33/98; [1998] VSC 98

SUPREME COURT OF VICTORIA

CLIFFORD v ADAMS

Smith J

18 September, 9 October 1998

PROCEDURE – SEARCH WARRANT – TEST TO BE APPLIED FOR ISSUE OF – WHETHER EXISTENCE OF PRIVILEGE RELEVANT TO ISSUE OR NOT – WHETHER ADMISSIBILITY OF MATERIAL SOUGHT RELEVANT TO ISSUE OF WARRANT: *CRIMES ACT* 1958, S465.

1. The existence of privilege is not relevant to the exercise of the discretion to issue a search warrant pursuant to the provisions of s465 of the *Crimes Act* 1958 ("Act"). However, a magistrate may refuse to issue a warrant where to do so would be futile or an abuse of the process. There could be extreme cases where a document sought was clearly privileged and there was evidence that privilege would inevitably be claimed and claimed successfully. Further, a magistrate may decline to exercise the discretion in the very extreme situation where it came to the notice of the magistrate that the officer seeking to execute the warrant intended to abuse the procedure.

***Allitt v Sullivan* [1988] VicRp 65; [1988] VR 621, considered.**

2. The test set out in s465 of the Act for the issue of a search warrant is whether there is reasonable ground to believe that the articles sought will afford evidence as to the commission of the offence in question. The question of the admissibility of any evidence gathered under the warrant is irrelevant to the statutory pre-conditions. It matters not that the information gathered is not admissible. The question of admissibility could become relevant later in determining a claim for public interest immunity on or after the return of the warrant. Upon the return of the warrant, a magistrate would be able to examine the documents should it be necessary to resolve a claim of public interest immunity.

SMITH J: [1] The Proceeding

1. By originating motion, the plaintiff seeks relief challenging the decision made in the Magistrates' Court at Melbourne on 9 August 1998 whereby the Defendant refused to issue a warrant authorising the plaintiff or members of the police force to search the Mont Park Psychiatric Hospital at Waiora Road, Macleod, for all medical records relating to one Thien Nguyen ("Nguyen") and, inter alia, to bring such medical records before the court so that the matter might be dealt with according to law. The relief sought was, firstly, an order in the nature of certiorari quashing or setting aside the order made, a declaration that the defendant erred in law by refusing to issue the search warrant pursuant to s465 *Crimes Act* (Vic) 1958 and an order in the nature [of] mandamus requiring the defendant to issue the search warrant.

2. Counsel appeared for the defendant to inform the court that he did not take an adversary position but would, of course, accept the decision of the court. At the same time he wished, through his counsel, to assist the court.

3. I proceed on the basis that the errors alleged are said to constitute either errors of law on the face of the record or jurisdictional errors (*Craig v State of South Australia* (1994-1995) 184 CLR 163). No issue was drawn to my attention by counsel for the defendant on this matter or on the question of what constituted the record. The record as I envisage it comprises the three exhibits; namely, the information for a search warrant, the search warrant submitted to the learned Magistrate and the letter from the learned Magistrate advising the plaintiff of the outcome of the application and the reasons. (s10 *Administrative Law Act*).

Background

4. On 11 June 1998 the accused Nguyen was charged with the murder of his brother Thuc Chi Nguyen. The accused was remanded in custody and eventually held at the Melbourne Assessment Prison. He was assessed by psychiatrists as suffering **[2]** from schizophrenia. He was subsequently transferred to the Mont Park Psychiatric Hospital to Ward M6.

5. On 18 June 1998 one Vicki Ryan, the Assistant Manager, Sentence Management Office of the Correctional Services Commission informed the plaintiff of that decision. She also informed the plaintiff that the accused had explained to Dr Vine "that if he had not have killed his brother he would have been killed" (sic). She also told the plaintiff that a note had been made in Nguyen's prison file by her quoting Dr Vine's opinion and the admission made by the accused Nguyen.

6. The plaintiff advised Nguyen's psychiatrist, Dr Bell, of his intention to obtain a search warrant saying that he believed that the accused had made admissions about killing his brother and that this fact had been noted on his file. He advised Dr Bell of the existence of established protocols between the police and the medical profession and that he was giving him notice so that time could be reduced in searching for records. He suggested to Dr Bell that the file could be photocopied and prepared for collection at a pre-arranged time. Dr Bell indicated he was going to seek advice. Subsequently the plaintiff was advised that it was proposed to challenge the warrant application. After further communication between the plaintiff and others, including Professor Mullen, which appears to have led to the involvement of the defendant in the processing of the matter, a warrant application was filed together with an affidavit in support.

7. Application for the search warrant was made pursuant to s465 *Crimes Act* (Vic) 1958, it provides as follows:

> "465. Issue of search warrant by magistrate
> 1. Any magistrate who is satisfied by the evidence on oath or by affidavit of any member of the police force of or above the rank of senior sergeant that there is reasonable ground for believing that there is, or will be within the next 72 hours, in any building, receptacle or place—
> (a) ...
> **[3]** (b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence;
> (c) ...
> may at any time issue a warrant authorizing some member of the police force or other person named therein to search such building receptacle or place for any such thing and to seize and carry it before the Magistrates' Court to be dealt with according to law.
> 1(A). ...
>
> 2. Subject to this section the rules to be observed with regard to search warrants mentioned in the *Magistrates' Court Act* 1989 shall extend and apply to warrants under this section..."

8. The search warrant submitted to the learned Magistrate identified the article, thing or material to which the search warrant was to apply as: "All medical records relating to the accused person, Thien Nguyen."

9. The place where the search was to be conducted was described as "Mont Park Psychiatric Hospital, Waiora Road, Macleod." The reason for the search and the suspected offence were described as follows:

> "Admissions made by the accused to psychiatric doctors indicating that he killed his brother Thuc Chi Nguyen. MURDER"

10. Authority was sought for the plaintiff and "all member of the police force". The warrant if issued would have directed them to break, enter and search the place described for any article, thing or material of the kind described in the warrant and "to bring the article, thing or material before the Court so that the matter may be dealt with according to the law:"

The decision

11. At 6:28 pm on Monday 3 August 1998 the plaintiff was informed by an officer of the Magistrates' Court that the defendant had refused the application for the search warrant. The learned Magistrate's reasons were sought.

[4] 12. The learned Magistrate supplied his reasons by letter to the plaintiff. After referring to authority that he was under no obligation to provide reasons, he stated the following:

> In the present matter, I am satisfied that "Mont Park Psychiatric Hospital" which is more correctly described as "Victoria Institute of Forensic Mental Health" would be entitled to resist the production of its records in relation to a security patient on the grounds of public interest immunity. Such a

> claim is not a matter of practicality where a search warrant is concerned. The better approach is for relevant documents to be made the subject of a subpoena where the competing claims may be raised on an application to set aside the subpoena for production of the document.

In my opinion the only relevant paragraphs for the affidavit in support of the application for a search warrant are paragraphs 34-36, which are as follows:

> '34. The accused was held in custody at the Melbourne Assessment Prison following his arrest in which time he was spoken to and assessed by Dr Ruth Vine of the Forensic Psychiatric Hospital situated at Mont Park.
>
> 35. During this assessment the accused told Dr Vine that he had to kill his brother otherwise he (the accused) would have been killed.
>
> 36. Investigators believe medical reports relating to the accused Thien Nguyen held at the Forensic Psychiatric Hospital at Mont Park will contain evidence that will implicate the accused in the murder of his brother Thuc Chi Nguyen on or about 7 June 1997.' I am unable to be satisfied that the belief of the investigators would lead to the discovery of any admissible evidence against the accused. I assume that what is hoped is that the documents sought will contain a record of admissions made by the accused in the course of treatment as a security patient, i.e. a person charged with offences involuntarily detained as a patient. I cannot accept that any such material would be admissible as evidence against the accused. In my opinion, in these circumstances to issue a search warrant would be oppressive and contrary to public interest."

13. I think it implicit in the brief reasons of the learned Magistrate that he accepted that the statutory pre-conditions for the issue of the warrant were made out but **[5]** determined that in the exercise of his discretion he would not issue one. It is not disputed by the plaintiff that such a discretion exists. I was referred to the decision of Gillard J in *Long v Magistrates' Court* [1997] VSC 40 (1997) 96 A Crim R 149, at 153 where His Honour commented that even though a Magistrate be satisfied as to the pre-conditions set out at s465(1)

> "he does have a discretion whether he should issue the search warrant or not. However, the discretion must be exercised judicially and to give effect to the object of the section. It is difficult to conceive of any circumstances which would justify a refusal to issue once the pre-conditions had been satisfied." (See, also, Murphy J in *Allitt v Sullivan* [1988] VicRp 65; [1988] VR 621 at 623.)

The alleged errors

14. Thus, the plaintiff seeks to challenge a discretionary decision. He seeks to do so on three bases. It is said that the defendant erred in exercise of his discretion under s465 of the *Crimes Act* (Vic) 1958 in that:

> (a) he acted upon a wrong principle by allowing a putative claim of public interest immunity to guide or affect him
>
> (b) he applied the wrong test by deciding that the search warrant would not lead to the discovery of any admissible evidence against the accused and the proper test to ask himself was whether the search warrant would afford evidence as to the commission of any offence;
>
> (c) he applied the wrong test by refusing to issue the search warrant on the ground that to issue the search warrant would be oppressive and contrary to the public interest.

15. As I read His Worship's reasons his reference to the issuing of a warrant being oppressive and contrary to public interest was the conclusion he expressed based on what he had earlier said. Thus he was taking a position that because, in his view, the Victorian Institute of Forensic Mental Health would be entitled to resist production of all its records in relation to a security patient on the grounds of public interest immunity and because he could not be satisfied that the execution of **[6]** the warrant would lead to the discovery of any admissible evidence against the accused it would, therefore, be oppressive and contrary to public interest to issue the warrant. Thus, I do not understand His Worship to be suggesting in his final words any new basis but rather attempting to summarise what had gone before and to speak of its consequences. In my view, the fate of the application turns on whether error is shown in the manner set out in paragraphs (a) and (b) above. As to the issue of public interest immunity, I note that His Worship considered that it applied to the whole of the records relating to Nguyen held by the Institute.

Ground (a) – Public Interest Immunity

16. As to the first ground, the plaintiff submits in essence that it was not open to the learned Magistrate to have regard to the putative claim of public interest immunity in exercising his discretion. It is submitted for the plaintiff that questions of privilege are not relevant to the decision whether to issue a warrant but are matters that are relevant for consideration on the return of the warrant. Reference is made to the fact that under s465 of the *Crimes Act* 1958 and under the terms of the warrant itself, the officer executing the warrant is obliged after conducting any necessary search and seizure, to carry the items seized "before the Magistrates' court to be dealt with according to law". It is put that it is at that stage that issues of privilege are to be argued and canvassed, if at all, but not at the time of issue.

17. Counsel appearing for the defendant drew my attention to certain matters that may be relevant. My attention was drawn to the scheme under the *Mental Health Act* 1958 whereby persons described as security patients (s3) may be detained under a residential hospital order. The Act envisages that such persons will be detained and treated for their illnesses (s16(3)(b)(4), and (5)). The Act contains a confidentiality section (s120A) which forbids the giving or disclosure of certain information. My attention was drawn also to s20 which provides that letters written to or by security patients must be forwarded without being opened subject to an exception where security conditions are imposed. Counsel suggested that **[7]** there was a heavy emphasis on confidentiality and on treatment. Counsel suggested that a public interest immunity issue could arise because of the public interest in the proper functioning of the security patient system which could be jeopardised by the execution of search warrants. Their execution would cast doubt on whether any relationship between psychiatrist and patient formed in the course of treatment under the Act could ever be confidential and might discourage patients from speaking frankly with their psychiatrist when seeking treatment. It is suggested that there is a public interest in ensuring that such treatment be successful and treatment is seen by the statute as being an important function of the statutory system.

18. In *Allitt v Sullivan* (above at 623) the Full Court was asked to consider whether the existence of privilege, in that case legal professional privilege, was something that needed to be considered at the issuing stage and dealt with by endorsing the warrant with an endorsement excepting privileged documents from production. It was argued that any warrant authorising a search of solicitors' premises must, if it is to have any validity, bear an endorsement or direction drawing attention to the fact that its execution did not apply to documents entitled to legal professional privilege. The submission was that if it did not do so, the warrant was invalid.

19. Murphy J (at 629-30) referred, *inter alia*, to the case of *Arno v Forsyth* (1986) 9 FCR 576 (1986) 65 ALR 125, a case concerning warrants issued under s10 *Crimes Act* 1914 (Cwth). In that case it appears that Fox J took the view that privilege was something to be considered at the time when it was sought to execute the warrant. Lockhart J took the view that the issue needed to be addressed at the time the warrant was issued and should be addressed by stating matters relating to legal professional privilege. Murphy J in *Allitt v Sullivan* (above) did not accept those propositions and accepted that privilege could be considered at the time of execution. Jackson J took the view that it was not open to say at the stage when the warrant was issued whether the warrant was bad on its face because it referred to documents which were privileged.

[8] 20. Murphy J however, appeared ultimately to base his decision on the conclusion that there was nothing in the material before the Magistrate to alert the Magistrate to the possibility that the warrant might relate to documents subject to legal professional privilege. His Honour went on to comment that the warrant was in the prescribed form and there was nothing in the regulations requiring any specific endorsement relating to legal professional privilege. He referred to s465 of the Act and the requirement to bring the relevant documents before the issuing Magistrate or Justice to be dealt with "according to law" and commented that if a claim of legal professional privilege is made on execution of the warrant it would be appropriate (631):

> "that the Justice to whom the documents are 'carried', if in any doubt as to the law, should give the claimant to privilege or the solicitor (for it is the client's privilege and not that of the solicitor), or the executing constable (as the case may be) the opportunity to obtain a court ruling, before disposing of the documents in any way at all."

21. His Honour went on to deal with the problem where the parties have no faith in one another by suggesting that in that situation:

> "Upon a solicitor, on execution, taking objection, the documents could be secured in some way (say in a box or an envelope) and both parties could go to the Justice, to whom the situation could be explained, and he could then rule upon the matter, if this was possible, and give the parties the opportunity to obtain a court ruling, before he dealt with the documents carried to him according to law" (631).

22. Later in his reasons, his Honour spoke (at 632) of the duty of the executing officer to execute the warrant reasonably and that simply because a claim of professional privilege was made it did not mean that the authority of the warrant ceased so that the executing officer had no warrant to proceed. He went on:

> "I would be inclined to accept that, if the executing officer took any step in connection with the documents seized, other than to carry them directly to the justice, he would be acting in excess of his authority. Then, before the justice, it would be his duty to explain to the justice even if the solicitor was not present, that a claim for legal professional privilege had been made in respect of the document. Here, once again, if he did act in any manner which was found to **[9]** infringe the protection, in fact attaching to the document because it was the subject of legal professional privilege, he would also be acting in a manner rendering him liable to action. No doubt, the justice, if in any doubt about the document would fix some reasonable time in the circumstances within which the relevant party could commence proceedings in the Supreme Court to determine the disputed issue, and in the meantime secure the material."

23. Brooking J (as he then was) in *Allitt v Sullivan* (above at 638) described the scope of authority given by a search warrant as follows:

> "A warrant issued under s465 authorises in terms search, seizure and carrying away. Once a thing has been found, identified and seized, then neither the warrant nor the section pursuant to which it was issued says anything in terms by way of authorising the executing officer to retain or use the thing seized: his power and his duty is to carry it before a justice to be dealt with according to law. I do not see how it can be said that the warrant itself, or s465, authorises retention or use of what has been seized. For such retention or use is inconsistent with the duty imposed by the warrant on the executing officer to carry what has been seized before a justice to be by him dealt with according to law..."

24. Should the officers executing the warrant improperly peruse any documents beyond what was needed for inspection they would a face an argument in any trial where evidence identified or gained as a result of that inspection might be used, that that evidence was improperly or illegally obtained and the *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 discretion should be applied.

25. His Honour commented further (640, 641):

> "A warrant under s465 authorises search and seizure. Documents must be identified and this will require limited inspection of them in the absence of an act of identification by the party having possession of the documents which is accepted by the officer executing the warrant. There is some danger that in a given case the mere inspection of documents for the purpose of identification will trespass upon the relationship of solicitor and client. There is also the practical danger that a police officer executing a warrant will act wrongfully by looking at documents covered by legal professional privilege otherwise than for the purpose of identifying them, whether he does this before or after seizure. If s465 does not exempt documents the subject of legal professional privilege from seizure, there is thus a double risk of violation of the privilege ... These considerations may be thought to show that the section should **[10]** be construed as exempting privileged documents from seizure. The first consideration - possible lawful violation - is undoubtedly material. As to the second, I am strongly disposed to think that the Court should proceed upon the basis that the police will act lawfully in the execution of these warrants, at all events once attention has been drawn to the limitations to which their powers are subject in consequence of the requirement of the warrant that the things seized be taken before a justice. We are after all concerned with the intention of Parliament, and I do not think that Parliament should be taken to have assumed that the requirements of warrants would not be observed by executing officers. There are, moreover, practical checks available against abuse of the warrant. A solicitor might, it seems to me, insist on accompanying the seized documents to a justice;..."

26. His Honour then went on to discuss the considerations that favoured construing s465 as requiring legal professional privilege to be considered at the stage when the documents are brought before a justice and not at the time of the issuing of the warrant.

27. After noting the provisional nature of the seizure under a warrant Brooking J, (at 641) referred, *inter alia*, to *Arno v Forsyth* and the uncertainty he saw being created by the approach suggested by Lockhart J in an area where in his Honour's view, certainty was of the first importance. He stated (642):

> "That certainty may, for the purposes of s465, be achieved by our holding that privilege is something to be dealt with when the seized documents are brought before a justice. The alternative is, in my view, judicial legislation: a code of procedure in relation to the issue and execution of warrants based, not on statute or on the known rules of the common law, but on judges' notions of what is fair and reasonable. It is possible that the Federal *Crimes Act* has driven us to this extremity, but I do not accept that s465 has done so."

28. Hampel J took a different view concluding that when issuing a warrant in respect of documents at a solicitor's office, a Magistrate should advert to the question of legal professional privilege and satisfy himself that the documents the subject matter of the search that was proposed were not privileged. He went further to say that if a Magistrate was not able to determine that question then he was obliged to limit the scope of the warrant or to provide a procedure by which it could be **[11]** ensured a privilege was not violated. I note that His Honour went on to say (at 663):

> "...s465 of the *Crimes Act*, pursuant to which this warrant was issued, authorised the police officers who executed the warrant to search and seize the objects or documents described, and carry them to the Magistrate who issued the warrant or another justice to be dealt with according to law. The section and the warrant authorised no more than that."

29. I did not understand the majority in that case to disagree with those latter propositions.

30. Another reason to conclude that issues of privilege may not be relevant at the issuing stage is that s465 envisages an ex-parte application. There is, of course, good reason for this. In the typical case the reason for issuing the warrant is to ensure that what is sought to be seized cannot be destroyed or cannot disappear. This could not be achieved in such cases where notice had to be given to the party against whom the warrant had to be issued. The machinery of s465 deals with the problem of protecting the rights of the person from whom the documents might be seized by requiring that they be brought before the Magistrate. Any issues of privilege may there be canvassed with the involvement of the person claiming privilege. Alternatively, the documents can be held by the court while proceedings are taken to challenge the validity of the warrant (see discussion in *Allitt v Sullivan* at 642 (10)).

31. The discussion of the majority in *Allitt v Sullivan* provides considerable support for the conclusion that the existence of privilege is not relevant to the exercise of the discretion to issue the warrant and that His Worship erred in considering it. The Full Court, however, did not express itself in such terms and it would be fettering the statutory discretion to hold that the existence of privilege could never be relevant. The plaintiff conceded that there may be some scope under the discretion to refuse to issue a warrant where to do so would be futile or an abuse of the process.

[12] 32. There could be, at least theoretically, extreme cases where a document was sought pursuant to a search warrant which was without any question privileged and there was evidence that privilege would inevitably be claimed and claimed successfully. In such circumstances it might be appropriate for the person issuing the warrant to take the view that it would be futile and that the privacy of the person holding the document should not be invaded. Such example postulates an extreme and clear case. There might also be an extreme situation such as one where plainly some of the documents sought were privileged and it came to the attention of the magistrate that the person executing the warrant would ignore any claims to privilege and seek to inspect the documents prior to the court determining the proper disposition of the documents. Again this is a very extreme situation and one could understand a Magistrate declining to exercise the discretion in that situation because it would involve the unlikely scenario of the officer seeking to execute the warrant intending to abuse the procedure.

33. Approaching the decision as a discretionary one, and assuming that public interest immunity can be relevant, the issue to be resolved is whether it was open to His Worship to conclude, on the material he had before him, that the Victorian Institute of Mental Health would

be entitled to resist production of the records on the grounds of public interest immunity and that such a claim would necessarily be successful. The question of the application of public interest immunity is one which requires information as to the nature of the contents of the documents in question and a balancing of competing public interests (see, for example, *D v National Society for the Prevention of Cruelty to Children* [1977] UKHL 1; [1978] AC 171; [1977] 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5; *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97;). Until the documents were before the issuing Magistrate in response to the warrant and they and the nature of their contents capable of identification, until he had also received from the Institute an outline of the bases upon which public interest immunity was said to arise in respect of each document in the records and a response from the informant to that **[13]** outline, no conclusion could properly be formed in my view as to the existence of any privilege. Thus the first ground is made out.

Ground (b) – Relevance of Admissibility of Evidence

34. The other ground on which the decision is challenged is, in essence, that His Worship erred in taking into account that he was unable to be satisfied that the search warrant would lead to the discovery of any admissible evidence against the accused. It is put for the plaintiff that the question posed by s465 of the Act was whether the search warrant would "afford evidence" as to the commission of any offence. It is true, as argued for the plaintiff, that test used by His Worship is not the test posed in the pre-conditions set out in s465 of the Act. The question posed there is whether there is "reasonable ground to believe" that the articles sought will "afford evidence as to the commission" of the offence in question. The issue to be determined, however, is whether it is relevant to the statutory pre-conditions or to the exercise of the statutory discretion, or both, to form a view as to whether, any admissible evidence is likely to be produced as a result of the search.

35. I accept the plaintiff's contention that the question of the admissibility of any evidence produced under the warrant is irrelevant to the statutory pre-conditions.

36. The phrase "will afford evidence as to the commission of [an] offence" was considered by the High Court in *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 at 119; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246). In a joint judgment the Court commented:

> "The power to issue a search warrant is in aid of criminal investigation as well as in aid of proof at the trial, though it is necessary that the investigation should have reached the stage where reasonable grounds for the statutory suspicion and belief can be sworn to. An object will answer the description in par (b) if there are reasonable grounds for believing that it will assist directly or indirectly in disclosing that an offence has been committed or in establishing or revealing the details of the offence, the circumstances in which it was committed, the identity of the person or persons who committed it or any other information material to the investigation of those matters."

The admissibility of such material is not to the point. It matters not that the **[14]** information gathered is not admissible.

37. Turning to the discretion, it is difficult to see how the admissibility or potential admissibility of any evidence that might be produced by the search could affect the exercise of the discretion to issue the warrant. The warrant is issued for the purpose of investigation and because there are reasonable grounds to believe that it will "afford" evidence - that is, that its execution may either itself produce admissible evidence or provide information that may lead to the gathering of evidence that will be admissible. Further, the issuing Magistrate will not be in a position to form a view about the admissibility of what may be gathered because he or she will not know the precise nature of the evidence or its form. In those circumstances it seems to me that it may fairly be said that the question of the likely admissibility of the evidence is not a matter that can be or should be considered at the time the warrant is issued.

38. Admissibility could become relevant later in determining a claim for public interest immunity on or after the return of the warrant. Any such claim involves a weighing up of competing public interests. It may well be relevant to that exercise to determine whether what is involved is the gathering of information which may lead to admissible evidence or whether what is involved is a piece of evidence which is admissible and may well be significant – such as an admission freely

given by an accused person. Those issues, however, would be issues to be considered on the return of the warrant before the issuing Magistrate should an issue of public interest immunity emerge. The Magistrate or an appropriate higher court would be able to examine the documents should it be necessary to resolve any such claim.

39. I have come to the conclusion, therefore, that the admissibility of the evidence that might have been gathered in executing the warrant was not a relevant consideration in the exercise of the discretion. Alternatively, if it was relevant, I am satisfied that there was insufficient material before the defendant to enable him to reach the conclusion that he did. That conclusion was not open. If the basis for the **[15]** defendant's conclusion was that any evidence gathered under the warrant would be subject to public interest immunity and therefore not admissible, that issue was not open for the reasons given in relation to the first ground.

Conclusion

40. For the foregoing reasons, I am persuaded that both grounds have been made out.

41. I was invited by counsel for the defendant to consider submissions as to what considerations are generally relevant to the statutory discretion on the basis that that might assist those asked to issue warrants. I do not think it appropriate, however, that I should do more than consider the issues that were raised or emerged in this case and, to that extent, hopefully give some guidance. I refer, in particular, to the references above from *Allitt v Sullivan*.

42. I will entertain further submissions on the appropriate form of orders to give effect to my reasons and decision.

APPEARANCES: For the Plaintiff: Mr G Silbert, counsel. Victorian Government Solicitor. For the Defendant: Mr F Costigan QC and Mr J O'Bryan, counsel. Hardham Dalton Sundberg, solicitors.
