17/07; [2007] VSC 71

SUPREME COURT OF VICTORIA

HERALD & WEEKLY TIMES PTY LTD v DPP & ORS

Kaye J

19, 23 March 2007 — (2007) 170 A Crim R 313

PRACTICE AND PROCEDURE – SUPPRESSION ORDER – ACCUSED A POLICE INFORMER – PRINCIPLES TO BE APPLIED IN MAKING A SUPPRESSION ORDER – WHETHER ORDER NECESSARY TO PREVENT DANGER TO INFORMER – ORDER MADE – WHETHER COURT IN ERROR: *COUNTY COURT ACT* 1958 SS80(1)(c), 80AA(b)(c).

Section 80AA of the *County Court Act* 1958 ('Act') provides:

The Court may make an order under s80 if in its opinion it is necessary to do so in order not to— ...
(b) prejudice the administration of justice; or

(c) endanger the physical safety of any person."

1. The starting point in a case involving the making of a suppression order is the principle of open justice. That principle is longstanding and well-established. It plays an important and indeed fundamental role in our system of justice. The open scrutiny of court proceedings is an important protection against abuse and arbitrary conduct in the judicial system. In addition, it fosters and maintains public confidence in the integrity and independence of our courts. It is for that reason that courts construe narrowly and strictly any statutory provision which permits the suppression of publication of their proceedings. Further, a high level of satisfaction must be achieved as to the existence of the conditions which are necessary for the making of the suppression order.
***R v Pomeroy and Anor* [2002] VSC 178, and**
***Herald & Weekly Times Ltd v County Court of Victoria* [2005] VSC 71; MC09/05, applied.**

2. In order that a court have jurisdiction to continue an earlier suppression order made, the court needs to be appropriately satisfied that such an order was *necessary* for one or more of the purposes stipulated in s80AA of the Act.

3. Where a Judge had "no doubt" in light of the information provided by an informer that the circumstances were exceptional and grave risks existed, it dictated the conclusion that it was necessary to continue the suppression order so as not to endanger the physical safety of the informer. Notwithstanding the use by the Judge of the phrase "substantial reasons", the test of "necessity" in s80AA of the Act was not supplanted but rather denoted the level of satisfaction the Judge considered he required to reach in order to find it "necessary" to continue the suppression order. In those circumstances, the Judge did not fall into jurisdictional error in finding that the suppression order remained necessary.

KAYE J:
1. The plaintiff by originating motion seeks relief in the nature of *certiorari* to quash an order of his Honour Judge McInerney of the County Court made on 25 November 2006. By that order his Honour refused to vacate a suppression order previously made by him on 28 April 2003 in County Court proceeding number CR-01-04383 ("the suppression order") in the trial of the thirdnamed defendant, to whom I shall refer as "X".

2. The suppression order was made under s80(1)(c) of the *County Court Act* 1958 (Vic). It prohibited the publication by the media of any matter which might directly or indirectly refer to or enable identification of any person concerned in the proceedings or of any photograph or picture as being a representation of any person concerned in the proceedings. Subsequently, on 6 May 2003, at the hearing of the plea of X, his Honour made a further order under s80(1)(a) of the *County Court Act* ("the closed court order") that the whole of the proceeding be heard in closed court.

3. Following the making of the closed court order, Mr Justin Quill, a member of the firm of solicitors representing the plaintiff, appeared before Judge McInerney and sought to have the two orders made by his Honour revoked. During his submissions, Mr Quill sought access to a copy of the transcript of the applications for those orders. However his Honour declined that request. On 19 May 2003 his Honour delivered a ruling in which he determined not to vary or revoke either of his two previous orders. His Honour again declined to make available to the plaintiff the transcript of the proceedings against X or any exhibits relied upon in making those orders.

4. In July 2003 X was sentenced to a term of imprisonment. He received a more lenient sentence than would have been the case, because he had acted as a police informer. In September 2003 he was released on parole. In May 2004 he was permitted by the Adult Parole Board to go overseas, on the condition that he return to give evidence for the Crown in the committal and trial of another accused person, to whom I shall hereafter refer to as "Y". Subsequently X failed to return to Melbourne to give evidence in accordance with his undertaking. Consequently, his parole was revoked in September 2005, and a warrant was issued for his arrest.

5. On 23 January 2006 the plaintiff made a further application to Judge McInerney to vary the suppression order of 28 April 2003, so as to permit the publication of X's name, his photograph, details of his sentence, details of the decision of the Adult Parole Board to release him on parole, and details of the revocation of his parole in September 2005. On 24 January 2006 his Honour delivered a ruling by which he refused that application.

6. Following the conclusion of the trials at which X had undertaken, but failed, to give evidence, the plaintiff on 17 November 2006 made a further application to Judge McInerney to revoke the suppression order of 28 April 2003. On 25 November 2006 his Honour delivered a written ruling, rejecting that application. His Honour found that the continuation of the suppression order was justified under s80AA(b) and (c) of the *County Court Act*. It is that ruling which is the subject of the present application by the plaintiff.

***County Court Act* 1958 (Vic) s80, 80AA**

7. The suppression order was made under s80(1)(c) of the *County Court Act*. The closed court order was made under s80(1)(a). Those provisions state:

> "(1) The Court must in the circumstances mentioned in s80AA—
> (a) order that the whole or any part of a proceeding be held in closed court; or
> (b) ...
> (c) make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding."

8. In his ruling on 25 November 2006 that the suppression order be continued, his Honour held that he was satisfied that sub-paragraphs (b) and (c) of s80AA applied. Those sections provide:

> "80AA. The Court may make an order under s80 if in its opinion it is necessary to do so in order not to— ...
> (b) prejudice the administration of justice; or
>
> (c) endanger the physical safety of any person."

Grounds of Review relied on by the plaintiff

9. In its originating motion the plaintiff claims relief in the nature of *certiorari* on the following grounds:

> 1. The judge fell into jurisdictional error in that he failed to consider whether the suppression order remained necessary for the purposes set out in s80AA of the *County Court Act*.
>
> 2. The judge erred on the face of the record in that he failed to consider whether the suppression order remained necessary for the purposes set out in s80AA of the *County Court Act*.
>
> 3. The judge erred in law on the face of the record in that he found there were grave risks still in existence in respect of the third defendant (that is, X) where there was no evidence to support such a finding.

10. The originating motion also specifies a fourth ground, alleging a want of procedural fairness. However in the course of submissions the plaintiff abandoned that ground, recognising that it could not be made out on the materials which were before me.

11. The first ground in the originating motion – alleging jurisdictional error in that the judge failed to consider whether it was necessary to continue the suppression order for the purposes in s80AA of the *County Court Act* – occupied the principal part of counsel's submissions. Mr Gilbertson, who appeared on behalf of the plaintiff, submitted that the judge failed to consider whether the continuation of the previous suppression order was necessary for the purposes set out in s80AA. Rather, it was submitted, the judge applied the wrong test, namely, whether there was "substantial evidence" that the publication of the third defendant's name would endanger the physical safety of him. It was submitted that by failing to apply the correct test, his Honour did not have jurisdiction to make an order to continue the suppression order.[1]

12. In order to evaluate that submission, it is necessary to set out, in some detail, the ruling made by Judge McInerney.

Judge's Ruling of 25 November 2006

13. In paragraph 3 of his ruling, his Honour referred to his previous written ruling of 24 January 2006, and quoted from it as follows:

> "As to (X), no doubt his circumstances have changed given his actions, as I have been advised, and his failure to give evidence in the (Y) committal. There is also genuine public interest in such circumstances, his movements and the role of the Parole Board in so far as its determination to allow him to move overseas prior to him having completed the undertaking he made to this Court. However, such actions do not change (X's) status as an informer. I have overnight re-read my sentence of 20 June 2003. His status remains as an informer who is almost unique in Australian history. I have no doubt, having perused the material and reacquainted myself with the matters that were tendered to the Court to which I had earlier denied access, that pursuant to s80A(c), I should not allow this application. I have no doubt that to do so would endanger the physical safety of (X)."

14. His Honour then noted that only two matters had changed since his previous ruling. First, the trial of Y had been completed and Y had been convicted. In that proceeding the tapes provided by the video undercover operation of X had been utilised in evidence and had formed a significant part of the Crown case. Secondly, the trial in another proceeding of another accused person (Z) was over, although an appeal was said to be imminent. X had not given evidence in that matter, but as his Honour observed, X's undercover activities had been "very much the basis of matters involved in such prosecution".

15. At paragraph 5 of his reasons, his Honour stated:

> "While it is true that, on the present information, there does not seem to be any more helpful information which may come from (X), it should not be forgotten what his status is, what evidence he gave and the importance of protecting future such witnesses who are utilised by the prosecution in order that such witnesses do not come to conclude that, should they act in a manner which the Crown do not particularly like, then their safety may be prejudiced."

16. His Honour then noted a submission on behalf of the plaintiff that anyone who was concerned must now know the identity of X and that, given the time which had elapsed, the risk to X must be seen as greatly reduced. His Honour responded to that proposition as follows:

> "8. I do not, however, upon consideration, consider that such risks have been reduced. As Mr Ryan submitted, such risks are the risks involved against informers from the criminal world. They are risks attached to long-held grudges against persons who act in this way and, given the dimension of the information supplied by (X), which I will not detail, they involve substantial numbers of persons. It should not be under-estimated, despite (X's) actions since appearing before me for sentence, that the evidence which he obtained at grave risk to himself has been of vital utility in a number of trials albeit that he did not actually give evidence himself."

17. At paragraph 9 of his reasons, his Honour concluded:

> "I accept the matters put to me by Mr Quill as to the proper questions for a court to ask itself in such circumstances. I accept the principles set out in *Herald and Weekly Times v The Magistrates' Court of*

> *Victoria* [1999] 2 VR 672, 678-679, that there should only be a derogation from open administration of justice where the circumstances are exceptional. I have no doubt, given the dimensions of (X's) intelligence obtained and provided as an informer, that such circumstances do meet the test of exceptional and that there are grave risks still in existence in so far as he is concerned. Hence, the proper manner in which to approach such applications is that it is appropriate to facilitate open justice unless substantial reasons exist as detailed in s80AA, which I do so find in this case, in particular in so far as sub-paragraphs (b) and (c) of that section are concerned."

Ground 1

18. In commencing his submissions, Mr Gilbertson referred me to some authorities which articulate and emphasise the importance of the principle of open justice in our system of justice.[2] The operation of that principle is reflected in the entitlement of the media to report fully, fairly and accurately on proceedings which are before our courts. Consequently any order detracting from the right of the media to report court proceedings must be regarded as exceptional.[3] It follows that any statutory provision which entitles a court to exclude the public from its proceedings, or to restrict or prohibit publication of its proceedings, must be construed strictly and narrowly, and in light of the overriding principle of open justice.[4] In that context Mr Gilbertson emphasised that the judge could only make orders continuing the suppression order if he were properly satisfied that it was "necessary to do so" in order not to prejudice the administration of justice or not to endanger the physical safety of any person. Mr Gilbertson drew my attention to authorities in which it is stated that a high standard of satisfaction must be achieved by the judge before a judge is entitled to conclude that it is necessary to make a suppression order for any of the purposes posited by s80AA of the *County Court Act*.[5]

19. Mr Gilbertson's submissions on ground one focussed on paragraph 9 of the judge's reasons, in which his Honour concluded that there were "substantial reasons" under s80AA(1)(b) and (c) of the *County Court Act* for the continuation of the suppression order. Mr Gilbertson submitted that the judge erred in applying the standard of "substantial reasons". In doing so, he submitted, the judge failed to make the requisite finding, namely, that the continuation of the suppression order was "necessary" for one of the purposes specified in s80AA.

20. In response, Mr C Ryan SC, who appeared on behalf of the firstnamed defendant, accepted the principles of law relied upon by Mr Gilbertson. Mr Ryan submitted that his Honour correctly applied those principles. He noted that ground one of the originating motion alleges jurisdictional error. In respect of that ground Mr Ryan relied on the evidence before me as to previous proceedings before Judge McInerney, and his rulings, which preceded the order of 25 November 2006. In particular he referred to his Honour's reasons of 19 May 2005, in which his Honour expressly stated his view that the suppression order and the closed court order were each necessary. Further, Mr Ryan tendered to me the outline submissions made on behalf of the plaintiff before Judge McInerney in the application on 23 January 2006. There the plaintiff expressly submitted that the Court had to be satisfied that the continuation of the suppression order was "necessary" for one of the purposes identified in s80AA. Mr Ryan also referred me to the ruling made by Judge McInerney on 24 January 2006 in which his Honour specifically referred to the plaintiff's written outline of argument.

21. Mr Ryan submitted that the ruling of Judge McInerney of 25 November 2006 must be read in light of the earlier submissions and rulings which had preceded it. Clearly, in his previous rulings, the judge was well aware of the appropriate test which needed to be applied under s80AA of the *County Court Act*. Furthermore, Mr Ryan submitted that in any event Judge McInerney's ruling of 25 November 2006, standing alone, disclosed that his Honour did apply the appropriate test under s80AA. In particular Mr Ryan referred me to the opening sections of Judge McInerney's ruling which make it clear, he submitted, that his Honour was well satisfied that there were serious risks to the safety and wellbeing of X, if his identity were publicly revealed.

22. Mr Gilbertson is correct in pointing out that the starting point in a case such as this is the principle of open justice. That principle is longstanding and well-established. It plays an important and indeed fundamental role in our system of justice. The open scrutiny of court proceedings is an important protection against abuse and arbitrary conduct in the judicial system. In addition, it fosters and maintains public confidence in the integrity and independence of our courts.[6] It is for that reason that courts construe narrowly and strictly any statutory provision which permits the suppression of publication of their proceedings.[7] Thus, as pointed out by Mr Gilbertson, in

order that Judge McInerney have jurisdiction to continue the earlier suppression order made by him, he needed to be appropriately satisfied that such an order was "necessary" for one or more of the purposes stipulated in s80AA of the *County Court Act*.

23. Furthermore, as a corollary of the importance of the principle of open justice, the courts have recognised that, in determining whether a statutory criterion for making a suppression order has been made out, a high level of satisfaction must be achieved as to the existence of the conditions which are necessary for making the suppression order. In *R v Pomeroy and anor*,[8] Teague J rejected the proposition that there had to be "cogent and admissible" evidence of necessity, before an order could be made under s120 of the *Magistrates' Court Act*, which is in similar terms to s80AA of the *County Court Act*. Teague J considered that such a proposition "puts the bar impossibly high". However his Honour noted:

> "There can be no doubt that because of the word 'necessary' in s19 (of the *Supreme Court Act*), the bar must be very high. It will only be reached in wholly exceptional circumstances."

24. Similarly, in *Herald & Weekly Times Ltd v County Court of Victoria*,[9] Byrne J observed that the word "necessary" (in s80AA) imposes a high standard of satisfaction. His Honour referred to the statement by Teague J in *R v Pomeroy* that the circumstances which warrant the making of such an order should be exceptional, and then stated:

> "What is then required before a suppression order may be made in such a case is such a high degree of satisfaction in the Court that the harm will occur that the making of the order is necessary to avoid it and further, when it is appropriate to make such an order, the order must be couched in terms which are no wider than are necessary to avoid that harm."

25. The principles to which I have just referred are important in determining ground one of the originating motion. In particular those principles are relevant to a proper appreciation of the reasons pronounced by his Honour Judge McInerney on 25 November 2006.

26. Mr Gilbertson in his submissions focussed principally if not solely on one sentence in paragraph 9 of his Honour's reasons, namely the sentence in which his Honour stated that the proper manner in which to approach the application before him is to "facilitate open justice unless substantial reasons exist as detailed in s80AA". That sentence must be viewed in its proper context. To do so it is necessary to consider his Honour's reasons as a whole. As I have set out, at the commencement of his reasons his Honour extracted part of his previous ruling of 24 January 2006, in which he then found that he had "no doubt" that to remove the suppression order would endanger the physical safety of X. In reaching that conclusion his Honour had described X as an informer whose role had been "almost unique in Australian legal history". Pausing there, it inevitably followed from those conclusions that his Honour, in January 2006, was well satisfied that, in terms of s80AA, it was necessary to continue the suppression order in order not to endanger the physical safety of X.

27. In his ruling of 25 November 2006 Judge McInerney then considered the plaintiff's submissions that, by virtue of two circumstances, matters had so changed that it was no longer necessary to continue the suppression order. Having considered those matters, his Honour, at paragraph 8, found that he did not consider that the risks to X's safety had been reduced. In other words, his Honour's level of satisfaction, as to the necessity to continue the suppression order, remained the same as it was in January 2006. In the remainder of paragraph 8 his Honour gave reasons why he considered that the risks to X had not diminished.

28. It is in the context of those conclusions that his Honour's remarks at paragraph 9 must be considered. His Honour correctly noted that "there should only be a derogation from the open administration of justice where the circumstances are exceptional." That statement by his Honour accords with the principles to which I have referred, namely, that the ordinary rule is that court proceedings are open, and that there is a strong public interest in the full, fair and accurate reporting of those proceedings by the media. His Honour, having enunciated that principle, then had "no doubt", in light of the "dimensions" of the information provided by X as an informer, "that such circumstances may be characterised as exceptional and that there are grave risks still in existence in so far as he is concerned." Pausing there, again, that finding by his Honour could only dictate one conclusion, namely, that it was necessary to continue the suppression order so as not to endanger the physical safety of X.

29. By referring to the need to find "exceptional" circumstances, his Honour adopted the test stated in the authorities to which I have already referred. It is that principle which dictates the standard of satisfaction required to be reached in order that a court concludes that it is necessary, for any of the purposes specified in s80AA, for a suppression order to be made. It is in that context that his Honour then made the reference to the existence of "substantial reasons" on which Mr Gilbertson has focussed his submissions. It is clear that in doing so his Honour was referring to the standard of satisfaction which he required to reach in order that he conclude that one or more of the criteria identified by s80AA had been appropriately established. In whatever way one describes the "bar" (to use the term adopted by Teague J in *Pomeroy*'s case), the level of satisfaction which is required, under s80AA, for the imposition of a suppression order, must be high. By referring to the need to find "substantial reasons", it is clear that Judge McInerney was referring to the level of satisfaction he considered he needed to reach before being appropriately satisfied that the continuation of the suppression order was necessary in order to protect the physical safety of X.

30. In other words, and contrary to the submissions by Mr Gilbertson, his Honour did not supplant the test of "necessity" in s80AA with another test of "substantial reasons". Rather, the reference to "substantial reasons" in paragraph 9 denoted the level of satisfaction, which his Honour considered he required to reach in order that he find it "necessary" to continue the suppression order for the purposes of s80AA. For those reasons I reject the submission on behalf of the plaintiff that the learned judge fell into jurisdictional error in failing to consider whether the suppression order remain necessary for the purposes set out in s80AA. On a proper analysis of his Honour's reasons, his Honour did correctly and properly consider whether the suppression order remained necessary for those purposes, and concluded that it was.

31. As I have already stated, Mr Ryan also pointed to earlier proceedings before his Honour which preceded his Honour's ruling of 25 November 2006. It is not necessary for me to refer to those matters in order to reach the conclusions set out above. However, the matters which were referred to by Mr Ryan do reinforce the conclusion that his Honour did have the correct test in mind when ruling, on 25 November 2006, that it was necessary to continue the suppression order. His Honour stated and applied the test of necessity in his ruling of 19 May 2003. He was clearly cognisant of it when he made his ruling on 24 January 2006. His Honour referred to and quoted from that ruling at the commencement of his ruling of 25 November 2006. In those circumstances, I am fortified in the conclusion which I have already reached, namely that his Honour was mindful of, and applied, the correct test of necessity in his ruling of 25 November 2006.

Ground 2

32. The conclusions which I have expressed above also dispose of ground two of the originating motion. Mr Gilbertson relied on ground two as an alternative to ground one, in the event that I found that his Honour erred in failing to consider whether the suppression order was necessary for the purposes of s80AA, but found that such an error was not a jurisdictional error. My conclusion, that Judge McInerney did not fail to consider whether the suppression order remained necessary for the purposes of s80AA of the *County Court Act*, disposes of ground two.

Ground 3

33. The third and last ground specified in the originating motion, and which is relied on by the plaintiff, is that Judge McInerney erred in finding that there were grave risks still in existence in so far as the third defendant was concerned, in circumstances where there was no evidence to support such a finding.

34. The judge did not make available to the plaintiff any of the material which was before him and on the basis of which he made the original suppression order, and continued it in November 2006. However Mr Gilbertson submitted that it is evident from his Honour's reasons for judgment that he had no direct evidence before him to support the proposition in his reasons that there were grave risks to the safety of X if his Honour did not continue the suppression order. Mr Gilbertson recognised that in some cases the very nature of the material which is before a judge in a criminal trial, or on a plea in mitigation of sentence, may give rise to an inference that a person's safety might be so jeopardised that it is necessary for a court in those circumstances to make a suppression order under s80 of the *County Court Act*. However Mr Gilbertson submitted that in this case such an inference was not open to the judge in the absence of appropriate

evidence being put before him as to the apprehended risk to X, should the suppression order not be continued. Mr Gilbertson submitted that, on the evidence before the judge, X had then been overseas for a period in excess of two years. He had been missing since at least August 2005. In those circumstances, the judge could only have been satisfied that it was necessary to protect X's safety by making a suppression order, if there was specific evidence that, notwithstanding the fact that he had decamped, nonetheless his physical safety would be in jeopardy if his identity were revealed.

35. In response Mr Ryan placed emphasis on the description of X by his Honour as an informer whose status was almost unique in the history of informers in this country. In those circumstances he submitted it was open to his Honour to infer that, because of the material which had been tendered before him on the plea, that there was still an ongoing risk to the safety of X which necessitated the continuation of the suppression order.

36. In my view, Mr Gilbertson was correct in accepting that there is no universal rule that, in every case, direct evidence must be led from a witness attesting to the level of danger which might be occasioned to a particular person, should a suppression order not be made. In *R v Pomeroy and anor*,[10] Teague J expressly rejected the proposition that there had to be "cogent and admissible evidence of necessity" before an order is made under the equivalent, in the *Magistrates' Court Act*, to s80 of the *County Court Act*. In *The Age Company Limited v Magistrates' Court of Victoria*[11] I rejected the proposition that it was necessary, in each case, that such evidence be adduced, and expressed the view that much depended on the particular circumstances of each case. Plainly that must be so. In a particular case, the materials before the judge, either in the depositions, or which are put forward on a plea in mitigation of sentence, may themselves be sufficient to give rise to an inference that it is necessary to make a suppression order in order to avoid endangering the physical safety of a person. In such a case it may not be necessary to call a witness who can specifically attest to the degree of risk to the person should his or her identity be revealed. Obviously, each case must depend on its own individual facts.

37. In this case the plaintiff is in a difficult position in seeking to establish ground 3 of the originating motion. Indeed Mr Gilbertson acknowledged that this is so. In his reasons, his Honour recited his previous remarks that the status of X as an informer is "almost unique in Australian legal history". His Honour stated that in the trial of Y (which was over), the tapes of the undercover operation of X had formed a "significant and important part". His Honour also noted that the information which he had given in relation to Z (who had also been convicted) was important in the prosecution of that accused. In paragraph 8 of his reasons, his Honour referred to the "dimension of the information" supplied by X, which involved "substantial numbers of persons". His Honour noted that that evidence " ... which he obtained at grave risk to himself has been of vital utility in a number of trials, albeit that he (X) did not actually give evidence himself."

38. It is clear from the foregoing that his Honour had evidence which indicated that X had given significant information which had played an important role in the prosecution of a number of criminal figures. One of those persons specifically named by his Honour could aptly be described as a very significant criminal figure. His Honour drew an inference from that material that, by providing that information, X had put himself in jeopardy, and that those dangers still persisted, notwithstanding the lapse of time which had occurred. Further his Honour drew the inference that, although the Australian authorities had, apparently, been unable to locate and re-arrest X, nonetheless the type of information given by X, and the persons about whom X had given such information, were such as to give rise to a substantial risk that he still remained within the reach of retribution at the hand of one or more of those persons.

39. Like Mr Gilbertson, I do not have access to the material before his Honour, and on which his Honour based that inference. In those circumstances, it is not possible for me to conclude that his Honour did not have material before him from which he might properly draw the inference that it was necessary to continue the suppression order in order not to endanger the physical safety of X. Accordingly it follows that the plaintiff has failed to establish ground 3 of the originating motion.

40. For the purpose of completeness I note that his Honour found that it was necessary to continue the suppression order under s80, not only on the basis set out in s80AA(c) (that it was

necessary in order not to endanger the physical safety of X), but also on the basis that, under s80AA(b), it was necessary in order not to prejudice the administration of justice. That conclusion was not the subject of separate submissions by counsel. His Honour based that conclusion on the proposition, which he expressed in paragraph 5 of his reasons, that it was important to protect Crown witnesses such as X, in order that such witnesses do not believe that, should they act in a manner which the Crown does not particularly like, then their safety may be prejudiced. It is clear that his Honour thus linked the applicability of s80AA(b) to the applicability of s80AA(c). In other words, s80AA(b) did not provide, in this case, a separate and independent basis upon which his Honour continued the suppression order. In that light, and given that I have found that his Honour did not err in finding that it was necessary to continue the suppression order under s80AA(c), it is not necessary for me to express any further views as to his Honour's conclusion as to the applicability of s80AA(b).

Conclusion

41. Thus, for the reasons which I have set out above, I have concluded that each of the first three grounds of review contained in the originating motion must fail. As I have stated, the fourth ground was abandoned by Mr Gilbertson. Accordingly, it follows that the application by the plaintiff for relief in the nature of certiorari in respect of the order of his Honour Judge McInerney of 25 November 2006 should be dismissed. I shall hear counsel on the question of costs.

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[1] *Herald & Weekly Times Pty Ltd v The County Court of Victoria & Ors* [2004] VSC 512 at [35] (Whelan J).
[2] *Scott v Scott* [1913] AC 417 at 437-8 (Viscount Haldane LC), 440 (Lord Halsbury), 477, 482-3 (Lord Shaw); [1911-1913] All ER 1; 29 TLR 520; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 520-521, (Gibbs J), 532 (Stephen J); [1976] FLC 90-022; (1976) 9 ALR 22; (1976) 24 FLR 399; (1976) 1 Fam LR 11; (1976) 1 Fam LN N4; (1976) 50 ALJR 594 (1976).
[3] *John Fairfax Publications Pty Ltd and anor v District Court of New South Wales and Ors* [2004] NSWCA 324; (2004) 61 NSWLR 344 at 353 (Spigelman CJ); 148 A Crim R 522; 50 ACSR 380.
[4] *Herald & Weekly Times Ltd and ors v Magistrates' Court of Victoria and Ors* [2004] VSC 194 at [14] (Whelan J); 21 VAR 117; *Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47 at 55 (Kirby P); *The Herald & Weekly Times Ltd v Magistrates' Court of Victoria and Ors [1999] VSC 232;* [1999] 2 VR 672 at 677 (Beach J).
[5] *R v Pomeroy and anor* [2002] VSC 178 at [10] to [11] (Teague J); *Herald & Weekly Times Ltd v the County Court of Victoria* [2005] VSC 70 at [13] (Byrne J).
[6] See for example *Russell v Russell* (above) at 520 (Gibbs J); *Re Applications by Chief Commissioner of Police (Vic) for leave to appeal* [2004] VSCA 3; (2004) 9 VR 275 at [25] – [27]; *Attorney-General v Leveller Magazine Limited* [1979] AC 440 at 450 (Lord Diplock); [1979] 1 All ER 745; [1979] 2 WLR 247; (1979) 68 Cr App R 342.
[7] *Re Applications by Chief Commissioner of Police* (above) at [30].
[8] Above at [10] to [11].
[9] [2005] VSC 71 at [13], [14].
[10] Above at [10].
[11] [2004] VSC 10 at [13] and [14].

APPEARANCES: For the plaintiff Herald & Weekly Times Pty Ltd: Mr D Gilbertson, counsel. Corrs Chambers Westgarth, solicitors. For the first defendant DPP: Mr CJ Ryan SC, counsel. The Solicitors for the DPP (Vic). No appearance of the second- and third-named defendants.
