

26/98

SUPREME COURT OF VICTORIA

GRACO v MAGISTRATES' COURT OF VICTORIA and ANOR

Beach J

18 March, 23 June 1998

PROCEDURE – COSTS – SEARCH WARRANT ISSUED AND MATERIAL SEIZED BROUGHT BEFORE COURT – ORDER MADE IN RELATION TO MATERIAL – APPLICATION FOR COSTS – “PROCEEDING” – MEANING OF – WHETHER RETURN OF MATERIAL A PROCEEDING – WHETHER COURT HAS POWER TO AWARD COSTS: MAGISTRATES' COURT ACT 1989, S131(1).

1. By virtue of s131(1) of the *Magistrates' Court Act 1989* (Act), a Magistrates' Court has power to make an order for costs in relation to a “proceeding” before the court. The word “proceeding” means “any matter in the Court”.

2. Where by force of a search warrant material was seized and brought before a Magistrates' Court to be dealt with according to law, the magistrate was required to make a judicial determination in relation to the material. In those circumstances the bringing of the material seized became a “matter” in the Court and accordingly, the magistrate had jurisdiction to make an order for costs under s131(1) of the Act.

BEACH J: [1] On 2 June 1997 a Magistrate issued a search warrant pursuant to the provisions of s465 of the *Crimes Act 1958* authorising the second defendant Detective Senior Sergeant Grinberg to search premises at Level 12A, 440 Collins Street, Melbourne for certain documentation relating to companies in the Keydata Group of companies. The second defendant executed the warrant on 3 June 1997 and seized numerous documents, a computer and computer diskettes, such material being the property of Titan Corporation Ltd a member of the Keydata Group. Pursuant to the directions contained in the warrant, the second defendant brought the material before the Melbourne Magistrates' Court later that same day. The plaintiff Gary Charles Graco, who is a director of Titan Corporation, was represented by counsel when the matter of the return of the warrant was mentioned in open court to the Magistrate, as was the second defendant.

Counsel for the plaintiff made application to the magistrate to have the material impounded by the Court pending an application being made to the Supreme Court on behalf of the plaintiff to have the warrant declared invalid on the ground that it was bad on its face, was issued for an improper purpose, was issued without adequate supporting material and was potentially in contempt of the Federal Court. The Magistrate acceded to the application and ordered that the material seized pursuant to the warrant be impounded until 4.15 pm on 5 June. On 5 June 1997 counsel for the plaintiff and the second defendant appeared before the Magistrates' Court at Melbourne and requested that the Magistrate transfer the matter to the Magistrates' Court at Prahran for further argument before the Magistrate who had issued the warrant. After hearing submissions from counsel for both parties in relation to the application, the Magistrate extended the order of 3 June to 4.00 pm on 11 June and ordered that the material seized pursuant to the warrant be transferred to the Magistrates' Court at Prahran. On 11 June senior counsel for both parties appeared before the Magistrates' Court at Prahran on behalf of their respective clients. Following discussion, it was agreed that the plaintiff would not pursue his allegations as to the invalidity of the warrant if the second defendant would permit inspection of the [2] material seized and would return to the plaintiff such of the material as was agreed to be outside the scope of the warrant and/or was legally privileged. Counsel for the parties then appeared before the Magistrate and with their consent the Magistrate made the following orders:

“1. That the order made by Mr C. McLeod, Magistrate at the Magistrates' Court at Melbourne on the 5th day of June 1997 be extended until further order.

2. That the documentation seized under Warrant No. 790/97 to which no objection has been taken by the Applicant be released to the custody of the Major Fraud Group.

3. That the computer hard drive and diskettes seized under Warrant No. 790/97 from the designated premises be released into the custody of the Major Fraud Group for the purpose of copying and downloading the contents thereof.

4. That once made, the said copies be supplied to the Applicant.

5. That the said computer hard drive and diskettes so released be retained UPON THE UNDERTAKING given to this Court on the 11th of June 1997 by the said Respondent that no examination be carried out of the material thereon at this stage and that the sole purpose for the release of the same is to carry out the process described in paragraphs 3 and 4 hereof.

6. Liberty to apply."

It is pertinent to note that during the course of the brief hearing before the Magistrate that day, counsel for both the plaintiff and second defendant informed the Magistrate that they would be making an application for the costs of the proceeding. The matter came back before the Magistrates' Court at Melbourne on 10 October 1997. There were further discussions between counsel for the parties with a view to resolving the dispute at the conclusion of which the Magistrate was asked to and did make the following further consent orders:

"1. By 5.00pm on the 13th October 1997 the legal representatives of the Applicant and Respondent herein agree on the technical process of inspection of the hard drive and diskettes seized under warrant number 790/97 the subject of this application.

[3] 2. That on or before the 16th of October 1997 the process of inspection as referred to in paragraph 1 herein commence.

3. Any disputes which arise during the process referred to in paragraphs 1 and 2 herein be referred for determination before His Worship Mr Harber to the week commencing the 10th of November 1997 subject to His Worship's availability.

4. Upon resolution of any disputed material the subject of the inspection, the material be released to Detective Senior Sergeant Douglas Rowlings or the officer holding the position of Detective Senior Sergeant for and on behalf of the Major Fraud Group.

5. The costs of and incidental of this application be reserved.

6. Liberty to apply."

During the course of the discussion which took place before the Magistrate before the consent orders were pronounced, counsel for the second defendant informed the Magistrate that the second defendant would be seeking costs in relation to the day's proceedings. Counsel for the plaintiff informed the Magistrate that such an application would be opposed. The Magistrate stated that he proposed to reserve the question of costs and, as the orders indicate, in due course did so. Between 10 October 1997 and 22 December 1997 there were meetings between representatives of the parties concerning the seized material. Eventually agreement was reached by them concerning the disposition of the material. It is unnecessary to detail those meetings in my reasons for judgment. By arrangement between the parties, the matter was brought before the Melbourne Magistrates' Court on 22 December and further consent orders were made by the Court concerning the disposition of the material. Again, it is unnecessary to recite those orders in my reasons for judgment. However, at that hearing an application was made by counsel for the second defendant for an order that the plaintiff pay his costs of the hearings on 3, 5 and 11 June, 10 October and 22 December. After hearing submissions in relation to the application, the Magistrate ordered that the plaintiff pay the second defendant's costs of the hearings on those days which costs he fixed at \$8,200.

[4] On 10 February 1998 the plaintiff filed in the Court the originating motion which is presently before me whereby he seeks leave to appeal from the costs order of the Magistrates' Court made on 22 December 1997, alternatively an order that the order as to costs be quashed. At the outset of the hearing counsel for the plaintiff informed me that his client did not propose to proceed with the application for leave to appeal but would simply seek to have the order as to costs quashed on the ground that the Magistrate had no jurisdiction to make such an order. The argument advanced in support of that application was that the issue of a search warrant and

all matters associated with it thereafter including matters relating to its execution and return before the Magistrates' Court, are administrative in nature and cannot be the subject of orders for costs; that the only power given to a Magistrate in respect of costs is the power to make such orders in respect of proceedings before the Magistrates' Court and the return of a search warrant before the Magistrates' Court cannot be so categorised.

In my opinion the starting point insofar as the resolution of this dispute is concerned is s131(1) of the *Magistrates' Court Act* 1989. The section reads:

"131(1) The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid."

Proceeding is defined in s3 of the Act to mean "any matter in the Court, including a committal proceeding, but does not include the exercise by a Registrar of any jurisdiction, power, or authority vested in the Registrar as Registrar under Schedule 7." The question which arises, therefore, is whether the return of a search warrant to the Court is a matter in the Court within the meaning of that definition. The warrant in the present case was issued pursuant to the provisions of s465 of the *Crimes Act*. Sub-section (4) of that section gives the Governor in Council power to make regulations prescribing the form of such a warrant. Pursuant to that power the Governor in Council has made the *Crimes (Form of Search Warrant) Regulations* 1992. [5] Regulation 5 of those regulations provides that a warrant issued by a Magistrate under s465 of the *Crimes Act* must be in the form in the Schedule. The form in the Schedule reads, so far as is relevant, that the warrant authorises the police officer named in the warrant

" – to break enter and search any place named or described in this warrant for any article, thing or material of any kind described in this warrant;

– to bring the article, thing or material before the Court so that the matter may be dealt with according to law."

And so it is by force of the warrant itself that the material seized pursuant to the warrant is brought before the Court to be dealt with according to law. Does the bringing before the Court of the material seized pursuant to the warrant become a matter in the Court? In my opinion the answer to the question posed is yes. It becomes a matter in the Court because when the material seized pursuant to the warrant is brought before the Court the Magistrate to whom the material is presented is required to do some act in relation to the material. The Magistrate can impound the material as the Magistrate in the present case did on 3 June, he can order that it be released into the custody of the police as he did on 10 October and again on 22 December, or he can order that it be returned to the person from whom it was seized as he did on 22 December.

In *Cheney v Spooner* [1929] HCA 12; (1929) 41 CLR 532; 35 ALR 173; (1929) 3 ALJR 30 the High Court was required to consider the meaning of the words "in any criminal trial or proceeding" where used in s16(1) of the *Service and Execution of Process Act* 1901-1924. At p536 Isaacs and Gavan Duffy JJ said:

"A 'proceeding', used broadly as it is used in s16 of the Federal *Service and Execution of Process Act*, is merely some method permitted by law for moving a Court or judicial officer to some authorized act, or some act of the Court or judicial officer."

At p538 Starke, J said:

"A civil proceeding, I apprehend, includes any application by a suitor to a Court in its civil jurisdiction for its intervention or action."

[6] In my opinion material seized pursuant to a search warrant is brought before the Magistrates' Court for the intervention of the Court or for action by the Court. It becomes a matter in the Court requiring some act on the part of the Court or Magistrate as is demonstrated by the history of the present matter to which I have referred. It requires a Magistrate to make a judicial determination concerning the fate of the seized material. My conclusion therefore is that there was a matter in the Magistrates' Court concerning the search warrant in question and the material seized pursuant to it, and that the Magistrate had jurisdiction to make the order for

costs he did in relation to the matter. The originating motion will be dismissed. I order that the plaintiff pay the second defendant's costs of the proceeding including any reserved costs.

APPEARANCES: For the plaintiff. L Lieder QC, counsel. Max Latimer & Co, solicitors. For the second defendant: P Hayes QC and G Cullen, counsel. Victorian Government Solicitor.
