

05/13; [2013] VSC 2

SUPREME COURT OF VICTORIA

McKENZIE & ANOR v MAGISTRATES' COURT of VICTORIA & ANOR

Sifris J

10, 25 January 2013

PRACTICE AND PROCEDURE – COMMITTAL PROCEEDING – WITNESS SUMMONSES ISSUED TO JOURNALISTS REQUIRING THEM TO GIVE EVIDENCE AND PRODUCE DOCUMENTARY MATERIAL – FINDING BY MAGISTRATE THAT SUMMONSES HAD BEEN ISSUED FOR A LEGITIMATE FORENSIC PURPOSE – WHETHER DENIAL OF NATURAL JUSTICE – SUFFICIENCY OF EVIDENCE RELIED UPON – SCOPE OF LEGITIMATE FORENSIC PURPOSE FOR WHICH EVIDENCE SOUGHT – WHETHER THERE WAS A BASIS FOR FINDING THAT THE SUMMONSES COULD BE USED FOR LEGITIMATE FORENSIC PURPOSE – WHETHER THERE WAS A BREACH OF PROCEDURAL FAIRNESS – PLAINTIFF'S KNOWLEDGE OF MATERIAL RELIED UPON IN MAKING DECISION – WHETHER REASONS ADEQUATE – IDENTIFICATION OF EVIDENCE RELIED UPON – DISCLOSURE OF USE OF EVIDENCE – WHETHER EVIDENCE PROPERLY CONSIDERED – USE OF TRANSCRIPT TO SUPPLY CONTEXT TO RULING – WHETHER IRRELEVANT CONSIDERATIONS TAKEN INTO ACCOUNT – RELEVANCE OF MATERIAL RELIED UPON – WHETHER MATERIAL WAS 'MERE SPECULATION' – PLAINTIFF'S KNOWLEDGE OF MATERIAL RELIED UPON – WHETHER MAGISTRATE MADE AN ERROR OF LAW.

HELD: Application for judicial review dismissed.

1. If the Magistrate approached the matter correctly and in accordance with established principles in relation to the decision-making process, the fact that the consequence may have required the Plaintiffs to reveal their sources was not to the point. This case was not about the protection of sources by journalists. It was assessment as to whether correct procedures were followed and the law was complied with and not the substantive correctness of the Ruling.

2. The Magistrate clearly approached the application on a broader basis than that submitted by the Plaintiffs. He did not regard the legitimate forensic purpose for which evidence was sought as being restricted to officers of the AFP. If this was the case it could be argued (and this was the foundation of the Plaintiffs' case on this ground) that having identified this restricted legitimate forensic purpose his Honour ignored or did not properly or adequately deal with the conclusive and uncontradicted evidence of Peter Bartlett and in particular paragraph 5(d) of Bartlett's affidavit.

3. The Magistrate's ruling did not give rise to an error of law because he did not confine the legitimate forensic purpose in a way that was inconsistent with the evidence. His Honour's approach was much broader and in fact consistent with the evidence given by Bartlett. Everyone agreed that the identification of this broader category of people may have been relevant to any submission concerning the interests of justice point.

4. As the relevant pages of the transcript made absolutely clear every effort was made by the Magistrate to inform the Plaintiffs' Senior Counsel of the relevant issues and context. The Plaintiffs' Senior Counsel had the transcript of 10 December 2012 in his brief and participated fully in the argument on 20 December 2012. No adjournment was sought and there was an adequate and sufficient understanding of the relevant issues and in particular the context in which the sources were relevant.

5. Having regard to the transcript of the day, it provided context to the reasons and the Ruling and in fact directly informed the Ruling. It was a continuous transcript and his Honour assumed that by delivering his Ruling with limited reasons immediately after argument it was not necessary to repeat or rehearse all of the arguments made earlier in the day, and which were familiar to all. With the transcript there was an adequate basis set out as to why the decision was reached. Although the Ruling was not sequential or compendious, given the nature of the application it was in the circumstances adequate.

6. The nature and subject matter of the Ruling was important. His Honour was not resolving issues of fact on the evidence but was called upon to make an assessment as to whether evidence could be relevant. The Article by the journalists and Bartlett's affidavit provided a sufficient basis for such determination and this emerged from the reasons and the transcript. In the context of an interlocutory application involving a non-party in relation to a permissible evidence gathering exercise the reasons given in the transcript were adequate.

7. The submissions were not 'mere speculation' and as such an impermissible foundation (and hence irrelevant consideration) to assess whether there was a legitimate forensic purpose. The submissions were made and various matters were raised in relation to the interests of justice point. Having been identified, although not necessarily established, it was permissible to endeavour to gather any further evidence that may have been helpful or directed to the submissions. The sources of the Article may well have been helpful and in making such a determination his Honour did not take into account any irrelevant consideration.

8. Accordingly, there was no error made by the Magistrate on the face of the record.

SIFRIS J:

Introduction and background

1. The Second Defendant and others face charges of conspiring to bribe foreign officials in Indonesia. The prosecution contends that the Second Defendant conspired to pay excessive commissions to an Indonesian agent, Radius Christanto ('Christanto'), who used part of these commissions to bribe Indonesian central bank officials in order to obtain bank note printing contracts. Committal proceedings with respect to the said charges commenced on 13 August 2012.

2. On 10 December 2012 the Second Defendant (and six of the other accused) were due to commence final oral submissions. Written submissions on behalf of the Second Defendant and the other accused had already been filed. They argued, amongst other things, that there was insufficient evidence for the Second Defendant (and the others) to be committed for trial. No evidence has been given from any witness from Indonesia and there has been no evidence presented of any money passing from Christanto to any bank officials. They also argued that the charges should be dismissed in the interests of justice pursuant to s11.5(6) of the *Criminal Code Act 1995* (Cth) ('Code') because of an abuse of process and impropriety in the way the case had been investigated and conducted.

3. The submissions of the Second Defendant and the other accused as to why the charges relating to the alleged conspiracy should be dismissed in the interests of justice address a broad range of matters, including prejudicial media publicity, especially some initiated by the Plaintiffs; the use of the media to place pressure on the accused; the manipulation of the committal process in various ways for apparently strategic reasons and the concealment of potentially relevant evidence from the Commonwealth Director of Public Prosecutions and in turn the Defence.

4. The Plaintiffs are journalists. They have been writing articles about the case and closely following it since about May 2009.

5. On 8 December 2012 an article written by the Plaintiffs was published in the print edition of the *Saturday Age* and online at *www.theage.com.au* titled 'Bagman to tell all in notes scandal' (the 'Article'). The Article stated that Christanto had done a deal to give direct evidence against the Second Defendant and others, which would greatly enhance the prosecution case. The Plaintiffs wrote that senior government sources and prosecutors had been a source for some of their information. The Crown Prosecutor in the committal proceeding has told the Magistrates' Court that there is presently no statement from Christanto.

6. If the Plaintiffs' sources are connected with the investigation or the prosecution of the Second Defendant and the other accused, this may strengthen the submissions of the Second Defendant and the other accused that the charges against them should be dismissed in the interests of justice, particularly if the information provided is incorrect or inaccurate.

7. On 11 December 2012, a witness summons was issued to each of the Plaintiffs on behalf of the Second Defendant

8. The witness summonses required the Plaintiffs, as authors of the Article, to attend to give evidence and to produce:

All documents relating to an article published in the *Saturday Age* on Saturday 8 December 2012 entitled, 'Bagman to tell all in notes scandal,' including but not limited to information regarding the source(s) and content for the following statements made in the article:

- (a) Radius Christanto has made a deal with the Australian government to plead guilty to bribery and testify in a Victorian Court.
- (b) A senior government source said that in return Christanto was likely to get a greatly reduced jail term.
- (c) Prosecutors expect [Christanto] to verify the authenticity of faxes sent between him and Securrency and NPA, containing explicit references to alleged bribes.

9. The witness summonses were returnable on 20 December 2012. On 18 December 2012, the Plaintiffs filed an application made returnable on 20 December 2012 to set aside the summonses, with a supporting affidavit sworn by Peter Llewellyn Bartlett on 19 December 2012 ('Bartlett's affidavit').

10. Documents answering the description in the witness summonses were not produced by the Plaintiffs but were exhibited to Bartlett's affidavit. The documents related to historical matters that were the subject of paragraphs 8–16 of the Article.^[1] However, paragraphs 1–7 of the Article were said to be the paragraphs that counsel for the Second Defendant was concerned about.^[2] The evidence before his Honour was that there were no documents, other than the article itself and a draft version of the article, in relation to those paragraphs.^[3] Counsel for the Plaintiffs put his instructions to the court that there were no documents in existence in relation to those paragraphs,^[4] and confirmed that the only evidence that could be given by the Plaintiffs was the identity of the person(s) to whom the Plaintiffs had spoken in preparing those paragraphs.^[5]

11. During the course of the hearing of the original application to set aside the summonses, his Honour addressed counsel for the Plaintiffs as follows:

You understand the submissions before me that have already been drafted, though [they] aren't before me in oral fashion, and what is proposed to be argued? That is, that in the interests of justice these charges should be dismissed ... And they should be dismissed, in short form, **because of the misbehaviour of investigating officials, including the misbehaviour of providing information to the media.** And what is really sought, if I understand it correctly, is material that might go to the issue of consideration of the interests of justice. And it does not need great intellectual gymnastics to say that if the source of the article is investigating officials or government, or offices – not officers, but offices – related to government, then that might go to significant consideration of the issue that's raised in relation to the application to dismiss.^[6]

12. Similar comments were made by his Honour both during the course of the hearing on 20 December 2012 and on 10 December 2012 after the publication of the Article.

13. His Honour made two rulings on the application to set aside the witness summonses. The first is the subject of the present proceedings.^[7] In that ruling ('the Ruling'), his Honour held that the witness summonses had been issued for a legitimate forensic purpose relating to the committal proceedings against the Second Defendant, namely whether 'investigating officials' investigating the subject matter of the proceedings below had not 'properly executed their obligations' (the legitimate forensic purpose).^[8] His Honour did not specify whom he meant by 'investigating officials.' Following that ruling, his Honour then ruled on a submission made by counsel for the Plaintiffs that the summonses should be set aside in the exercise of his Honour's discretion. His Honour ruled against that submission. That second ruling is not complained of in the present proceeding.

14. After his Honour's ruling on, *inter alia*, the test of legitimate forensic purpose in relation to both Plaintiffs, and prior to his Honour's ruling regarding discretionary matters, his Honour asked counsel for the prosecution, Mr Robinson, if he had made inquiries in relation to who the source of the material might be. Mr Robinson replied: '[y]our Honour, with the obvious caveat that the DPP is not an investigating agency ... the answer is I do not know the source of the information.'^[9]

15. The Plaintiffs seek Judicial Review of the Ruling under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic). Three grounds are relied on.

16. Order 56 is essentially concerned with procedure. The court is not as such concerned with the correctness of the decision but rather whether the Magistrate acted properly and within jurisdiction and that in making the decision the law was complied with.

17. The scope of the jurisdiction was discussed by the High Court in *Craig v South Australia*.

^[10] In a joint judgment the court said:

Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal, or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of an impugned order or decision upon one or more of a number of distinct established grounds: most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, or fraud, and error of law on the face of the record. Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to 'the record' of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.^[11]

18. In *Chief Constable of North Wales Police v Evans*, Lord Brightman said:

Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.^[12]

19. In *Lednar & Ors v The Magistrates' Court & Anor*, Gillard J said:

This court is not concerned to examine whether in fact each Magistrate made the right decision, whether he or she misapplied some principle of law, but is concerned to ensure that the Magistrate acted within jurisdiction and that in performing his or her decision making process, complied with the law.^[13]

...

I refer to what the High Court said in *Craig's case*, and emphasise that the jurisdiction is not appellate and it does not able this court to substitute for the decision made, a decision which this court thinks should have been made.^[14]

20. If his Honour approached the matter correctly and in accordance with established principles in relation to the decision making process, the fact that the consequence may require the Plaintiffs to reveal their sources is not to the point. This case is not about the protection of sources by journalists. It is an assessment as to whether correct procedures were followed and the law was complied with and not the substantive correctness of the Ruling.

Ground 1 – Natural justice

21. His Honour, it was submitted, denied the Plaintiffs natural justice by implicitly finding that compelling one or both of them to give evidence in the proceedings below could result in evidence being adduced which related to the legitimate forensic purpose, in circumstances where the only evidence before his Honour on the point was in paragraph 5(d) of Bartlett's affidavit to the effect that no officer of the Australian Federal Police ('AFP') was a source for the Article.

22. According to the Plaintiffs, the only identification of the legitimate forensic purpose given to Senior Counsel for the Plaintiffs prior to his Honour making the Ruling was the passage of transcript referred to in paragraph 11 above, which identified alleged misbehavior of 'investigating officials' providing information to the media.^[15] Because the subject charges are offences under the Code, it was assumed by the Plaintiffs that the 'investigating officials' would be officers of the AFP. No suggestion was made to Senior Counsel for the Plaintiffs that any 'investigating officials' other than AFP officers had been involved in investigating the conduct the subject of the committal proceeding.

23. The only material referred to by the court on the subject of misbehaviour or otherwise of 'investigative officials' was the newspaper article written by the Plaintiffs which identifies a 'senior government source'. Bartlett's affidavit deposed that the Plaintiffs had told him and he believed that no officer of the AFP was a source for the Article.^[16] This evidence was uncontested and Bartlett was not cross-examined.

24. The Ruling, supplemented if necessary for comprehensibility by the transcript, discloses,

it was submitted, no basis upon which his Honour could have found that any evidence to be adduced from the Plaintiffs could satisfy the legitimate forensic purpose which his Honour had identified. The Plaintiffs submitted that even if it was accepted that the charges could be dismissed on the basis of investigators having provided information to the media, the transcript discloses no evidentiary foundation for this having occurred. The only evidence, it was submitted, was to the effect that no officer of the relevant investigating authority was involved and this evidence was ignored.

25. His Honour's reference in exchanges with counsel for the Plaintiffs prior to delivering the Ruling to 'submissions that have already been drafted, though aren't before me in oral fashion, and what is proposed to be argued,'^[17] does not assist, it was submitted, because whatever these submissions may have been, they were not disclosed to Senior Counsel for the Plaintiffs. If his Honour relied upon them in finding a legitimate forensic purpose for the issue of the witness summonses, then that finding was made on no evidence, or no evidence that was disclosed to the Plaintiffs.

26. Finally, it was submitted by the Plaintiffs that the absence of evidence, or at least any evidence disclosed to counsel for the Plaintiffs, upon which his Honour made the Ruling, gave rise to an error of law which constituted a breach of natural justice.

27. The Second Defendant contends that the Plaintiffs' argument mistakenly narrows the context and scope of his Honour's Ruling. His Honour's reasons, it was submitted, must be read in the context of the argument that preceded them and the written submissions of the Second Defendant and the other accused, as well as the evidence in the lengthy committal hearing. The matters raised by the Plaintiffs cannot and should not be considered in isolation. It is clear, it was submitted, from a proper reading of the argument before his Honour that he was speaking of a broader category of possible sources for the material than AFP officers alone. The Second Defendant relied on the following passage in the transcript:

His Honour: You understand the submissions before me that have already been drafted, though [they] aren't before me in oral fashion, and what is proposed to be argued? That is, that in the interests of justice these charges should be dismissed.

Mr Collins: Yes^[18]

His Honour: And they should be dismissed, in short form, because of the misbehaviour of investigating officials including the misbehaviour of providing information to the media. And what is really sought, if I understand it correctly, is material that might go to the issue of consideration of the interests of justice. And it does not need great intellectual gymnastics to say that if the source of the article is investigating officials or government, or offices – not officers, but offices – related to government, then that might go to significant consideration of the issue that's raised in relation to the application to dismiss.^[19]

28. The Second Defendant submits that in the above passage his Honour is referring to the possibility that the source of the material could be government officers or others related to government. Elsewhere in argument his Honour hypothesises that the source of the material could have some role in the case in an evidentiary way.^[20] His Honour also refers to the leaking of information from relevant people as a matter to be considered in the overall determination of dismissal in the interests of justice.^[21] Elsewhere his Honour says that the source might be a witness in the case.^[22]

29. Finally, it was submitted that his Honour made no error of law such as to provide any basis for Judicial Review.

30. In my opinion the ground is not made out. His Honour clearly approached the application on a broader basis than that submitted by the Plaintiffs. His Honour did not regard the legitimate forensic purpose for which evidence was sought as being restricted to officers of the AFP. If this was the case it could be argued (and this was the foundation of the Plaintiffs' case on this ground) that having identified this restricted legitimate forensic purpose his Honour ignored or did not properly or adequately deal with the conclusive and uncontradicted evidence of Peter Bartlett and in particular paragraph 5(d) of Bartlett's affidavit.

31. However, it is clear that in using the words 'investigating officials' in the context of 'a legitimate forensic purpose', his Honour did not confine the class to officers of the AFP. This is clear from the passages referred to above and a reading of the transcript of the hearing on 20 December 2012.^[23] The ruling was given on the same day after argument. Reference should also be made to the transcript of 10 December 2012 where it is clear that the category was intended to go beyond officers of the AFP.^[24] The transcripts referred to are not objected to and are properly in evidence. I am entitled to have regard to the relevant passages in relation to this ground which does not concern error on the face of the record.^[25]

32. The adequacy of the reasons given by his Honour is of course another matter, and is the subject of ground 2. However, so far as ground 1 is concerned the ruling does not give rise to an error of law because his Honour did not confine the legitimate forensic purpose in a way that was inconsistent with the evidence. His Honour's approach was, as pointed out, much broader and in fact consistent with the evidence given by Bartlett. Everyone agreed, even Senior Counsel for the Plaintiffs, that the identification of this broader category of people may be relevant to any submission concerning the interests of justice point.^[26]

33. Finally, it was submitted that so far as the broader category was concerned, the relevant material, documents and information and the way in which the committal unfolded were not matters known to the Plaintiffs. This lack of knowledge or disadvantage it was submitted supported a want of procedural fairness that presumably affected the ability of the Plaintiffs to present argument based on a full and proper understanding of the issues, and required his Honour to fully disclose and deal with such matters as may be relevant in the Ruling.

34. The submission is without merit. As the relevant pages of the transcript to which I have referred make absolutely clear every effort was made by his Honour to inform the Plaintiffs' Senior Counsel of the relevant issues and context. The Plaintiffs' Senior Counsel had the transcript of 10 December 2012 in his brief and participated fully in the argument on 20 December 2012. No adjournment was sought and there was an adequate and sufficient understanding of the relevant issues and in particular the context in which the sources were relevant.

35. The Ruling by his Honour that the sources were relevant was not based on a lack of evidence or by ignoring evidence and there is no basis on which the category of the source should be restricted.

Ground 2 – Inadequate reasons

36. Next it was submitted that his Honour erred in giving reasons for the Ruling which do not display a discernible path of reasoning in that:

(a) the reasons do not identify the evidence on which his Honour relied in holding that the witness summonses had the legitimate forensic purpose; and

(b) the reasons do not disclose what, if any, use his Honour made of the only evidence before him on the point that no officer of the AFP was a source for the newspaper article of which the plaintiffs were the authors.

37. At common law it is necessary, it was submitted, for courts to give reasons to enable parties to prosecute an appeal,^[27] and to enable the losing party to understand why he lost.

38. It was contended that there was no basis for the findings in the Ruling although his Honour states that there was 'no doubt that the material ... is relevant to considerations that may be put before me in the course of submissions.'^[28] Despite that statement, the material that goes to the 'proper execution of obligations by investigating officials'^[29] was not identified in the Ruling. Further, his Honour stated that the submissions on behalf of the Plaintiffs 'misunderstands the nature of the material that is sought, the reason why the material is sought, the purpose for which the material is sought and the legitimate forensic purpose that I have determined exists.'^[30] However, his Honour did not identify what the material, reasons, purpose or legitimate forensic purpose were, and consequently the reasons do not display a discernible path of reasoning. This is so, it was submitted, even if the broadest reading of the transcript of the argument on 20 December 2012 is imported into the reasons.^[31] Thus his Honour did not properly fulfil 'the function which the law calls upon him as a judicial person to exercise,'^[32] and such a decision, it was submitted, constitutes an error of law.

39. Further, it was submitted that the Plaintiffs cannot have, 'a proper understanding of the basis upon which the verdict entered has been reached,^{133]} because there is no statement, or even implication within the Ruling, that his Honour considered the fact of the source not being an officer of the AFP. This fact should have been significant in determining whether allowing the witness summonses to stand, and compelling the Plaintiffs to be examined in the witness box, could satisfy the legitimate forensic purpose found by his Honour to support their issue.^[3] The contents of Bartlett's affidavit was the only evidence before the court in relation to the question of the behaviour, be it misbehaviour or otherwise, of the investigating officials, so far as that behaviour could be related to the Article. It was evidence which did not support his Honour's ruling. Accordingly, the inadequacy of his Honour's reasons in explaining the basis of his finding that there was a legitimate forensic purpose for the witness summonses, as well as the failure to disclose what, if any, use was made of that evidence as to the source not being an officer of the AFP, was said to be an error of law.

40. The Second Defendant submits that his Honour's reasons must be read in the context of the argument that preceded them and the written submissions of the Second Defendant and the other accused, as well as the evidence in the lengthy committal hearing. The matters raised by the Plaintiffs cannot and should not be considered in isolation.

41. Senior Counsel for the Plaintiffs, it was submitted, told his Honour that he was aware of the written submissions that outlined the arguments on dismissal in the interests of justice.

42. The Second Defendant submitted further that the Plaintiffs' Article itself is the most telling evidence going to the legitimate forensic purpose. His Honour clearly articulated that if relevant people (senior government sources or prosecutors) had provided the information to the Plaintiffs, that was material to the interests of justice argument. It is entirely unremarkable that his Honour did not disclose what use, if any, he made of a hearsay statement reproduced in an affidavit by the Plaintiffs' solicitor that baldly asserts that no AFP officer was the source of the material. As submitted under ground 1, the legitimate forensic purpose identified by his Honour was broader than the AFP being the source. What is crucial, it was submitted, is that the Plaintiffs say that senior government sources and prosecutors were sources of the material.

43. In my opinion the second ground is not made out.

44. In the context of the argument and submissions that occurred earlier in the day, as evidenced by the transcript, the brief reasons in the Ruling were sufficient to dispose of the application. This is particularly so given the way in which his Honour approached the matter and in particular the clear reference to the broader category of investigating officials referred to.

45. The Plaintiffs submitted that as this ground related to an error on the face of the record, I was only entitled to have recourse to the transcript in order to give meaning or relevant context to the reasons and the Ruling.

46. In my opinion it is necessary and appropriate to have regard to the transcript of the day. It does provide context to the reasons and the Ruling and in fact directly informs the Ruling. It is a continuous transcript and, as is apparent, his Honour assumed that by delivering his Ruling with limited reasons immediately after argument it would not be necessary to repeat or rehearse all of the arguments made earlier in the day, and which were familiar to all. With the transcript there is an adequate basis set out as to why the decision was reached. Although the Ruling is not sequential or compendious, given the nature of the application it is in the circumstances adequate. Indeed that there is a legitimate forensic purpose in identifying the (broader) sources was not seriously challenged by the Plaintiffs below or before me.

47. Finally, the nature and subject matter of the Ruling is important. His Honour was not resolving issues of fact on the evidence. His Honour was called upon to make an assessment as to whether evidence could be relevant. The Article and, ironically, Bartlett's affidavit provided a sufficient basis for such determination and this emerges from the reasons and the transcript. In the context of an interlocutory application involving a non-party in relation to a permissible evidence gathering exercise the reasons given on pages 3385-6 of the transcript are adequate.

Ground 3 – Irrelevant consideration

48. His Honour, it was submitted, erred in making the Ruling by taking into account an irrelevant consideration, namely that foreshadowed submissions were to be made which apparently would go to the proper execution of obligations by investigating officials, namely 'submissions that have already been drafted, though aren't before me in oral fashion, and what is proposed to be argued.'^[34]

49. However, it was submitted that the only evidence before him in relation to the Article was that no officer of the AFP was a source for it. In the absence of any evidentiary basis for them, the foreshadowed submissions would appear to have been mere speculation and in taking into them account, the court took into account an irrelevant consideration, that is a matter which the relevant statute did not permit to be taken into account.^[35]

50. The Second Defendant submitted that Senior Counsel for the Plaintiffs was aware of the general nature and content of the written submissions of the Second Defendant and others that were directed to dismissal in the interests of justice. The proposed submissions it was submitted were clearly relevant to whether there was a legitimate forensic purpose in cross examining the Plaintiffs as to the sources of the Article.

51. For all of the reasons referred to above ground 3 is not made out. The existence and general nature, content and basis of the submissions to be made, of which the Plaintiffs' Senior Counsel was informed of and was aware, were relevant and fundamental to any assessment of whether there was a legitimate forensic purpose.

52. The submissions had already been filed and it was both logical and necessary to take them into account in determining whether the identification of the sources of the Article were relevant and of possible assistance to the Second Defendant. The submissions provided the context for the necessary assessment.

53. Finally, I do not consider the submissions to be 'mere speculation' and as such an impermissible foundation (and hence irrelevant consideration) to assess whether there was a legitimate forensic purpose. The submissions were made and various matters were raised in relation to the interests of justice point. The submissions remain to be determined. Having been identified, although not necessarily established, it is permissible to endeavour to gather any further evidence that may be helpful or directed to the submissions. The sources of the Article may well be helpful and in making such a determination his Honour did not take into account the suggested irrelevant consideration.

54. Accordingly, I do not consider that there was any error on the face of the record.

Disposition

55. Accordingly for the reasons given none of the grounds are made out and the application for judicial review will be dismissed.

[1] Affidavit of Peter Lewellyn Bartlett dated 19 December 2012, Exhibit PLB-4.

[2] Transcript of Proceedings, *DPP (Cth) v Anderson & Ors* (Magistrates' Court of Victoria, B11812417, Magistrate Goldberg, 20 December 2012) 3354, lines 12-13.

[3] Affidavit of Peter Lewellyn Bartlett dated 19 December 2012, [5(e)].

[4] Transcript of Proceedings, *DPP (Cth) v Anderson & Ors* (Magistrates' Court of Victoria, B11812417, Magistrate Goldberg, 20 December 2012) 3373, line 2.

[5] Ibid 3373, lines 4-6.

[6] Ibid 3361, lines 6-22 (emphasis added).

[7] *DPP (Cth) v Anderson & Ors* (Unreported Ruling, Magistrates Court of Victoria, Magistrate Goldberg, 20 December 2012).

[8] Ibid 3386, lines 1-9.

[9] Transcript of Proceedings, *DPP (Cth) v Anderson & Ors* (Magistrates' Court of Victoria, B11812417, Magistrate Goldberg, 20 December 2012) 3393, lines 10-14.

[10] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.

[11] Ibid 175-6.

[12] [1982] UKHL 10; [1982] 3 All ER 141; [1982] 1 WLR 1155, 1173; (1982) 147 JP 6.

[13] [2000] VSC 549, [110]; (2000) 117 A Crim R 396.

[14] Ibid [114] (underlining in original).

[15] Transcript of Proceedings, *DPP (Cth) v Anderson & Ors* (Magistrates' Court of Victoria, B11812417, Magistrate Goldberg, 20 December 2012) 3361, lines 11-22.

[16] Affidavit of Peter Llewellyn Bartlett dated 19 December 2012, [5(d)].

[17] Transcript of Proceedings, *DPP (Cth) v Anderson & Ors* (Magistrates' Court of Victoria, B11812417, Magistrate Goldberg, 20 December 2012) 3361, line 6.

[18] The Plaintiffs' submissions leave out this statement by Counsel for the Plaintiffs indicating that he understood the submissions that were before the court.

[19] Transcript of Proceedings, *DPP (Cth) v Anderson & Ors* (Magistrates' Court of Victoria, B11812417, Magistrate Goldberg, 20 December 2012) 3361, line 6.

[20] Ibid 3374, line 17, 3363 line 12 to 3363 line 16, 3375 line 15 to 3375 line 19.

[21] Ibid 3376, line 17.

[22] Ibid 3393, line 21.

[23] Ibid 3361, 3363, 3368, 3369, 3374-6.

[24] Transcript of Proceedings, *DPP (Cth) v Anderson & Ors* (Magistrates' Court of Victoria, B11812417, Magistrate Goldberg, 10 December 2012) 2834-5, 2838, 2840-2, 2846.

[25] *Lednar & Ors v The Magistrates' Court & Anor* [2000] VSC 549, [104] and [116]; (2000) 117 A Crim R 396.

[26] Transcript of Proceedings, *DPP (Cth) v Anderson & Ors* (Magistrates' Court of Victoria, B11812417, Magistrate Goldberg, 10 December 2012) 3368.

[27] *Pettitt v Dunkley* [1971] 1 NSWLR 376; 38 FLR 199; 5 Fam LR 137.

[28] *DPP (Cth) v Anderson & Ors* (Unreported Ruling, Magistrates' Court of Victoria, Magistrate Goldberg, 20 December 2012) 3386, line 1.

[29] Ibid.

[30] Ibid 3386, line 23.

[31] See *Easwaralingam v DPP* [2010] VSCA 353, [22]; 208 A Crim R 122. The transcript of the hearing at which the ruling was made may be considered for the purpose of understanding the ruling in context where s10 of the *Administrative Law Act 1978* (Vic) is relied upon to render the reasons part of the record.

[32] *Pettitt v Dunkley* [1971] 1 NSWLR 376, 382; 38 FLR 199; 5 Fam LR 137.

[33] Ibid.

[34] Ibid 3361, line 6.

[35] *Magistrates' Court Act 1989* (Vic) s43(3) regarding witness summons and *Criminal Procedure Act 2009* (Vic) s139 regarding admissibility of non-oral evidence.

APPEARANCES: For the Plaintiffs McKenzie and Baker: Dr KP Hanscombe SC and Ms NE Hodgson, counsel. Minter Ellison, solicitors. For the Second Defendant Leckenby. Mr CF Thomson, counsel. Holding Redlich, solicitors. For Mr Anderson: Mr LC Carter, counsel. Logie Smith Lanyon, solicitors. For Mr Boillot: Mr AV Chernok, counsel. Doogue & O'Brien, solicitors. For Mr Hutchinson: Mr JL Bushby, counsel. Jimmy Lardner & Associates, solicitors.