17/99; [1999] VSC 136

SUPREME COURT OF VICTORIA

THE HERALD & WEEKLY TIMES LTD & ORS v THE MAGISTRATES' COURT of VICTORIA & ORS

Mandie J

5 March, 10 September 1999 — [1999] 3 VR 231

PRACTICE AND PROCEDURE – OPEN COURT RULE – MEANING OF – COMMITTAL PROCEEDINGS – GOVERNED BY STATUTORY REQUIREMENTS – WHETHER POWER IN COURT TO GRANT TO MEMBERS OF THE PUBLIC OR MEDIA ACCESS TO DOCUMENTS – APPLICATION BY MEDIA FOR ACCESS TO DOCUMENTS DURING COMMITTAL PROCEEDINGS – APPLICATION REFUSED – WHETHER MAGISTRATE IN ERROR IN REFUSING APPLICATION: *MAGISTRATES' COURT ACT* 1989, SS16A, 18, 20(2), 56, 125(1).

Section 125(1) of the *Magistrates' Court Act* 1989 ('Act') provides:

"All proceedings in the Court are to be conducted in open court, except where otherwise provided by this or any other Act or the Rules."

Whilst conducting committal proceedings, a magistrate refused an application by media representatives for access to the witness statements and the charge-sheet tendered. Upon originating motion for an order to quash the decision—

HELD: Originating motion dismissed.

1. The fundamental purpose of the open court rule is not the provision of information to the public at large or the facilitation of public discussion. A proceeding is conducted in open court if the public has a right of admission to that court which is reasonably and conveniently exercisable. However, there is a wider public policy of open justice which is not only concerned with the conduct of proceedings in open court but also keeping the public at large informed of what is occurring in the courts. This wider policy acknowledges that the public can only be kept so informed if the members of the media are able to go about their task without undue hindrance or impediment.

2. Schedule 5 of the Act which authorises the use of the hand-up brief procedure requires as part of that procedure that the hand-up brief (including the charge-sheet and the witness statements) be served and filed with the court. It also provides that the evidence contained in the witness statements need not be given orally. There is no express power given to a magistrate to grant access to the charge-sheet or the witness statements; nor is it a power that needs to be implied to enable the court to effectively exercise its statutory jurisdiction. The wider policy of open justice cannot be utilised to extend the meaning of "open court" in s125(1) of the Act or to justify the necessary implication of a power in the Magistrates' Court to provide access to documents to the public. Accordingly, the open court requirement contained in s125(1) of the Act does not extend to obliging the court to provide, upon request, reasonable access to copies of the charge-sheet and witness statements.

MANDIE J:

1. By originating motion dated 2 February 1999, the plaintiffs (Herald & Weekly Times Ltd, Nine Network Australia Pty Ltd, Seven Network Limited and 3AW Southern Cross Broadcasting Pty Ltd) bring proceedings against the Magistrates' Court of Victoria, the Director of Public Prosecutions (Victoria) and Martin Wright-Goodwin in relation to a question of access to certain documents filed or tendered in a committal proceeding.

2. The orders sought by the plaintiffs are:

> "1. An order quashing the decision of Magistrate Fleming made on 2 February 1999 that an application by each of the plaintiffs for access to the witness statements and charge sheet ('the Statements and Charge Sheet') tendered in the committal hearing of the third defendant before Magistrate Fleming be refused.
> 2. Further or alternatively a declaration that practice direction 41/98 dated 13 November 1998 issued by the principal registrar of the first defendant is beyond the power of the Chief Magistrate of the first defendant.

3. Further or alternatively an order in the nature of mandamus requiring the first defendant to act according to law and provide access to the Statements and Charge Sheet forthwith."

3. The grounds relied upon for the relief sought as set out in the originating motion are:

"A.Magistrate Fleming acted contrary to s125 of the *Magistrates' Court Act* 1989 (Vic) and further or alternatively contrary to schedule 5 clause 5(5) of the *Magistrates' Court Act* in refusing each of the plaintiffs access to the Statements and Charge Sheet.

B. Magistrate Fleming had no power to refuse any of the plaintiffs access to the Statements and the Charge Sheet.

C. Magistrate Fleming wrongly distinguished between a trial and a committal proceeding in determining that access to the Statements and the Charge Sheet should not be given to any of the plaintiffs.

D. Magistrate Fleming wrongly decided that committal proceedings were to be treated differently from trials in relation to access to any documents the subject of admitted evidence in the *Magistrates' Court Act*.

E. Practice direction 41/98, contrary to s16A(2) of the *Magistrates' Court Act*, was inconsistent with provisions of the *Magistrates' Court Act*, **[2]** namely s125 and further or alternatively s126 and further or alternatively schedule 5 clause 5(5).

F. By the Chief Magistrate by Practice Direction 41/98 requiring the Director of Public Prosecutions to consider any application by any of the plaintiffs for access to documents referred to in schedule 5 clause 5(5) of the *Magistrates' Court Act*, the Chief Magistrate has impermissibly delegated the function, power and/or duty of the first defendant to be performed under s125 and/or s126 of the *Magistrates' Court Act*.

G. By the Chief Magistrate by Practice Direction 41/98 directing that the first defendant will no longer supply documents of the kind referred to in schedule 5 clause 5(5) of the *Magistrates' Court Act* to any of the plaintiffs or to the media generally, the Chief Magistrate has impermissibly directed that the first defendant not exercise its functions, power and/or duties as required under s125 and/or s126 of the *Magistrates' Court Act*."

Factual background

4. On 13 November 1998 the Principal Registrar of the Magistrates' Court of Victoria issued Practice Direction 41/98 in the following form:

"13 November, 1998
Practice Direction 41/98
Registrars of Magistrates' Court
Information Provided to Media in Committal Proceedings
he Chief Magistrate has directed that members of the media who request access to briefs, statements and exhibits in respect to committal proceedings are to be informed to direct requests to the Director of Public Prosecutions. The court will no longer supply this information to the media. This Practice Direction takes precedent (sic) over any prior instructions that are inconsistent with this direction.
Graeme J. Horsburgh
Principal Registrar
Magistrates' Court of Victoria"

5. On 24 November 1998 the Office of Public Prosecutions ("the OPP") issued a document entitled *"Media Access to Statements and Materials in Magistrates' Court Proceedings"* which stated:

"A Practice Direction issued by the Melbourne Magistrates' Court and dated 16 November 1998 appears to change Court policy in relation to access to these materials. The Practice Direction from the Principal Registrar reads as follows: [The Practice Direction is set out.]

Media access is a delicate area. On the one hand, you have the media representing the public interest in the processes of the Court and the details of the cases coming before it. On the other, you have the interests of the defendant and the legal restrictions upon publication of certain material whether related to the nature of the offences e.g. sexual offences or an Order of the Court. Moreover, the Director is anxious that there not be any allegations that the Crown has selectively released material or taken other steps which might prejudice the prospects of a fair trial.
From the date of this Direction, OPP staff are authorised to give access to statements and other material, including agreed summaries, tendered during proceedings only where the following

> conditions have been met:
> 1. The materials in question must have been tendered to the Court.
> 2. The prosecutor considers that it is appropriate to grant access in the individual circumstances of the case.
> 3. The defence agree to the media being granted access to the materials.
> 4. The Press are not to be given copies of the material but may be allowed to peruse that material.
> ...
> The media have the right to go before the Court and argue the question of access to these materials. It is the preferred position of the Director that access be granted through the Court, or at the very least, by agreement between the parties involved. Where neither of those conditions can be achieved, then it is for the media to look to their own remedies."

6. In response to certain submissions to him, the Chief Magistrate by letter to the solicitor for the first plaintiff dated 18 December 1998 replied:

> "I refer to your correspondence of 26 November 1998 and your fax of 16 December 1998, regarding access to committal documentation.
>
> Practice Direction 41/98 was not introduced to hinder the media, or any other person, from access to briefs, statements or exhibits tendered in committal proceeding. The intention of the direction is the exact opposite. It is to ensure that access to relevant documents, etc. produced to the Court are available.
>
> The Director of Public Prosecutions, when providing access to documents for the Court, can advise that statements from sexual offence victims cannot be reported, nor should details of confessions or admissions be published."

7. A committal hearing in relation to charges of some kind of fraud against Mr Wright-Goodwin commenced before Fleming M in the Melbourne Magistrates' Court on 25 January 1999. An application was made by counsel for Mr Wright-Goodwin for a suppression order under s126 of the *Magistrates' Court Act* ("the Act") but this was refused. A court reporter for the first plaintiff, Ms Pellegrini, was present in court on Monday, 25 January and Wednesday, 27 January 1999 but was unable to make sufficient sense of the committal proceedings to compile a news report because she did not have access to the statements of the witnesses tendered in court and was denied access to the charge-sheet. When Ms Pellegrini approached the bench clerk for a copy of the charge-sheet she was informed that the magistrate had been instructed "not to grant the media access to anything". She also made a request to the OPP for access to the witness statements and charge-sheet but she was informed that because the defence did not agree to the media having access to these documents she could not be granted access to them.

8. On 28 January 1999 the solicitor for the first plaintiff applied to the magistrate for access to the witness statements tendered in open court in the committal proceeding and, as directed, later in the day filed written submissions with the court. On 29 January 1999, the magistrate heard submissions from Mr Hicks, Senior Crown Prosecutor, who submitted that the legislative scheme of the *Magistrates' Court Act* required that the court determine the question of access to witness statements tendered in open court and that the power to determine access to statements tendered in open court rests in only one office: the court. Mr Hicks submitted that it was "nonsensical" that the media be entitled to report upon committal proceedings but be denied access to the statements of witnesses tendered in court unless a statutory exception applied.

9. On Monday, 1 February 1999 the magistrate heard submissions from Mr J Elliott of counsel, for the plaintiffs herein. On Tuesday, 2 February 1999 Fleming M ruled on the matter as follows: [*His Honour set out the Magistrate's ruling declining to make the orders sought together with the reasons given by McLennan M in another matter, and continued*] ...

13. The plaintiffs relied upon a number of affidavits sworn by various experienced journalists who all deposed to the effect that it was very difficult to understand the cross-examination of witnesses in committal proceedings without being granted access to witness statements and that without such access it was difficult, if not impossible, to produce an accurate and balanced story. It was difficult to obtain such access from prosecutors and on many occasions defence lawyers refused to consent to the prosecutors allowing such access. In general there was now a strong deterrent to the reporting of committal proceedings. The plaintiffs also produced evidence of the

now superseded guidelines as to access to statements and exhibits in committals which had been provided by the then Chief Magistrate in April 1995 after consultation with representatives of the media, the OPP, the Law Institute and the Criminal Bar Association. These guidelines (which were not binding on any magistrate) provided for the Committals Co-ordinator to make available the hand-up briefs for perusal by the media, for a short time, after conclusion of the committal proceeding. The guidelines warned reporters against the publication of prejudicial material such as might disclose prior convictions or the details of confessions and admissions. In the case of contested committals, the former guidelines provided for the Committals Co-ordinator, on request, to provide to the media one copy of each statement tendered in evidence (subject to any contrary ruling of the magistrate). Access to other exhibits in all committals was left to be determined on a case by case basis.

Legislative background

14. Section 4 of the *Magistrates' Court Act* 1989 ("the Act") establishes the Magistrates' Court of Victoria which "shall consist of the magistrates and the registrars of the Court" (s4(2)) but the court is "constituted by a magistrate" except in the case of any proceeding for which provision is made for a registrar to constitute the court (s4(3)). Section 17(1) provides that for the purposes of the Act and to assist in the administration of the court there are to be employed a principal registrar and as many registrars and deputy registrars as are necessary. Section 16A of the Act, headed "Practice notes", provides:

> "1. The Chief Magistrate may from time to time issue practice directions, statements or notes for the Court in relation to civil or criminal proceedings or any class of civil or criminal proceedings.
>
> 2. Practice directions, statements or notes issued under sub-section (1) must not be inconsistent with any provision made by or under this or any other Act."

15. Section 18(1) of the Act requires the principal registrar to cause a register to be kept of all the orders of the court and of such other matters as are directed by the Act or the Rules to be entered in the register. Section 18(3) entitles any person, for a fee, to inspect only "that part of the register that contains the final orders" of the court whereas s18(4) entitles a party to a proceeding to inspect without charge "that part of the register that relates to that proceeding". I note that the position as to the inspection of documents held by the registry in the Magistrates' Court can be unfavourably compared with that obtaining in the Supreme Court and the County Court under r28.05, which provides:

> "28.05 (1) When the office of the Court is open, any person may, on payment of the proper fee, inspect and obtain a copy of any document filed in a proceeding.
>
> Notwithstanding paragraph (1)—
> (a) no person may inspect or obtain a copy of a document which the Court has ordered remain confidential;
>
> (b) a person not a party may not without leave of the Court inspect or obtain a copy of a document which in the opinion of the Prothonotary [Registrar] ought to remain confidential to the parties."

16. Section 20(2) requires the principal registrar to "keep the original of all process issued out of the Court". "Process" is defined by s3(1) to include witness summons, charge-sheet, summons to answer to a charge, complaint, a variety of warrants and any other initiating process. A criminal proceeding is commenced by "filing" a charge (s26(1)) or a "charge-sheet" (s26(2)). Other documents are also required by the Act to be "filed" (eg ss30(2), 35(4), 37(8), 56(4), 98(6)) or "lodged" (s94(1)) and other documents are referred to in the Act in respect of which it might perhaps be inferred that it is appropriate or even necessary that at least a copy be filed with the court, to the extent that they do not amount to original "process" which must be kept under s20(2).

17. The Magistrates' Court has jurisdiction under s25(1)(c) of the Act to conduct committal proceedings into indictable offences and either to direct the defendant to be tried or to discharge the defendant. I interpolate that although it has been held that the function of the court in committal proceedings is non-judicial and does not involve the exercise of judicial power, it has been also authoritatively stated that the hearing of such proceedings is a function which is *sui generis* and has the closest, if not an essential, connection with an actual exercise of judicial power and traditionally constitutes the first step in the criminal curial process. (See *R v Murphy* [1985]

HCA 50; (1985) 158 CLR 596, 616; (1985) 61 ALR 139; (1985) 59 ALJR 682; 16 A Crim R 203.) The purposes of a committal proceeding have been said to include the laying "before the accused and the community, in a public tribunal, the charge brought and the evidence upon which the prosecution will rely." (*DPP v Kolalich* (1990) 19 NSWLR 520, 528).

18. Section 56 of the Act provides that a committal proceeding must be conducted in accordance with Schedule 5 of the Act but that nothing in the Act alters the nature of a committal proceeding from that existing immediately before the commencement of that section.

19. Schedule 5 provides as follows. The informant may serve on the defendant a hand-up brief which must contain a notice in the prescribed form, a list of witness statements intended to be tendered and copies thereof, a copy of the charge-sheet, copies of proposed documentary exhibits and a list of other proposed exhibits and that a witness statement must be in the form of an affidavit or statutory declaration (cl.1). An informant must file a copy of the hand-up brief with a designated registrar (cl.2(3)). Witnesses need not attend the committal but the defendant may give a notice requiring any such witness to attend (cl.3). Unless the court gives leave to the contrary, a witness called to give evidence for the prosecution must simply attest to the truthfulness of the relevant witness statement in the hand-up brief (cl.5(4)). Witness statements served, and verified orally where necessary, are admissible "as if their contents were a record of evidence given orally" (cl.5(5)). Provision is also made for such witness statements where a hand-up brief is not served (cl.6(1)).

20. If a defendant is committed for trial, the registrar must forward to the DPP the "depositions" (the transcript of evidence and witness statements), all exhibits which have remained in the custody of the court and copies of all processes filed in the court (cl.11(3)).

21. The hand-up brief procedure may be contrasted with the traditional and now residual procedure of a "full" committal which commenced by the charge being read in open court to the defendant (who did not plead at that stage): Fox: *Victorian Criminal Procedure* (9th ed, 1997). Under that procedure, after opening remarks, if any, by the prosecutor, the evidence of witnesses for the prosecution was then taken orally, on oath, and reduced to writing or recorded and later transcribed.

22. Section 3(1) of the Act defines "proceeding" to mean "any matter in the Court, including a committal proceeding" and s125(1) of the Act provides:

> "All proceedings in the Court are to be conducted in open court, except where otherwise provided by this or any other Act or the Rules."

Submissions

23. Mr Houghton QC, who appeared with Mr Elliott of counsel for the plaintiffs, referred to the fundamental principle of open justice (see *Scott v Scott* [1913] AC 417; [1911-1913] All ER 1; 29 TLR 520, per Viscount Haldane LC at AC 434, 437-8; per Earl of Halsbury at AC 440-1; per Lord Atkinson at AC 463; per Lord Shaw at AC 477; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 520 per Gibbs 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; and, as to committal proceedings, *Moularas v Nankervis* [1985] VicRp 40; [1985] VR 369.

24. Mr Houghton submitted that "this fundamental common law principle had received statutory approval" in s125(1) of the Act. In essence, the submission was that the court had by denying access to the documents acted in breach or infringement of s125(1).

25. Mr Houghton referred to a number of cases in relation to what was covered by the concept "open court". In *Daubney v Cooper* (1829) 10 B & C 237; 109 ER 438, the Court of King's Bench (per Bayley J at 240) said that it was "one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose – provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed – have a right to be present for the purpose of hearing what is going on." In *Kenyon v Eastwood* (1888) 57 LJQB 455, Lord Coleridge CJ said that an "open court" did not include a small room, which, though open to the

public, adjoined the Court room and had none of the accustomed external signs of a Court room. It was accordingly held that prohibition must issue for lack of jurisdiction in relation to an order for committal of a debtor made in that room. To similar effect was the decision of Dean J in *Dando v Anastassiou* [1951] VicLawRp 30; [1951] VLR 235 esp. at 237-8 in which Dean J emphasised the importance of publicity as opposed to privacy in the conduct of judicial proceedings and that all cases should be heard in circumstances which made plain that the public had a right of free access to the court because the essence of the words "open Court" was the existence of the public's right to admission.

26. Mr Houghton submitted that the effect of the Practice Direction and of the order of Fleming M, by denying access to the evidence-in-chief was to deny the public its right of free access to the case as effectively as if the doors were locked because the public was unable to "hear" the case through its eyes and ears, the media. He also submitted that it was impermissible to leave the question of access to evidence to the OPP which was to confuse in the mind of the public the exercise of a judicial function with the exercise of a prosecutorial function (cf *Dando v Anastassiou* per Dean J at 238). With regard to the position of the media, Mr Houghton referred to what was said by Lord Widgery CJ in *R v Denbigh Justices; Ex parte Williams* [1974] 1 QB 759 at 764-5; (1974) 2 All ER 1052: [*After setting out this passage, His Honour continued*] …

27. Mr Houghton submitted that the committal proceeding was not public "in all respects" when the press was effectively precluded from being able to publish a fair and accurate report of the proceeding. Reference was made to *R v Felixstowe Justices; Ex parte Leigh* [1987] QB 582; [1987] 1 All ER 551; [1987] 2 WLR 380 in which a journalist obtained a declaration that the policy of certain justices to withhold their names from the public and the press during the hearing of cases and afterwards, was contrary to law. Watkins LJ (with whom Russell and Mann JJ agreed) said, at QB 591-3: [*After setting out this passage, His Honour continued*] …

28. Mr Houghton contended that, in these days when more and more evidence-in-chief was in written form, it was a corollary of the principle of open justice that the court was obliged to provide upon request some form of reasonable access to the public to that written form "as much as one could by sitting in court as if the witness was giving the evidence orally". He referred to what was said by Ormiston J (as he then was) in relation to committal proceedings under earlier and differently worded legislation in *Moularas v Nankervis*, *supra*, esp. at 375-7. Mr Houghton said that a court, having power to regulate its own proceeding, could make arrangements for inspection of documents in a way which was convenient and did not disrupt the proceeding, but that access to documents could not be entirely refused simply on grounds of convenience. He submitted that if the press representing the public was effectively precluded from being able to compile and publish a fair and accurate report of a proceeding in the manner complained of, then that proceeding was not being conducted in open court.

29. In relation to practice direction 41/98, Mr Houghton submitted that it was ultra vires because the regulation of access to materials involved in a proceeding, such as the charge-sheet and witness statements, involved the exercise of the judicial power of the magistrate and that the practice direction impermissibly purported to instruct all magistrates to refuse access to the material and to delegate that judicial power to a third person, namely the Director of Public Prosecutions. Alternatively, he submitted that if the practice direction was to be read as a direction to registrars only and not to magistrates, Fleming M (and also McLennan M) had not so construed it.

30. Mr Houghton further submitted that insofar as Fleming M had relied upon the difference between committal proceedings and other proceedings to justify the refusal of access, she had misdirected herself.

31. Mr Houghton referred to *Moularas v Nankervis*, *supra*, and to *dicta* of Mason CJ in *Hinch v Attorney-General for the State of Victoria* [1987] HCA 56; (1987) 164 CLR 15 at 26; 74 ALR 353; 28 A Crim R 155; 61 ALJR 556:

> "Be this as it may, the reporting of committal proceedings is an example of the reporting of public affairs, notwithstanding that the publication of the report may cause prejudice to the accused at his trial by prejudicing the minds of potential jurors in relation to the issues to be determined at the trial. Reports of court proceedings are not a true example of the public interest in the administration of

> justice yielding to the public interest in freedom of discussion. Rather it is a case where on balance the wider interests of the administration of justice are thought, as the law currently stands, to be better served by allowing publicity."

32. Mr Houghton suggested that the dicta of Beach J in *David Syme & Co Ltd v Hill* ([1995] VSC 59, unreported, Supreme Court of Victoria, 10 March 1995) went contrary to the trend of principle and authority.

33. Mr Houghton concluded by conceding that the magistrate was probably now *functus officio*, that mandamus was inappropriate but that some purpose might be served by quashing her decision. He contended however that the appropriate form of relief for the court to grant would be a declaration.

34. Ms Carlin of counsel who appeared for the DPP made brief submissions by way of assistance to the court but did not seek to oppose (or to support) the plaintiffs' position.

35. The learned Solicitor-General, Mr D Graham QC, appeared (by leave) with Mr Hopkins of counsel for the Attorney-General. Mr Graham said that the difficulties experienced by the plaintiffs and their staff were a direct consequence of the hand-up brief procedure provided for by the legislature and that the plaintiffs had no right to insist upon inspecting the documents in the hand-up brief. Mr Graham submitted that the plaintiffs had to show that the magistrate had acted without or in excess of her jurisdiction in refusing access to the plaintiffs to statements and exhibits tendered in the committal proceeding. He submitted that, once tendered, the statements and exhibits became part of the court file and the plaintiffs had no right to inspect them, whether express or implied. As to the express provisions of the Act, he referred to s18(3) which permits inspection only of "that part of the register that contains the final orders of the court". He referred to *Smith v Harris* [1996] VicRp 70; [1996] 2 VR 335; [1996] A Def R 52-065 in which Byrne J said (at 350) that "the documents retained in the registry of the Magistrates' Court are not public documents available for public inspection". [However, I interpolate that in the same case (at 341) Byrne J said that "[a] document prepared for, filed and even served is not in that sense part of the court's proceedings, at least until it is deployed as part of the judicial process" thereby making a distinction, which could be argued to be relevant here, between documents simply on the court file and documents "deployed in court".]

36. Mr Graham submitted that the open court rule (and s125 of the Act) required no more than that justice be done in public and that the public have the right to attend the courts and view and listen to the proceedings while the court was in session but it did not require that the public and the press were entitled to be provided with materials and facilities which would enable them to understand or better understand what the proceedings were about or to be fully acquainted with all the details of the proceedings. Mr Graham argued that the conduct of proceedings would become unworkable if, for example, a right was extended to the media, and therefore to any member of the public, "to interrupt proceedings at their convenience in order to demand the release of a tendered document". Alternatively, if the right was claimed during an adjournment, that would appear to be in substance precluded by s18(3) of the Act. Mr Graham submitted further that not only was there no right to access but that neither a magistrate nor a registrar had power to grant access to the charge-sheet or the witness statements.

37. In relation to the practice direction, Mr Graham submitted that it was not a practice direction within the meaning of s16A of the Act. It was not in the class of practice directions which are commonly directed to practitioners and litigants as to some matter of practice or procedure. It was not issued by the Chief Magistrate but was simply an administrative direction to the registrars of the Magistrates' Court by the principal registrar at the behest of the Chief Magistrate. It did not purport to bind magistrates and would very probably have been beyond the power of the Chief Magistrate under s16A of the Act if it had purported to do so.

38. Finally, Mr Graham submitted that no substantive remedy could give any relief to the plaintiffs in relation to the present dispute. All that was sought was a weapon to deploy in front of magistrates in future proceedings.

Open court

39. As I have said, the essence of the plaintiffs' submission was that the committal proceeding

had not been conducted in open court within the meaning of s125(1) of the Act once the magistrate had refused access to the charge-sheet and the witness statements. It was not contended that there was a positive or continuing obligation upon the court to provide access, or to provide some machinery for reasonable access, to such documents, unless and until a request for access was made, but it was contended that once such a request was made and reasonable access was refused, the proceeding was no longer conducted in open court. If correct, it would follow (and it was submitted) that once a magistrate refused such requested reasonable access the court would be acting without or in excess of jurisdiction. The committal proceeding would thus become a "nullity" in the language of the authorities, or I would have thought at least voidable (see *McPherson v McPherson* [1936] AC 177, 204-5) if such a request was made and reasonable access was refused.

40. The plaintiffs' submissions recognised that most of the cases referred to an "open court" in terms of the right of the public to admission to the court and to the importance of the absence of any secrecy as to the existence of that right or as to the way in which it might be exercised (eg knowing the whereabouts of the courtroom). See, for example: *Daubney v Cooper*; *Kenyon v Eastwood*; *Danda v Anastassiou*; *McPherson v McPherson*. On the other hand, a different and more restrictive view has been taken as to the right to see written evidence or exhibits. In *R v Waterfield* [1975] 1 WLR 711 the Court of Appeal heard an appeal by a defendant who had been charged on indictment with 12 counts of fraudulent evasion of a prohibition on the importation of indecent films contrary to the *Customs and Excise Act*. The judge had closed the court to the public and the press during the showing of the films. The appeal was based on a preliminary point that the trial had therefore been a nullity because that part of the trial was not held in public. Lawton LJ (for the court) said (at 713-5): [*After setting out this passage in which Lawton LJ held that the judge's decision to have the films shown in a closed courtroom was not an irregularity, His Honour continued*] ...

41. The case of *R v Felixstowe Justices* [1987] QB 582; [1987] 1 All ER 551; [1987] 2 WLR 380 may be thought to support a wider principle of open justice. That case decided that the justices had no power to withhold their names from the public and the press because such a power was not necessary in order to effectively control the conduct of their own proceedings. The principle of open justice was utilised in a negative sense to limit what was described as the "inherent power" of the court. It is relevant in this context to note that it has been authoritatively stated in Australia that a magistrates' court has no "inherent power" but rather only the implied power necessary for the exercise of its limited jurisdiction. In *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183, Dawson J in the course of discussing the history and nature of committal proceedings said (at CLR 15-17):

> "The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. *A fortiori* that must be the case when its functions are of an administrative character ... it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (*ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental ...
>
> It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'. ... The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of

course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him."

42. It was not suggested by the plaintiffs, and it could not be correct to say, that a committal proceeding is not conducted in open court if all that has happened is that the committal proceeding has been conducted in accordance with s56 of the Act and Schedule 5 thereto. Indeed, s125(1) of the Act requires proceedings to be conducted in open court "except where otherwise provided". It is Schedule 5 of the Act which authorises the use of the hand-up brief procedure and which requires as part of that procedure that the hand-up brief (including the charge-sheet and the witness statements) be served and filed and provides that the evidence contained in the witness statements need not be given orally. Of course, Schedule 5 does not prohibit the provision of access to copies of the charge-sheet and witness statements to members of the public but, I repeat, the plaintiffs did not submit that the court was under any obligation to do so, unless requested.

43. In my opinion, the open court requirement contained in s125(1) does not extend to obliging the court to provide, upon request, reasonable access to copies of the charge-sheet and witness statements. I consider that a proceeding is conducted in open court if the public has a right of admission to that court which is reasonably and conveniently exercisable. I do not think that an open court becomes a closed court if a request by a member of the public or the media for access to the charge-sheet, the witness statements or any part of the hand-up brief is refused in a committal proceeding. Likewise, an open court would not become a closed court if access to an affidavit relied upon but not read or to an exhibit tendered were refused to a member of the public or the media in a civil proceeding.

44. The difficulties which have been and are being created by the increasing use of written evidence may be appreciated in the light of what was said by Lord Diplock in *Home Office v Harman* [1983] 1 AC 280, 302-3; [1982] 1 All ER 532; [1982] 2 WLR 338:

> "...justice in the courts of England is administered in open court to which the public and press reporters as representative of the public have free access and they can listen to and communicate to others all that was said there by counsel or witnesses. The common law system of trial in which the evidence is given orally upon oath before the court of trial itself, in contrast to the practice followed by the courts of countries whose legal systems are based upon the civil law, thus results in the 'public hearing ... by an independent and impartial tribunal established by law' that is called for by **[24]** article 6 of the European Convention on Human Rights being a good deal more informative in England about the details of particular cases than it is in most civil law countries."

45. However, the fundamental purpose of the open court rule, it must be remembered, is not the provision of information to the public at large or the facilitation of public discussion, as was said by Lord Diplock in *Home Office v Harman*, *supra*, in a passage following the one extracted above:

> "So far as England is concerned the principle that civil actions must be heard in open court was accepted by this House as being the established general rule in *Scott v Scott* [1913] AC 417; [1911-1913] All ER 1; 29 TLR 520, and is often referred to by the name of that case, although most of the speeches were devoted to discussion of exceptions to that rule. In the speech of Lord Shaw of Dunfermline, however, is to be found a useful quotation from Bentham that states the reason for the rule. It is not: to satisfy public curiosity about the private affairs of individuals who have recourse to courts of justice for the resolution of their disputes rather than each agreeing with the other to submit them to arbitration; nor is it, even, what might be regarded as a less unworthy reason, to facilitate public discussion on matters of general public interest that may happen to have been involved in the dispute between the particular parties to the suit – as was undoubtedly the case in *Williams v Home Office* [1981] 1 All ER 1151 itself. The reason is, as Bentham put it in one of the passages cited by Lord Shaw of Dunfermline, at p477:
>
> > 'Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.' (*Benthamiana, or Select Extracts from the Works of Jeremy Bentham* (1843), p115.)"

46. There is, it seems to me, a distinct and overlapping but wider public policy of "open justice" which is not only concerned with the conduct of proceedings in open court, thereby keeping the judiciary under public scrutiny, but which is also concerned with keeping the public at large informed of what is occurring in the courts. This policy acknowledges that the public can only

be kept so informed if the members of the media are able to go about their task without undue hindrance or impediment. The policy or principle was utilised in such cases as *R v Felixstowe Justices*, *supra*, and *Herald and Weekly Times Ltd v Medical Practitioners Board* [1999] 1 VR 267 to limit a court's or tribunal's power to restrict access to information. In the latter case, Hedigan J said (at 278):

> "The reason for the favouring of open hearings is intimately connected with the conduct of public affairs in a democracy, namely, that it is, as a general principle, in the public interest that disputes between State and citizen, and citizen and citizen, not be tried behind closed doors but so that the work of those appointed to decide, the evidence given by witnesses, and the decisions can be scrutinised by all who care to visit. Since not everyone can visit, citizens in a democracy depend to a substantial extent upon accurate and published reporting of what takes place. Restrictions on access to the courts and on the dissemination of events which take place in court ought, it seems to be generally thought, only be imposed if it is necessary to do so for the proper administration of justice …

In an open and truly democratic society, the right of various forms of the media (that is, the media as a means of communication of the issues, parties and the hearing) to be present and to publish is generally regarded as being in the public interest, so long as the reports are accurate and do not misrepresent, by omission or unbalanced selection, the evidence and its effect. The right to report is seen as an adjunct to the right to attend."

47. The policy or principle has been applied in order to narrowly construe statutes seen to be departing from the open administration of justice (see what was said by Kirby P in *Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47, 55). The principle was recently discussed by the Lord Chancellor, Lord Irvine of Lairg, in an address at University College, Dublin: *"Reporting the Courts: The Media's Rights and Responsibilities"* (14 April 1999).

48. However, I do not consider that the wider policy or principle can be utilised here either to extend the meaning of "open court" in s125(1) or to justify the necessary implication of a power in the Magistrates' Court to provide access to documents to the public. The plaintiffs' submission involves, in my opinion, an unwarranted attempt to extend the scope of s125(1) which is not justified by the "plain natural and ordinary meaning" of the words "open court" (see *R v Governor of Lewes Prison, ex parte Doyle* [1917] 2 KB 254, 271 per Viscount Reading CJ). Nor is the submission justified by what was decided in the line of authorities relied upon or by the fundamental purpose of the open court rule.

49. There are no doubt powerful public policy arguments for the provision of documentary access to the media and the public as I have already suggested, but an adequate and workable mechanism should be provided to deal with the problems by clear legislation or by rules of court and not by stretching the statutory language. The past attempt to deal with the problem in committal proceedings by an agreed protocol may perhaps have been unsatisfactory. The present solution by "practice direction" may well be totally unsatisfactory but I do not think that a strained process of statutory interpretation possibly leading to a plethora of individual court applications by members of the media offers the correct solution.

50. The conclusion that s125(1) of the Act does not bear the construction advanced by the plaintiffs means, I think, that the plaintiffs' case fails because Mr Houghton disavowed any argument that the court had an obligation to provide access to the documents independently of the statutory provision. Indeed, as I have already foreshadowed, I think there is much to be said for the view advanced by Mr Graham that the court has no power to grant access to the charge-sheet or the witness statements. It has no express power to do so and it would not seem to be a power that needs to be implied to enable the court to effectively exercise its statutory jurisdiction (see *Grassby v R*, per Dawson J, *supra*). If that is so, Practice Direction 41/98 is superfluous both in court and also out of court. Out of court, s18(3) of the Act does not permit a non-party to inspect the register, except for the final orders, and "the register" in this context, I would think, must include all documents kept by or filed or lodged with the court under the sections which I have earlier referred to. If, contrary to my view, a magistrate does have power, in court, to grant access to the charge-sheet or the witness statements, I doubt that this power could be countermanded by a practice direction. Insofar as the so-called practice direction seeks to resolve the practical problem by requiring that members of the media be referred to the DPP (who will then feel constrained to seek the consent of the defendant), it seems to me to be ill-advised if not beyond power.

51. For the foregoing reasons, the originating motion is dismissed. I reach that result with no great satisfaction because it is manifest that the media, as the link between the courts and the public at large, should in general be afforded reasonable access to such information concerning any court proceeding, committal or otherwise, as will enable fair and accurate reporting to take place. A balanced solution ought to be promulgated which satisfies that aspect of the public interest without interrupting or interfering with the conduct of court proceedings and the due administration of justice.

APPEARANCES: For the plaintiffs Herald & Weekly Times Ltd & Ors: Mr W Houghton QC and Mr J Elliott, counsel. Corrs Chambers Westgarth, solicitors. For the second defendant DPP: Ms R Carlin, counsel. Director of Public Prosecutions. For the Attorney-General (intervening): Mr D Graham QC, Solicitor General and Mr N Hopkins, counsel. Attorney-General of Victoria.
