warrants originally tendered to the magistrate appear to the magistrate (a) to be a fishing expedition, (b) to be designed to bring other pressures to bear to resolve the tax issue, (c) to be improper?"

In my opinion, it would not be appropriate to grant the leave sought. At the outset it should not be forgotten that at trial a party can, as of right, issue subpoenas to any relevant witness regardless of that person's status or office, be it magistrate, judge or anything else. But what we are concerned with is the discretionary power to order interrogation as an interlocutory process. Although judicial challenges to the validity of the issue and execution of warrants is a

well established form of litigation and in general is conducted according to the ordinary rules of court like any other civil litigation, I have not been directed to any previous instance in which interrogatories have been allowed for the examination of the issuing magistrate.

A magistrate in issuing a warrant is not obliged by law to give reasons for his decision. The decision of a magistrate to issue a search warrant is expressly excluded from the obligation to give reasons imposed in respect of administrative decisions by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth): see s13(1), (11)(c), **[4]** Schedule 2 par (e)(iii). Absent an obligation to give reasons, or keep a record, it would be oppressive for a magistrate to be required to analyse extensive documents and revisit thought processes in relation to events which may have occurred a considerable time ago. This is especially so since, as the High Court made clear in *Hardiman*, the magistrate is only made a party to proceedings for the sake of completeness and is positively discouraged from joining the fray as a litigant in the ordinary way.

A power to issue warrants is not infrequently conferred by statute on judicial officers; e.g. on nominated Federal and Supreme Court judges in respect of listening devices under Part XII Division 1A of the *Customs Act* 1901 (Cth) and "eligible" Federal Court Judges under the *Telecommunications (Interception) Act* 1979 (Cth). If in litigation concerning such a warrant the issuing judge was made a party it would seem highly undesirable that he or she should be subjected to interrogation.

More specifically, in the present case the principal reason advanced for the interrogation of the magistrate is that it is said that one of the complaints of the applicants is that there was not full disclosure made by those who obtained the warrant, as required by law. In particular, it is said, they did not disclose to the magistrate the fact that a disputed tax liability had been already the subject of an agreed compromise between the Australian Tax Office (ATO) and the **[5]** applicants.

The short answer to that proposition seems to be that one of the respondents, Detective Sergeant McDermott of the Australian Federal Police (AFP), has sworn an affidavit which records in considerable detail a meeting with the magistrate on 16 September 1992 at which a draft information which had previously been submitted to the magistrate was discussed. The magistrate made a number of detailed comments and criticisms about the draft, and on the following day, 17 September, Mr McDermott again attended with the Deputy Director of Public Prosecutions, Mr Peter Wood, before the magistrate and drew his attention to the changes made to the draft information. The magistrate then indicated that he was satisfied with the information and was prepared to issue the warrants, which later that day he did. One of the matters discussed on 16 September was, according to Sergeant McDermott, a comment by the magistrate concerning the delay between the time the ATO suspected the offence had been committed and the time the AFP became involved. Sergeant McDermott noted the magistrate's comments:

> "In view of this delay and the unresolved negotiations between the ATO and the suspects it appeared that the AFP were on a fishing expedition designed to exert pressure against the Grollo Group to resolve these outstanding issues. Mr Tuppen said that if that were so, the warrants were being sought for an improper purpose." (Emphasis added.)

There then follows an account of the explanation given by Mr **[6]** Wood. For present purposes, it is sufficient to note that on Sergeant McDermott's account it is plain that the magistrate was not told that there had been any concluded settlement of the tax dispute. If at trial the evidence discloses that there had in fact been an agreed settlement of the tax dispute, and the trial judge holds that there was a legal obligation in the circumstances to disclose that to the magistrate, then the applicants' case is made out. So I do not see that the need to interrogate the magistrate as asserted is made out.

Counsel for the applicants said that they wanted to be able to tender the answers of the magistrate to prove this without calling Sergeant McDermott as part of their case, but there are other ways of establishing the fact as to what, on Sergeant McDermott's version, was said to the magistrate. Tactical considerations of this kind do not in my mind outweigh the general undesirability of interrogation of the magistrate. The application is dismissed. I order that the applicants pay the sixth respondent's costs of the application including reserved costs.