IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S196 of 2019

BETWEEN:

ANNIKA SMETHURST

First Plaintiff

NATIONWIDE NEWS PTY LTD

Second Plaintiff

10

and

COMMISSIONER OF POLICE

First Defendant

JAMES LAWTON

Second Defendant

20 **SUPPLEMENTARY SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)**

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PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: ARGUMENT

2. The Court has invited further submissions on two questions concerning the implications of the Court's original jurisdiction under s 75(v) of the *Constitution* having been invoked.

3. South Australia makes no submission on the first question, that is, whether, assuming the search warrant to be invalid, there exists a sufficient juridical basis for the Court to issue an injunction. Nor does South Australia make any submission as to whether any injunction would properly be granted in the exercise of the Court's jurisdiction conferred by s 75(v) of the *Constitution* or otherwise.[1]

Question 2 – Discretionary arguments

4. Assuming the warrant is invalid and that there is a sufficient juridical basis for granting an injunction, South Australia submits that regardless of the source of the Court's jurisdiction, an injunction remains a discretionary remedy.[2] One essential factor that the Court needs to consider in circumstances where the exercise of the discretion could have consequences for future criminal proceedings is the public interest in the due administration of and non-interference with justice.[3]

5. It is an essential part of the fabric of that public interest that the common law, and more recently statute (relevantly, s 138 of the *Evidence Act 1995* (Cth)), establish that the mere fact that otherwise probative evidence has been obtained pursuant to an invalid search warrant is not determinative of whether that evidence is to be admitted in a criminal trial. Such unlawfulness does, however, enliven a discretion to exclude the evidence on public policy grounds. The exercise of that discretion requires the balancing of competing public interests, namely the public interest in bringing to

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1 Plaintiffs' Supplementary Submissions at [3], [4].

2 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 396 [32] (Gaudron, McHugh, Gummow and Callinan JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92 [17], at 107 [54] (Gaudron and Gummon JJ, Gleeson CJ and Hayne J agreeing), at 136 - 137 [148] - [149] (Kirby J).

3 *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393 at 405 (Hill J); *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at 221 - 222 [158] - [162] (the Court).

conviction those who commit criminal offences, and the public interest in the protection of the individual from unlawful and unfair treatment.[4]

6. The discretion to exclude unlawfully seized evidential material is exercisable by the trial court in which a prosecution is heard. A grant of injunctive relief by this Court would deny the trial court that discretion. That discretion could never be enlivened if injunctive relief prevents law enforcement authorities from retaining and using evidential material in the course of their investigations.

7. In cases where no prosecution could be sustained without reliance on the evidentiary material concerned, the grant of injunctive relief would be tantamount to ordering a permanent stay. The power to grant a permanent stay is exercisable by a trial court and only in the most exceptional circumstances.[5] There must be no other way to remedy the mischief caused by the unlawfulness and no other available means to bring about a fair trial.[6]

8. In deciding whether to grant injunctive relief this Court should not itself undertake an exercise of balancing the competing public interests relevant to the exclusion of evidence or, where the issue is enlivened on the state of the evidence, determine whether a permanent stay is warranted. Even if the Court had before it all the material relevant to such tasks (which must be doubted), this Court has repeatedly expressed its reluctance to disturb or fragment the criminal process.[7]

9. The policy underlying that reluctance has as much relevance when criminal proceedings are on foot as when they are merely anticipated or a real possibility. The public interest in the due administration of and non-interference with justice requires that in all but exceptional or extraordinary cases, trial courts be free to determine these

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4 *Bunning v Cross* (1978) 141 CLR 54 at 72 (Stephen and Aicken JJ, Barwick CJ agreeing), quoting *R v Ireland* (1970) 126 CLR 321 at 335 (Barwick CJ). The *Bunning v Cross* discretion is given statutory effect in the uniform evidence law: see for example s 138 of the *Evidence Act 1995* (Cth).

5 *R v B, P* [2016] SASCFC 30 at [28] (Kourakis CJ; Kelly and Bampton JJ agreeing); *Williams v Spautz* (1992) 174 CLR 509 at 529 (Mason CJ, Dawson, Toohey and McHugh JJ); *Barton v The Queen* (1980) 147 CLR 75 at 94 - 95 (Gibbs ACJ and Mason J); *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31, 34 (Mason CJ), 60 (Deane J), 76 (Gaudron J).

6 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76 - 78 (Gaudron J).

7 *R v Elliott* (1996) 185 CLR 250 at 256 - 257 (Brennan CJ, Gummow and Kirby JJ); *Yates v Wilson* (1989) 168 CLR 338 at 339 (Mason CJ, Toohey and Gaudron JJ); *Obeid v The Queen* (2016) 90 ALJR 447 at 450 – 451 [15] - [16] (per Gageler J); *Alqudsi v Commonwealth* (2015) 90 ALJR 192 at 195 [21] - [22] (French CJ); *Sankey v Whitlam* (1978) 142 CLR 1 at 25 26 (Gibbs ACJ), 81 – 82 (Mason J); *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at 133 [23] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ). See also *Flanagan v Commissioner of the Australian Federal Police* (1996) 60 FCR 149 at 187 – 188 (the Court).

matters for themselves and that their established processes are not circumvented by the grant of pre-emptive or interlocutory relief.

10. The public interest in the due administration of and non-interference with justice is a relevant, indeed fundamental, discretionary factor, no matter the source of the Court's jurisdiction to grant the relief sought by the Plaintiffs. The "protective purpose" of s 75(v)[8] in no way diminishes the significance of the public interest in the due administration of and non-interference with justice.

11. As this Court has previously recognised, there is a discretion to refuse relief where "in all the circumstances that seems the proper course",[9] where "circumstances appear making it just that the remedy should be withheld"[10] and where "the issue of the writs would involve disproportionate inconvenience and injustice".[11] There can be no doubt that it would be both appropriate and just to refuse injunctive relief where to do so serves the public interest in the due administration of and non-interference with justice.

12. Against this background, it can readily be seen that to refuse injunctive relief would not be to deny a plaintiff an appropriate remedy. Rather, it is to acknowledge that the remedy of injunction would be pre-emptive and premature in circumstances where the common law and statute provide a process to resolve questions relating to the use of unlawfully obtained material, and one that recognises that the trial court is best placed to balance the competing public interests that necessarily arise. The trial court, which has the benefit of all relevant considerations, is empowered to exclude unlawfully obtained evidence and (in truly exceptional cases) stay criminal proceedings. The principle relied on by the plaintiffs, that courts should provide remedies to ensure the

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8 Plaintiffs' Supplementary Submissions at [15], [16] and [31], citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 – 514 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

9 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 106 [51] (Gaudron and Gummow JJ, Gleeson CJ and Hayne J agreeing), quoting *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 (Gibbs CJ).

10 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 108 [56] (Gaudron and Gummow JJ, Gleeson CJ and Hayne J agreeing), quoting *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ).

11 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 137 [148] (Kirby J).

executive acts only in accordance with the laws which govern the exercise of its powers,[12] is entirely accounted for by this regime.

13. A plaintiff's right to agitate these matters in this or the other superior courts is not thereby lost to them. Decisions of trial courts on these matters are variously subject to appellate review and, ultimately, the entrenched supervisory jurisdiction.

PART III: ORAL ARGUMENT

14. South Australia does not seek a further oral hearing.

Dated: 28 January 2020

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12 Plaintiffs' Supplementary Submissions at [31].

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ANNEXURE TO THE SUPPLEMENTARY SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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ANNEXURE: LIST OF RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

CONSTITUTIONAL PROVISIONS

1. Section 75(v) of the *Constitution*.

LEGISLATION

2. *Evidence Act 1995* (Cth) (current version dated 26 October 2018).

STATUTORY INSTRUMENTS

3. Nil.