

Form 40 (version 1)  
UCPR 35.1

FILED

15 APR 2014



**AFFIDAVIT OF JUSTINE MELISSA MUNSIE - 14 APRIL 2014**

**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Common Law
List	Defamation
Registry	Sydney
Case number	2014/ 114469

**TITLE OF PROCEEDINGS**

First Plaintiff	<u>Justine Munsie</u>
Number of plaintiffs	<u>2</u>
Defendant	<u>Shane Dowling</u>

**FILING DETAILS**

Filed for	<b>Kerry Stokes and Justine Munsie plaintiffs</b>
Filed in relation to	Plaintiffs' statement of claim
Legal representative	Martin O'Connor, Addisons
Legal representative reference	RMK: MOC
Contact name and telephone	Richard Keegan, +61 8915 1075

**AFFIDAVIT**

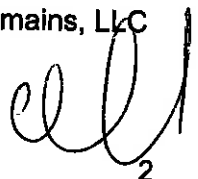
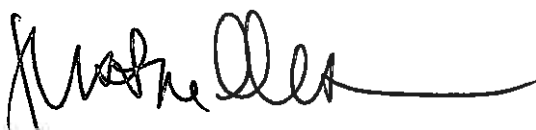
Name Justine Melissa Munsie  
Address Level 12, 60 Carrington Street Sydney NSW 2000  
Occupation Solicitor  
Date 14 April 2014

I say on oath:

- 1 I am a partner of Addisons and the first plaintiff.
- 2 I am authorised by Mr Kerry Stokes, the second plaintiff, to swear this affidavit on his behalf and make this affidavit based on my personal knowledge or else on information provided to me by Mr Stokes or other employees and officers of the Seven West Media Group, of which Mr Stokes is Chair, and to whom I will refer in my affidavit, which information I believe to be true.
- 3 Mr Stokes, the second plaintiff, is the Chairman of Seven West Media, whose media assets include the Seven Network which broadcasts news, current affairs and other programs throughout Australia.

**The Website**

- 4 I am informed by Mr Stokes, and believe that he recently became aware of the existence of an article concerning him and me on a website at the internet address <http://kangarocourtofaustralia.com> ("**Website**").
- 5 Exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-1** is a print out of the home page of the Website and an article, a link to which appears on the home page and which refers to Mr Stokes and me (**Article**).
- 6 Exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-2** is a typed copy of the Article, marked with line numbers.
- 7 According to domain name searches which I caused to be performed:
  - (a) The registrant of the Website is Shane Dowling;
  - (b) The registrar of the Website is a company known as Wild West Domains, LLC which is located in the United States of America.



- 8 Annexed to my affidavit and marked "A" is a print out of my search results using the website Geektools Who is Proxy.
- 9 The Article contains several false allegations about me.
- 10 The Article also contains several allegations about Mr Stokes which, I am informed by him and believe, are false.

#### **Search results**

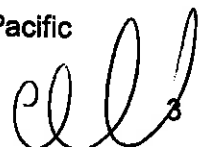
- 11 Exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-3** is a print out of the results of a search using Google which I caused to be made for the name "Kerry Stokes". The Article appears on the second page of those results.
- 12 Exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-4** is a print out of the results of a search using Google which I caused to be made for the name "Justine Munsie". The Article is the second item on page 1 of those results.
- 13 On the basis of the false statements made in the Article, I caused to be prepared a letter to Google, Inc, requesting that the website be removed from search results for Mr Stokes or myself.
- 14 Exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-5** is a copy of a report which I caused to be made to Google in relation to the Article dated 19 March 2014. At the time of swearing my affidavit, I have not received a response to my letter.

#### **The Twitter Link**

- 15 In the course of preparing this affidavit, I became aware of the tweet made on the defendant's twitter page at [www.twitter.com/kangaroo\\_court](http://www.twitter.com/kangaroo_court), together with a link to the Article, a copy of which is exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-6**.

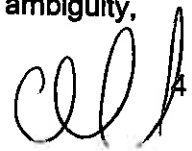
#### **AFP Proceeding**

- 16 The Article refers to recent Federal Court proceedings commenced by Seven West Media, Pacific Magazines Pty Limited, me and my firm, Addisons, against the Commissioner of the Australian Federal Police (AFP) and others in relation to search warrants which had been issued against Seven West Media, Pacific



Magazines and Addisons, together with orders issued under section 246 of the Proceeds of Crime Act which had been issued personally to me and another Seven West Media employee (**AFP Proceeding**).

- 17 The search warrants and section 246 orders had been issued as part of an investigation undertaken by the Australian Federal Police in response to media speculation that Seven West Media had entered into an agreement with Schapelle Corby to provide a paid exclusive television interview following her release from a Bali prison in February 2014.
- 18 On 11 February 2014, the AFP had issued a production order under section 202 of the Proceeds of Crime Act to Seven West Media requiring production of documents by 4pm on 14 February 2014. The AFP allowed an extension for the production of documents until the close of business on 17 February 2014.
- 19 In the afternoon of 17 February 2014, the AFP applied for the search warrants addressed to Seven West Media and Addisons and the section 246 order addressed to me. The following morning, the AFP applied for the search warrant against Pacific Magazines Pty Limited and the additional section 246 order.
- 20 The search warrants included statements that certain persons, including me, were "suspects" in an investigation, when it was common ground that none of those persons, other than Schapelle Corby, was or had ever been a "suspect".
- 21 There were also statements contained in section 246 orders that I and another Seven West Media employee were "reasonably suspected of having committed a criminal offence" when it was again accepted that neither of us was or had ever been so suspected.
- 22 Her Honour Justice Jagot delivered judgment in the AFP Proceeding on 26 March 2014.
- 23 Annexed to my affidavit and marked B is a copy of Jagot J's judgment in which her Honour found that the decisions made by the Magistrates to issue the search warrants and section 246 orders were materially affected by legal error and should be quashed, with the effect that they are taken not to have existed.
- 24 Her Honour held that the AFP did not make it clear to the issuing Magistrates that neither the deriving of literary proceeds nor the payment or facilitation of a payment which might give rise to a literary proceeds order, is an offence. This ambiguity,



together with the making of the erroneous statements referred to in paragraphs x and Y above in the urgent circumstances in which the applications for search warrants were made, meant that it was likely that the issuing Magistrates incorrectly assumed that there was some offence relating to literary proceeds in the Proceeds of Crime Act which would justify issuing the warrants.

25 Justice Jagot rejected the submission that the erroneous statements were trivial or inconsequential, holding instead that the errors had materially misled the Magistrates who issued the warrants.

26 Justice Jagot concluded at [80] that *"it is not all difficult to see how and why the [Magistrates] were led into error by the AFP"*.

27 Her Honour further found at [110] that the AFP had materially misled the Magistrates who issued the warrants by:

- (a) stating that the AFP was not satisfied that Seven had complied with the production order when a consensual regime was in place for continuing compliance; and
- (b) failing to disclose to the Magistrates the evidence of Seven's compliance with the production order.

28 However, her Honour concluded, also at [110] that she was bound by authority not to rely on those factors in support of her decision to quash the warrants as she could not say that there was fraud involved.

29 I am informed by Richard Keegan, a Senior Associate employed by Addisons, and believe, that he attended the hearing of the AFP Proceeding on 7 March 2014 and observed a man whom he believed to be Mr Dowling, the defendant, also in attendance. Mr Keegan has informed me and I believe that he recognised Mr Dowling from photos on the Website and from the fact that he was wearing a Kangaroo Court t-shirt, an image of which also appears on the Website.

30 Mr Keegan informed me and I believe that there was some discussion during the hearing of Seven West Media's compliance with the production order and, in particular, whether two draft agreements which Seven West Media had not produced in response to the production order but later volunteered to the AFP agents during the execution of the search warrants, were caught by the terms of the production order.

31

Annexed to my affidavit and marked C is a copy of pages 79-80 of the transcript from the AFP Proceeding during which the following exchange took place between counsel for the AFP, Mr Watson SC and her Honour Justice Jagot. Mr Keegan has informed me and I believe that the exchange concerned a question put by Mr Bruce McWilliam to the AFP Commissioner at a press conference conducted by the AFP:

MR WATSON: It's a long question. And your Honour can see what it is, is that material wasn't seized. It was handed over. The warrant was wider than what you asked for, wider than the production order. There's nothing wrong with that. So if you hadn't asked for it, I think if you said a reasonable expectation would have been given, why not just ask for it; the cost of one email. And then there's a shot about the faulty word processor. There's complaint of all the people coming:

*Now, I apologise you're in this terrible position of having to explain. But you started off saying it's not criminal. It was akin to civil. So why not just do the normal thing under the civil which is to say, "Okay. Well, can you give us this". All you got was an unsigned draft that was your extra material.*

Could I just pause there and say this is the extra material presumably under the warrant. I don't know this. The AFP doesn't know this because they haven't been able to access it, yet:

*All you got was an unsigned draft that was your extra material. But you didn't ask –*

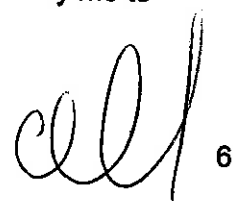
and this is about a reference to the production order:

*...you didn't ask for unsigned drafts. You only asked for agreements.*

That's quite right. If your Honour goes right back – I won't take you to it now – but the production order itself spoke of agreements. And a good lawyer had read it and said, "Well, that doesn't capture drafts of agreements". Well, that's the nature of the production, and that's the nature of argy bargy in this kind of litigation. It's also the case that a search warrant which is a completely separate process does separate things and it acquires information which could be helpful including a draft.

#### **Additional matters referred to in the Article**

32 The Article refers to a threatening legal letter said to have been sent by me to Shane Dowling.

 6

- 33 Exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-7** is a copy of my letter dated 26 May 2011, marked "Not for Publication" and sent to Mr Dowling to which I did not receive a response.
- 34 Exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-8** is a print out from the website of Mr Dowling's article about my letter.
- 35 Given Mr Dowling's reaction to my letter which is Confidential Exhibit JMM-2, neither Mr Stokes nor I have any confidence that a similar letter requesting him to remove the Article from the website would be treated differently and we are concerned not to provide a basis for Mr Dowling to repeat the false and defamatory imputations contained in the Article elsewhere on the website.
- 36 The Article and other material posted on the website refers to findings made by his Honour Justice Sackville in the "C7" proceeding between Seven Network Limited and others and News Limited and others.
- 37 Annexed to my affidavit and marked **D** is a copy of an extract from his Honour's judgment concerning the evidence given by Mr Stokes.
- 38 The Article also refers to evidence which I gave in my capacity as solicitor for Mr Ray Hadley in an interlocutory application part of a District Court dispute.
- 39 Annexed to my affidavit and marked **E** is a copy of the judgment of Judge Sorby in that application which refers to the evidence I gave.

**Other statements by the defendant**

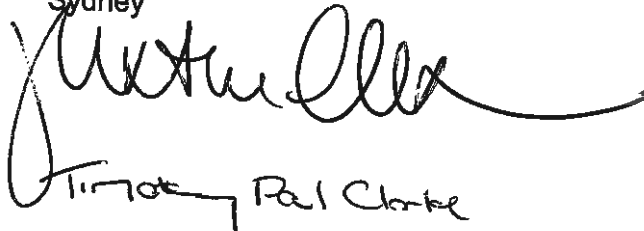
- 40 Exhibited to me at the time of swearing this affidavit and marked **Confidential JMM-9** are copies of other statements made by the defendant about the first plaintiff and/or myself:
- (a) Copy of an article about the defendant, including quotes from an interview apparently given by the defendant and published on the website [www.altmedia.com.au](http://www.altmedia.com.au);
  - (b) Article on the Website dated 23 May 2011.
  - (c) Article on the Website dated 17 March 2013.



SWORN at

Sydney

Signature of deponent



Name of witness

Timothy Paul Clarke

Address of witness

Level 12, 60 Carrington Street  
Sydney NSW 2000

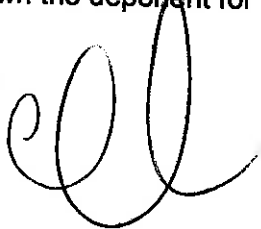
Capacity of witness

Solicitor of the Supreme Court of New South Wales, holding a  
current practising certificate under the Legal Profession Act  
2004 (NSW)

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness





"A"



Tools | Traceroute | Whois



This and the following 2 pages comprise the annexure marked "A" to the affidavit of JUSTINE MURPHY MURPHY on 14 APRIL 2014 before me:

[Signature] Justice of the Peace/Solicitor of the Supreme Court

Whois: kangarocourtofaustralia. [ Whois >> ]

Checking server [whois.crsnic.net]

Checking server [whois.wildwestdomains.com]

Results:

Domain Name: KANGAROCOURTOFAUSTRALIA.COM  
 Registry Domain ID: 1630244993\_DOMAIN\_COM-VRSN  
 Registrar WHOIS Server: whois.wildwestdomains.com  
 Registrar URL: http://www.wildwestdomains.com  
 Update Date: 2013-09-19 05:59:57  
 Creation Date: 2010-12-14 07:52:12  
 Registrar Registration Expiration Date: 2014-12-14 07:52:12  
 Registrar: Wild West Domains, LLC  
 Registrar IANA ID: 440  
 Registrar Abuse Contact Email: abuse@wildwestdomains.com  
 Registrar Abuse Contact Phone: +1.480-624-2505  
 Reseller: WordPress.com  
 Domain Status: clientTransferProhibited  
 Domain Status: clientUpdateProhibited  
 Domain Status: clientRenewProhibited  
 Domain Status: clientDeleteProhibited  
 Registry Registrant ID:  
 Registrant Name: Shane Dowling  
 Registrant Organization:  
 Registrant Street: 5 / 68-70 Curlewis St  
 Registrant Street: Bondi Beach  
 Registrant City: Sydney  
 Registrant State/Province: New South Wales  
 Registrant Postal Code: 2026  
 Registrant Country: Australia  
 Registrant Phone: +41.1238704  
 Registrant Phone Ext:  
 Registrant Fax:

9.

Registrant Fax Ext:  
Registrant Email: shanedowling@hotmail.com  
Registry Admin ID:  
Admin Name: Shane Dowling  
Admin Organization:  
Admin Street: 5 / 68-70 Curlewis St  
Admin Street: Bondi Beach  
Admin City: Sydney  
Admin State/Province: New South Wales  
Admin Postal Code: 2026  
Admin Country: Australia  
Admin Phone: +41.1238704  
Admin Phone Ext:  
Admin Fax:  
Admin Fax Ext:  
Admin Email: shanedowling@hotmail.com  
Registry Tech ID:  
Tech Name: Shane Dowling  
Tech Organization:  
Tech Street: 5 / 68-70 Curlewis St  
Tech Street: Bondi Beach  
Tech City: Sydney  
Tech State/Province: New South Wales  
Tech Postal Code: 2026  
Tech Country: Australia  
Tech Phone: +41.1238704  
Tech Phone Ext:  
Tech Fax:  
Tech Fax Ext:  
Tech Email: shanedowling@hotmail.com  
Name Server: NS1.WORDPRESS.COM  
Name Server: NS2.WORDPRESS.COM  
DNSSEC: unsigned  
URL of the ICANN WHOIS Data Problem Reporting System: <http://wdprs.internic.net/>  
Last update of WHOIS database: 2014-04-02T01:00:00Z

The data contained in this Registrar's Whois database, while believed by the registrar to be reliable, is provided "as is" with no guarantee or warranties regarding its accuracy. This information is provided for the sole purpose of assisting you in obtaining information about domain name registration records. Any use of this data for any other purpose is expressly forbidden without the prior written permission of this registrar. By submitting an inquiry, you agree to these terms of usage and limitations of warranty. In particular, you agree not to use this data to allow, enable, or otherwise make possible, dissemination or collection of this data, in part or in its entirety, for any purpose, such as the transmission of unsolicited advertising and solicitations of any kind, including spam. You further agree not to use this data to enable high volume, automated or robotic electronic processes designed to collect or compile this data for any purpose, including mining this data for your own personal or commercial purposes.

Please note: the owner of the domain name is specified in the "registrant" section. In most cases, the Registrar is not the owner of domain names listed in this database.

Results brought to you by the GeekTools Whois Proxy  
Server results may be copyrighted and are used with permission.  
Proxy © 1999-2013 CenterGate Research Group LLC  
Your host (203.111.13.84) has visited 6 times today.



Copyright Centergate® Research Group, LLC 1998 - 2014

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# FEDERAL COURT OF AUSTRALIA

**Seven West Media Limited v Commissioner, Australian Federal Police [2014]  
FCA 263**

**Citation:** Seven West Media Limited v Commissioner, Australian Federal Police [2014] FCA 263

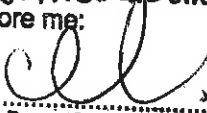
**Parties:** SEVEN WEST MEDIA LIMITED, ADDISONS, JUSTINE MUNSIE, PACIFIC MAGAZINES PTY LIMITED ACN 097 410 896, MERCEDES PEARL ESMA CORBY and VASILIOS KALANTZIS v COMMISSIONER, AUSTRALIAN FEDERAL POLICE, HIS HONOUR MAGISTRATE GRAEME CURRAN and HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN

**File number:** NSD 201 of 2014; NSD 207 of 2014

**Judge:** JAGOT J

**Date of judgment:** 26 March 2014

**Catchwords:** ADMINISTRATIVE LAW – warrants – *Proceeds of Crime Act 2002* (Cth) ss 225, 246 – *Administrative Decisions (Judicial Review) Act 1997* (Cth) s 5 – *Weinmayer* unreasonableness – decision so unreasonable no reasonable person could make – failure to consider statutory question – decision based on innocent but material misrepresentation – decision based on non-existent fact – decision based on irrelevant consideration or failure to take account of relevant consideration – search warrants and s 246 orders issued by magistrates in respect of “literary proceeds” – applicants wrongly listed as “suspects” on warrant – addressees wrongly described in s 246 orders as “reasonably suspected” of committing offence – no evidence applicants ever suspected of any offence – productions order previously issued under *Proceeds of Crime Act 2002* (Cth) s 202 – decision maker materially misled as to extent of compliance with s 202 order – whether innocent but material misrepresentation basis for quashing warrants and orders

This and the following 41 pages comprise the annexure marked "B" to the affidavit of JUSTINE MUNSIE sworn on 14 March 2014 before me:  
  
Justice of the Peace/Solicitor of the Supreme Court

**Legislation:** *Administrative Decisions (Judicial Review) Act 1977* (Cth)  
*Criminal Code Act 1899* (Qld)  
*Federal Court of Australia Act 1977* (Cth)

*Federal Court Rules 2011* (Cth)

*Judiciary Act 1903* (Cth)

*Proceeds of Crime Act 2002* (Cth)

**Cases cited:**

*Firearm Distributors Pty Ltd v Carson* (2001) 2 Qd R 26;  
[2000] QSC 159

*George v Rockett* (1990) 170 CLR 104

*Hu v Minister for Immigration and Multicultural and  
Indigenous Affairs* [2004] FCAFC 63

*Jilani v Wilhelm* (2005) 148 FCR 255; [2005] FCAFC 269

*Lego Australia Pty Ltd v Paraggio* (1994) 52 FCR 542;  
[1994] FCA 1286

*Majzoub v Kepreotis* [2009] NSWSC 1498

*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986)  
162 CLR 24; [1986] HCA 40, at 40

*Minister for Immigration and Ethnic Affairs v Wu Shan  
Liang* (1996) 185 CLR 259

*Minister for Immigration and Multicultural Affairs v  
Rajamannikam* (2002) 210 CLR 222; [2002] HCA 32

*Ousley v The Queen* (1997) 192 CLR 69

*Rashid v Minister for Immigration and Citizenship* [2007]  
FCAFC 25

*Williams v Keelty* (2001) 111 FCR 175; [2001] FCA 1301

**Date of hearing:** 7 March 2014

**Date of last submissions:** 7 March 2014

**Place:** Sydney

**Division:** GENERAL DIVISION

**Category:** Catchwords

**Number of paragraphs:** 119

**In NSD 201 of 2014:**

**Counsel for the Applicants:** AS Bell SC, G Jones, DFC Thomas and Z Heger

**Solicitor for the Applicants:** LG Wright of Atanaskovic Hartnell

**Counsel for the Respondents:** GM Watson SC and NJ Owens

**Solicitor for the Respondents:** J Bird of Ashurst Australia

**In NSD 207 of 2014:**  
**Counsel for the Applicants:** S Chrysanthou

**Solicitor for the Applicants:** V Kalantzis of Kalantzis Lawyers

**Counsel for the Respondents:** GM Watson SC and NJ Owens

**Solicitor for the Respondents:** J Bird of Ashurst Australia

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 201 of 2014**

**BETWEEN: SEVEN WEST MEDIA LIMITED  
First Applicant**

**ADDISONS  
Second Applicant**

**JUSTINE MUNSIE  
Third Applicant**

**PACIFIC MAGAZINES PTY LIMITED ACN 097 410 896  
Fourth Applicant**

**AND: COMMISSIONER, AUSTRALIAN FEDERAL POLICE  
First Respondent**

**HIS HONOUR MAGISTRATE GRAEME CURRAN  
Second Respondent**

**HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN  
Third Respondent**

**JUDGE: JAGOT J**

**DATE OF ORDER: 26 MARCH 2014**

**WHERE MADE: SYDNEY**

**THE COURT ORDERS THAT:**

1. The following search warrants issued under s 225 of the *Proceeds of Crime Act 2002* (Cth) (the search warrants) be quashed as invalid and of no effect:
  - (a) CMO 14/035 in relation to the premises of Seven West Media Limited;
  - (b) CMO 14/037 in relation to the premises of "Pacific Magazines (New Idea), Media City";
  - (c) CMO 14/039 in relation to the premises of Addisons Lawyers;
  - (d) CMO 14/043 in relation to the premises of Justine Munsie, each issued on 17 February 2014; and

- (e) CMO 14/045 in relation to the premises identified as "Media City", issued on 18 February 2014.
2. The following orders issued under s 246 of the *Proceeds of Crime Act 2002* (Cth) (the s 246 orders) be quashed as invalid and of no effect:
- (a) CMO 14/036 to "Seven West Media Ltd (Seven Network)";
  - (b) CMO 14/038 to "### or or any other employee, Pacific Magazines (New Idea)";
  - (c) CMO 14/040 to "Justine Munsie or any other employee, Addisons Lawyers"; and
  - (d) CMO 14/044 to Justine Munsie or any other resident, ###.
3. In the event of any request by a non-party to access to documents filed in the proceedings, all parts of documents filed in the proceedings (including pleadings, affidavits and submissions) which identify the names of:
- (a) the natural persons identified as suspects in condition two of the search warrants; or
  - (b) the natural persons the recipient of a s 246 order, other than the names Justine Munsie, Vasilios Kalantzis, Schapelle Corby and Mercedes Corby, not be disclosed other than to the parties and their legal representatives.
4. The proceedings be listed for further hearing in respect of consequential orders, and orders for costs, on a date to be nominated in consultation with the parties, such date to be vacated if the parties file consequential and costs orders by consent beforehand.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.



**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 207 of 2014**

**BETWEEN:**                   **MERCEDES PEARL ESMA CORBY**  
                                    **First Applicant**

**VASILIOS KALANTZIS**  
**Second Applicant**

**AND:**                         **COMMISSIONER, AUSTRALIAN FEDERAL POLICE**  
                                    **First Respondent**

**HIS HONOUR MAGISTRATE GRAEME CURRAN**  
**Second Respondent**

**HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN**  
**Third Respondent**

**JUDGE:**                     **JAGOT J**

**DATE OF ORDER:**   **26 MARCH 2014**

**WHERE MADE:**       **SYDNEY**

**THE COURT ORDERS THAT:**

1.    The following search warrants issued under s 225 of the *Proceeds of Crime Act 2002* (Cth) (the search warrants) be quashed as invalid and of no effect:
  - (a)    CMO 14/041 in relation to the premises of Kalantzis Lawyers.
2.    The following orders issued under s 246 of the *Proceeds of Crime Act 2002* (Cth) (the s 246 orders) be quashed as invalid and of no effect:
  - (a)    CMO 14/042 to Kalantzis Lawyers.
3.    In the event of any request by a non-party to access to documents filed in the proceedings, all parts of documents filed in the proceedings (including pleadings, affidavits and submissions) which identify the names of:
  - (a)    the natural persons identified as suspects in condition two of the search warrants; or
  - (b)    the natural persons the recipient of a s 246 order,

other than the names Justine Munsie, Vasilios Kalantzis, Schapelle Corby and Mercedes Corby, not be disclosed other than to the parties and their legal representatives.

4. The proceedings be listed for further hearing in respect of consequential orders, and orders for costs, on a date to be nominated in consultation with the parties, such date to be vacated if the parties file consequential and costs orders by consent beforehand.

**Note:** Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 201 of 2014;  
NSD 207 of 2014**

**BETWEEN: SEVEN WEST MEDIA LIMITED  
First Applicant**

**ADDISONS  
Second Applicant**

**JUSTINE MUNSIE  
Third Applicant**

**PACIFIC MAGAZINES PTY LIMITED ACN 097 410 896  
Fourth Applicant**

**AND: COMMISSIONER, AUSTRALIAN FEDERAL POLICE  
First Respondent**

**HIS HONOUR MAGISTRATE GRAEME CURRAN  
Second Respondent**

**HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN  
Third Respondent**

**NSD 201 of 2014;  
NSD 207 of 2014**

**BETWEEN: MERCEDES PEARL ESMA CORBY  
First Applicant**

**VASILIOS KALANTZIS  
Second Applicant**

**AND: COMMISSIONER, AUSTRALIAN FEDERAL POLICE  
First Respondent**

**HIS HONOUR MAGISTRATE GRAEME CURRAN  
Second Respondent**

**HIS HONOUR MAGISTRATE CHRISTOPHER O'BRIEN  
Third Respondent**

**JUDGE: JAGOT J**

**DATE: 26 MARCH 2014**

**PLACE: SYDNEY**

## REASONS FOR JUDGMENT

### 1. THE PROCEEDINGS

1           These two proceedings involve challenges to the validity of search warrants and so-called s 246 orders issued under the *Proceeds of Crime Act 2002 (Cth)* (the PoC Act).

2           On 17 February 2014 the second respondent, a magistrate, issued five search warrants in respect of premises occupied by Seven West Media Limited (Seven West), Pacific Magazines Pty Limited (Pacific Magazines), Addisons Lawyers, Justine Munsie, a partner at Addisons Lawyers, and Kalantzis Lawyers. At the same time the second respondent issued five s 246 orders to provide information and assistance to Seven West, “[a named individual], or any other employee Pacific Magazines (New Idea)”, “Justine Munsie or any other employee, Addisons Lawyers”, “Justine Munsie or any other resident” at Ms Munsie’s residential address, and “Kalantzis Lawyers”. On 18 February 2014 the third respondent, a magistrate, issued a search warrant in respect of premises identified as “Media City” and which are occupied by Seven West’s wholly owned subsidiaries, including Pacific Magazines.

3           The applicants are persons aggrieved by the issue of the search warrants being, in proceeding NSD 201 of 2014, Seven West, Addisons Lawyers, Ms Munsie and Pacific Magazines and, in the second proceeding NSD 207 of 2014, Mercedes Corby and her lawyer Vasilios Kalantzis, the principal of Kalantzis Lawyers. The applicants contend that the search warrants and s 246 orders are invalid on numerous grounds most of which relate, one way or another, to the propositions that the s 246 orders identified the recipients as “reasonably suspected of having committed the offence stated in the warrant” when, in fact, none of them were or at any time had been suspected of having committed an offence, and that the search warrants identified individuals who were the applicants or their employees or partners as being “suspects...that are the subject of the investigation” when, in fact, none of them were, or at any time had been, suspected of having committed an offence or suspects the subject of an investigation.

4           In order to understand the applicants’ contentions, and the response of the Commissioner, Australian Federal Police (the AFP) that the acknowledged errors in each of the s 246 orders do not invalidate those orders or the search warrants, it is necessary to explain the scheme of the PoC Act and the factual circumstances in which the search warrants and s 246 orders were issued.

5 None of the primary facts are in dispute.

6 The second and third respondents, the magistrates who issued the search warrants and orders, entered submitting appearances.

2. THE POC ACT

7 The PoC Act establishes a scheme to deprive persons of the proceeds of crime including "literary proceeds derived from the commercial exploitation of [the person's] notoriety from having committed offences": s 5(b). By s 153(2) of the PoC Act "commercial exploitation" may be by any means including publishing any material in written or electronic form, any use of media from which visual images, words or sounds can be produced, or any live entertainment, representation or interview. Pursuant to s 152, a court may make, amongst other orders, a literary proceeds order requiring a person to pay an amount to the Commonwealth if satisfied that the person has committed an indictable offence (s 152(1)) or foreign indictable offence (s 152(2)) and has derived literary proceeds in relation to the offence. Importantly, deriving literary proceeds is not itself an offence, nor is paying any person money which might enable a literary proceeds order to be made. The scheme is a civil scheme enabling recovery of literary proceeds if the conditions for the making of an order are satisfied.

8 Chapter 3 of the PoC Act enables information and evidence to be gathered for the purposes of the Act including determining whether an application for a literary proceeds order should be made. Amongst other things, s 202 enables a magistrate to make a production order requiring production of property-tracking documents to an authorised officer if satisfied by information on oath that the person is reasonably suspected of having possession or control of such documents. Property-tracking documents relevantly include (s 202(5)):

- (a) a document relevant to identifying, locating or quantifying the property of any person:
  - (i) who has been convicted of, charged with, or whom it is proposed to charge with, an indictable offence; or
  - (ii) whom there are reasonable grounds to suspect of having committed a serious offence;

...

21.

- (e) a document relevant to identifying, locating or quantifying literary proceeds in relation to an indictable offence or a foreign indictable offence of which a person has been convicted or which a person is reasonably suspected of having committed;

...

9 By s 203(2), the time for compliance with a production order is 14 days unless the magistrate who makes the order is satisfied that an earlier time should be specified, being at least 3 days after the day on which the production order is made.

10 By s 225, search warrants may be issued. Section 225 provides that:

- (1) A magistrate may issue a warrant to search \*premises if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is at the premises, or will be within the next 72 hours, \*tainted property or \*evidential material .
- (2) If an application for a \*search warrant is made under section 229 (applying for warrants by telephone or other electronic means), this section applies as if subsection (1) referred to 48 hours rather than 72 hours.
- (3) The \*search warrant can only be issued on application by an \*authorised officer of an \*enforcement agency.

11 Evidential material is defined in the Dictionary to the PoC Act (s 338) in these terms:

"evidential material" means evidence relating to:

- (a) property in respect of which action has been or could be taken under this Act; or
- (b) \*benefits derived from the commission of an \*indictable offence, a \*foreign indictable offence or an \*indictable offence of Commonwealth concern; or
- (c) \*literary proceeds.

12 The AFP is an enforcement agency under the PoC Act and the officers of the AFP who applied for the search warrants and s 246 orders are authorised officers of the AFP.

13 Section 227(1) of the PoC Act prescribes the contents of search warrants. Amongst other things, the search warrant must state the "the nature of the property in respect of which action has been or could be taken under this Act" (s 227(1)(a)), "the nature of that action" (s 227(1)(b)), "the kinds of \*tainted property or \*evidential material that is to be searched for

under the warrant" (s 227(1)d)), "that the warrant authorises the seizure of other things found at the premises in the course of the search that the \*executing officer or a \*person assisting believes on reasonable grounds to be... evidential material in relation to property to which the warrant relates... if he or she believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence" (s 227(1)(h)), and "whether the warrant authorises an \*ordinary search or a \*frisk search of a person who is at or near the premises when the warrant is executed if the executing officer or a person assisting reasonably suspects that the person has any tainted property or evidential material in his or her possession" (s 227(1)(i)).

14 Section 228(1) provides that a search warrant allows the executing officer and persons assisting to enter premises, search for and take fingerprints and samples, search for and seize tainted property or evidential material of the kinds specified in the warrant and, if the warrant allows, to conduct an ordinary or frisk search of a person at or near the premises if the executing officer or person assisting suspects on reasonable grounds that the person has any tainted property or evidential material in his or her possession.

15 By s 238, "[i]n executing a \*search warrant, an \*executing officer may obtain such assistance and use such force against persons and things as is necessary and reasonable in the circumstances".

16 Section 245 enables the executing officer or person assisting to operate electronic equipment at the premises being searched to access data if he or she believes on reasonable grounds that the data might constitute evidential material and the equipment may be operated without damaging it, and also to copy the data.

17 Section 246 is in these terms:

- (1) An \*executing officer may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable or necessary to allow the officer to do one or more of the following:
  - (a) access \*data held in or accessible from a computer that is on the \*premises;
  - (b) copy the data to a \* data storage device;
  - (c) convert the data into documentary form.
- (2) The magistrate may make an order if satisfied that:

- (a) there are reasonable grounds for suspecting that \* evidential material is accessible from the computer; and
  - (b) the specified person is:
    - (i) reasonably suspected of possessing, or having under his or her control, \*tainted property or evidential material; or
    - (ii) the owner or lessee of the computer; or
    - (iii) an employee of the owner or lessee of the computer; and
  - (a) the specified person has knowledge of:
    - (i) the computer or a computer network of which the computer forms a part; or
    - (ii) measures applied to protect \*data held in or accessible from the computer.
- (3) A person is guilty of an offence if the person fails to comply with the order.
- Penalty: Imprisonment for 6 months or 30 penalty units, or both.

18

Under s 266:

A person is guilty of an offence if:

- (a) the person makes a statement (whether orally, in a document or in any other way); and
- (b) the statement:
  - (i) is false or misleading; or
  - (ii) omits any matter or thing without which the statement is misleading; and
- (c) the statement is made in, or in connection with, an application for a \*search warrant.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

19

Section 338 defines the term "suspect" but only in relation to a restraining order, confiscation order and an unexplained wealth order.

### 3. THE FACTS

20

On 11 February 2014 a magistrate issued a production order to Seven West under s 202 of the PoC Act. The order required production of documents in eight classes by 14 February 2014, each of the classes relating to arrangements between Seven West and/or its



associated companies for the publication of the story of Schapelle Corby. The order required the documents to be produced to Jeffrey Kokles, an authorised officer within the meaning of the PoC Act and an officer of the AFP.

21 On 14 February 2014, before the expiry of the 3 day period later that day, Ms Munsie of Addisons Lawyers forwarded an email to Mr Kokles which referred to an earlier telephone call and confirmed that Ms Munsie acted for Seven West and would coordinate the response to the production order. In her email Ms Munsie requested clarification of certain issues including the fact that the order was not limited as to time and production of documents brought into existence before 1 January 2014 could not be achieved within the short time allowed, the wording of the production order which, it was said, extended to payments to staff of Seven West, and the terms of class 8 of that order. Mr Kokles replied shortly thereafter also by email. In the reply it was said that:

The AFP agrees that Seven West Media Ltd can provide requested documents in two (2) tranches as follows:

- Specified documents from the past 2 years to be provided by 4.00 pm this date as stated in the order; and
- All other documents to be provided by 25 February 2014 (14 days from the order date).

22 Mr Kokles' response also clarified the AFP's position in answer to the other questions Ms Munsie had asked.

23 Later on 14 February 2014, Ms Munsie personally delivered documents in answer to the production order to Mr Kokles. Those documents included a letter dated 24 January 2014 from New Idea to Mercedes Corby, Schapelle Corby's sister, confirming the conditions of an agreement between Mercedes Corby and Pacific Magazines, the publisher of New Idea, for an exclusive interview with Mercedes Corby. Under the heading "Fee" the letter stated:

Pacific will...pay to you or your nominee a total fee of \$25,000...within 14 days after the issue of New Idea containing the article goes off sale.

24 The documents produced also included a letter dated 7 February 2014 from Seven Network (Operations) Limited (Seven Network) to Mercedes Corby concerning exclusive arrangements with "Sunday Night", a proposed broadcast involving an interview between Mercedes Corby and Mike Willesee. The letter recorded Mercedes Corby's agreement to be involved in the exclusive interview and to "use [her] best endeavours to procure the

28

agreement of [her] sister, Schapelle, also to be similarly involved in an exclusive interview with Mike Willesee as part of the Sunday Night feature". The letter said that Seven Network agreed to meet the obligations as outlined in an attachment. The attachment included certain arrangements said to be "following release", meaning following the release of Schapelle Corby from prison in Bali on parole. The arrangements included, for the duration of a defined exclusivity period, Seven Network paying for Mercedes Corby and her family including Schapelle to be located in a secure villa, providing to the family a local driver and providing security for the Corby family, as well as providing Mercedes Corby with a Samsung smartphone which she could retain.

25 According to a subsequent letter, when she produced the documents Ms Munsie informed Mr Kokles that: (i) all documents relating to Seven West's television programs had been produced, (ii) the 24 January 2014 letter agreement between New Idea and Mercedes Corby was an unsigned copy but Seven West was continuing to search for documents associated with that agreement including in relation to the fee and would produce those further documents as soon as possible, (iii) clarification was still required as to whether production of documents, predating 1 January 2014, between Seven West and third parties not related to the Corby family was within the terms of the production order, and (iv) Seven West was aware of arrangements entered into by its magazine division for the purchase of photographs relating to the Corby family which it had not yet been able to locate and in respect of which Seven West's request for clarification was repeated.

26 Shortly before midday on 17 February 2014, the AFP served a letter on Ms Munsie at her home address. The letter stated that the AFP had reviewed the documents produced by Seven West in response to the production order and that, in the AFP's view, it was clear that Seven West had not complied with the order. The letter said that, by way of example, the documents provided did not identify how payment of the fee of \$25,000 to Mercedes Corby "is or was to be made" and that the letter dated 7 February 2014 relating to the Mercedes Corby exclusive arrangements made "no mention of funds that are to be paid despite a signed contract". The letter concluded:

We invite Seven to review its position and provide all the documents requested in the Order in their entirety for the past two years, by no later than the close of business today.

In the event that Seven does not fully comply with the Order as required the AFP will have no option but to consider further action be taken under the Act.

27 Just before 4.00 pm on the same day, 17 February 2014, the AFP approached the second respondent, a magistrate, to request the issue of the search warrants and s 246 orders issued on that day. In support of the applications the AFP provided the second respondent with an affidavit from Mr Kokles which was sworn before the magistrate as witness to the affidavit and copies of the proposed s 246 orders and search warrants as issued on 17 February 2014.

28 Mr Kokles' 17 February 2014 affidavit identified that he was an authorised officer of the AFP, being an enforcement agency under the PoC Act, and the applicant for a search warrant under s 225 of the Act in relation to premises including the premises of Seven West, Pacific Magazines, Addisons Lawyers, Kalantzis Lawyers, Mr Kalantzis, Ms Munsie and another named individual.

29 In paragraph 5, the affidavit records that, by reason of the matters set out in the affidavit, "a magistrate may properly be satisfied that there are reasonable grounds for suspecting that there are at the premises specified above evidential material within the meaning of the [PoC Act], being evidence relating to: literary proceeds which satisfies the following three conditions."

30 The three conditions are then set out.

31 The first condition identifies "Things which are: Originals or copies of any one or more of the following, including any of them which are stored on a computer... or any other type of storage medium or storage device". Several categories of document ranging from "contracts" to "currency" are then listed.

32 The second condition is that the "things" "relate to anyone or more of the following", after which some 33 items appear including the names of individuals (including Schapelle Corby, Mercedes Corby, Ms Munsie, Mr Kalantzis and a number of other people whose names need not be repeated), entities (including Pacific Magazines, New Idea, Seven West, Seven Network and Channel Seven), and things (including "CORBY Agreement" and "Mercedes CORBY Exclusive Agreement").

33 The third condition states that the "things" are things:

in relation to which there are reasonable grounds for suspecting that they relate to:

Evidence as to Schapelle Leigh CORBY (CORBY) born 10 July 1977 who on 27 May 2005 in Denpasar, Indonesia was convicted of an offence, being a foreign

indictable offence within the meaning of the Proceeds of Crime Act 2002, deriving Literary Proceeds as defined under section 153, Proceeds of Crime Act 2002.

34 Paragraph 6 of the affidavit, under the heading "The nature of the property in respect of which action has been or could be taken under the Proceeds of Crime Act 2002 and the nature of that action is set out below", states

On 27 May 2005, in Denpasar, Indonesia, CORBY was convicted of an offence, being a foreign indictable offence within the meaning of the Proceeds of Crime Act 2002, deriving Literary Proceeds as defined under section 153, Proceeds of Crime Act 2002.

Proceeds of Crime action could be taken to apply for a Literary Proceeds order under section 152 of the Proceeds of Crime Act 2002 in respect of all Literary Proceeds, as defined under section 153 Proceeds of Crime Act 2002, derived by CORBY in respect to any and all agreements entered into with Seven West Media Limited and related media representative entities by CORBY or on her behalf. ...

35 Paragraph 7 of the affidavit states that records obtained by the AFP reveal that Schapelle Corby was convicted in Indonesia of an offence which Mr Kokles suspected would, if carried out in Australia, amount to an indictable offence against the laws of Australia and that Schapelle Corby was granted parole in Bali on 10 February 2014. Sources identified as "open source enquiries", in effect newspaper articles and media statements, had reported that Channel Seven had secured an interview with Schapelle Corby for amounts of up to \$3 million. Under the heading "Actions taken by AFP", the following paragraphs appear:

7(i) On 11 February 2014, the AFP applied for and were granted a Proceeds of Crime Act 2002 section 202 Production Order (CMO14/023) (the order) to be served on Seven West Media Ltd, by New South Wales Magistrate GROGIN. The order stipulated that documents in respect to the order were to be provided to the AFP by 4.00pm on Friday 14 February 2014. Seven West Media Ltd is the corporate entity for Seven Network;

7(j) About 5.12pm on Tuesday 11 February, the AFP attended the offices of Seven West Media Ltd and served the order on Seven West Media Ltd located at...

7(k) About 3.50pm on 14 February 2014, at..., representative of Seven West Media Ltd, Justine MUNSIE (MUNSIE) of Addisons Lawyers, handed the AFP several documents in response to the order.

36 Paragraph 7(s) of the affidavit is in these terms:

Between 14 February and 17 February 2014, the AFP have reviewed documents provided by Seven West Media Ltd in response to the order dated 11 February 2014.

Upon reviewing the documents the AFP are not satisfied that Seven Network have complied with the order for example:

- A copy of a letter from New Idea to Mercedes CORBY dated 24 January 2014 has reference to an amount of \$25,000 ("the Fee"). It is not articulated in the limited documentation provided to the AFP as to how that payment is or was to be made;
- In relation to the "Mercedes Corby Exclusive Agreement" there is no mention of funds to be paid despite a signed contract.

37 In paragraph 8 of the affidavit, Mr Kokles requested that the search warrant authorise the conduct of an ordinary search or a frisk search of a person at or near the premises if the executing officer or person assisting suspects on reasonable grounds that the person has any tainted property or evidential material in his or her possession.

38 Paragraph 9 of the affidavit records the following, under the heading "Legal Professional Privilege":

**Legal premises**

It is my intention that, if practicable, before the premises are searched the executing officer will give the occupier of the premises, or a person who apparently represents the occupier, a copy of the document entitled "General Guidelines Between the Australian Federal Police and the Law Council of Australia as the Execution of Search Warrants on Lawyers' Premises, Law Societies and the Like Institutions in Circumstances Where a Claim of Legal Professional Privilege is Made" (a copy of which is attached) and that, as far as possible, the search will be conducted in accordance with the procedures set out in that document in the event that legal professional privilege is claimed in respect of any document covered by the warrant.

**Other premises**

It is my intention that, if practicable, before the premises are searched the executing officer will give the occupier of the premises, or a person who apparently represents the occupier, a copy of the document entitled "Claims for Legal Professional Privilege: Premises other than those of a Lawyer, Law Society or Like Institution" (a copy of which is attached) and that, as far as possible, the search will be conducted in accordance with the procedures set out in that document in the event that legal professional privilege is claimed in respect of any document covered by the warrant.

39 The affidavit concludes with the statement that Mr Kokles applies for a search warrant authorising him "with such assistance by such force as is necessary and reasonable" to enter the premises mentioned in the affidavit, search for and record fingerprints and take samples of things found at the premises, search for the kind of tainted property or evidential material specified in the warrant and seize things of that kind, seize other things on the basis of a belief on reasonable grounds that seizure is necessary to present the concealment, loss or

destruction or use of those things in committing an indictable offence, to conduct the ordering or frisk search of persons as specified and, "to apply provisions of an order under section 246 of the Proceeds of Crime Act 2002".

40

At 3.55 pm on 17 February 2014 the second respondent issued the search warrants and s 246 orders as identified in the table below:

File number	Order type	Premises/Addressce
CMO 14/035	s 225 Warrant	Seven West Media Limited
CMO 14/036	s 246 Order	"Seven West Media Ltd (Seven Network)"
CMO 14/037	s 225 Warrant	"Pacific Magazines (New Idea), Media City, [###]"
CMO 14/038	s 246 Order	"[###] or any other employce, Pacific Magazines (New Idea)"
CMO 14/039	s 225 Warrant	Addisons Lawyers[]
CMO 14/040	s 246 Order	Justine Munsie or any other employce, Addisons Lawyers
CMO 14/041	s 225 Warrant	Kalantzis Lawyers
CMO 14/042	s 246 Order	Kalantzis Lawyers
CMO 14/043	s 225 Warrant	[address of Ms Munsie's premises]
CMO 14/044	s 246 Order	"Justine Munsie or any other resident, [###]"

41

Apart from the different file numbers and premises to which the search warrants related, the search warrants were in identical terms. The search warrants were addressed to Mr Kokles. The warrants recorded the second respondent's satisfaction in respect of each of the premises as follows:

WHEREAS I am satisfied by information on oath provided to me by an authorised officer of an enforcement agency that there are reasonable grounds for suspecting that there is at the following premises:

[Premises]

[###]

42 The search warrants also set out each of the three conditions as referred to in the affidavit of Mr Kokles except (importantly, for the applicants' case) that the second condition appeared in these terms:

Second condition: And which relate to any one or more of the following:

List suspects, entities or other matters that are the subject of the investigation.

43 Following this statement the same 33 names of people, entities and things appeared as set out in the affidavit.

44 Apart from the different file numbers and people to whom the s 246 orders related, those orders were also in identical terms. Each order recorded that an application had been made by Mr Kokles, an authorised officer of an enforcement agency within the meaning of the PoC Act, in relation to a search warrant issued under s 225 of that Act in respect of the nominated premises for an order under s 246 of the Act. The s 246 orders also each recorded the following:

And whereas I am satisfied that:

- there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, a computer or data storage devices at those premises;
- you are reasonably suspected of having committed the offence stated in the relevant warrant and a person who uses or has used the computer or device; and
- you have relevant knowledge of the computer or device or a computer network of which the computer or device forms a part and measures applied to protect data held in, or accessible from, the computer or device.

And whereas I am satisfied that it is reasonable and necessary for the constable specified above to have the information or assistance set out below to:

- access data held in, or accessible from, a computer or data storage device on the warrant premises;
- copy data held in, or accessible from, a computer or data storage device on the warrant premises; and

- convert data held in, or accessible from, a computer or data storage device on the warrant premises into documentary form or another form intelligible to a constable.

I, [###], a magistrate within the meaning of the Proceeds of Crime Act 2002 hereby order you to provide the information or assistance set out in the following Schedule to the constable specified above.

45 Also on 17 February 2014, at 4.24 pm after the search warrants and s 246 orders had been issued but before they had been served and before the close of business that day, Ms Munsie forwarded a letter by email to the AFP in response to the AFP's earlier letter of the same day which invited Seven West to review its position and provide all the documents requested in the production order under s 202 of the PoC Act by no later than the close of business 17 February 2014.

46 The letter from Ms Munsie of 17 February 2014 confirmed that Seven West had not yet produced all documents in response to the production order "but has taken and is continuing to take all reasonable steps to comply with the terms of the order". This letter also clarified that, in response to AFP's query regarding the letter of 7 February 2014 relating to the "Mercedes Corby Exclusivity Agreement", there were "no funds to be paid except the matters referred to in the agreement" and that, accordingly, no such documents had been produced. The letter concluded with this statement:

Seven is continuing to search for and will produce any additional documents in response to the production order as soon as they are located. In the meantime, we would appreciate your responses to the requests for clarification made of Agent Kokles and set out above.

47 Later on 17 February 2014, Ms Munsie forwarded another email to the AFP which attached, by way of further production pursuant to the production order under s 202 of the PoC Act, remittance advices relating to the agreement between New Idea and Mercedes Corby. The attachments show a record of an electronic funds transfer by Seven Network to Mercedes Corby in the sum of \$25,000, as well as other records of historical transfers to members of the Corby family.

48 On 18 February 2014 another authorised officer of the AFP approached a different magistrate, the third respondent, with an affidavit seeking the issue of a search warrant in relation to the premises occupied by Media City. That officer, Victor Phun, swore his affidavit before the magistrate as witness, the affidavit being in substantially the same terms



as that sworn on the previous day by Mr Kokles. In particular the affidavit contained the same version of paragraph 7 including paragraph 7(s) referred to above forming part of Mr Kokles' affidavit. The affidavit also contained new paragraphs 7(t) and (u) to the effect that search warrants had been executed at premises of Seven Network and Seven West on 18 February 2014 and the AFP had been informed that one of the individuals named in the second condition of the search warrant was located at different premises known as Media City. No mention was made of the further correspondence from Ms Munsie late on 17 February 2014.

49           The third respondent issued a search warrant to Mr Phun in respect of the premises occupied by Media City. The conditions of this search warrant are in the same terms as the other search warrants referred to above including the second condition which sets out the name of 33 people, entities and things under the heading "List suspects, entities or other matters that are the subject of the investigation". However, this search warrant also contained deletions, which I infer to be by the third respondent, so that the authorisations to search for and record finger prints and take samples, as well as to conduct ordinary and frisk searches at or near the premises, have been struck through.

50           On 18 February 2014, the AFP served the s 246 order addressed to Addisons Lawyers on Ms Munsie at the premises of Addisons Lawyers. The AFP also executed the search warrants issued by the second respondent on 17 February 2014 in so far as they related to the premises of Seven West, Pacific Magazines, and Addisons Lawyers. The AFP did not execute the search warrant in respect of Ms Munsie's home and did not serve the s 246 orders addressed to Seven West, Pacific Magazines or the residents of Ms Munsie's home. Also on 18 February 2014, the AFP executed the search warrant issued that day by the third respondent in respect of the Media City premises.

51           On 21 February 2014, in response to a letter from the solicitors for Addisons Lawyers and Ms Munsie, the AFP confirmed in writing that the statement in the s 246 order stating that the magistrate was satisfied that "you are reasonably suspected of having committed the offence stated in the relevant warrant" was "incorrect", "should not have been made", was a "regrettable error" and an "innocent word-processing error". Further, as the AFP had "made clear" to Ms Munsie on 18 February 2014, "she was not suspected of any offence" and that "this was and has always remained the position". In a press conference held on 22 February 2014 the AFP confirmed that:

When our members put the search documents together and the accompanying order under s 246, they used a previous pro-forma from another matter, that in there referred to a criminal offence. Then they changed some of the details, what they failed to do, was omit that particular paragraph. That's all it was. It did say in there it referred to a criminal offence in the warrant. Of course when you go to the warrant there is no criminal offence. Having said that though it is a mistake and it's a mistake the AFP regrets, and we sincerely apologise for any inconvenience, particularly to the individuals who may have thought as a result of their name being at the top as the occupier of the premises that we had any way inferred that they committed any criminal activity.

52 Consistent with these matters, it is common ground in this proceeding that none of the  
33 people, entities and things identified in the second condition of the search warrants, other  
than Schapelle Corby in respect of the offence committed in Indonesia in 2005 for which she  
had been convicted and was on parole, was or had ever been a "suspect". Further, none of  
the recipients of the s 246 orders was or had ever been "reasonably suspected of having  
committed the offence stated in the relevant warrant".

#### 4. DISCUSSION

53 The parties proceeded on the basis that the decisions of the second and third  
respondents to issue the search warrants and s 246 orders were amenable to judicial review  
under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and  
s 39B of the *Judiciary Act 1903* (Cth) (Judiciary Act). I agree.

##### 4.1 The "suspects" points

54 As noted, the applicants' primary contentions of invalidity are founded upon the  
propositions that the s 246 orders wrongly asserted the recipients were reasonably suspected  
of having committed an offence and the search warrants wrongly identified numerous  
individuals as "suspects". According to the applicants, as a result of these matters, the s 246  
orders and search warrants are bad on their face as they show the second and third  
respondents addressed the wrong question, and the decisions to issue the s 246 orders and  
search warrants should be vitiated for error of law as those decisions: - (i) were based on facts  
which did not exist, (ii) disclose a failure of any consideration of the statutory conditions for  
the issue of the s 246 orders and search warrants, (iii) disclose the taking into account of an  
irrelevant consideration, and (iv) were so unreasonable that no reasonable person could have  
made the decisions.

55 The AFP answered the applicants' primary contentions in a number of ways.

56 The AFP submitted that while the s 246 orders contained a clear clerical error (the statement that “[y]ou are reasonably suspected of having committed the offence stated in the relevant warrant”), the same could not be said of the search warrants. The second condition in the search warrants involves three alternatives – suspects, entities or other matters that are the subject of the investigation. Some of the items appearing in the list are plainly not capable of being “suspects” (for example, the item the “Mercedes CORBY Exclusive Agreement”). It is not tenable, according to the AFP, to construe “entities” and “other matters” as excluding natural persons as to do so would “suggest that individuals who were not suspects were intended to be excluded from the Second Condition (in circumstances where non-suspect entities were included)”. As the AFP put it:

An ordinary reading of the three categories together, along with the statutory context, makes clear that an individual who is not a suspect may nonetheless be listed in the Second Condition.

57 The AFP said also:

...the warrant makes plain that the only relevant offence is the offence for which Schapelle Corby was convicted. It is abundantly clear that, other than Schapelle Corby, no person, entity or thing on the list could even conceivably be regarded as a “suspect” in the commission of an offence.

58 It may be accepted that the search warrants identify Schapelle Corby as having committed an offence. However, the second condition of the warrants also identifies “suspects, entities or other matters that are the subject of the investigation”. I do not accept the submission that a natural person may fall within the descriptions “entities or other matters”. The natural and ordinary reading of the second condition is that all of the individuals named in the list are “suspects... that are the subject of the investigation”. The ordinary meaning of a “suspect”, in the context of a search warrant, is a person suspected of having committed an offence.

59 The AFP’s submission that no person in the list “could even conceivably be regarded as a “suspect” in the commission of an offence” ignores the terms of the second condition. The submission also assumes both knowledge of the PoC Act (specifically that, despite its title, the Act provides a civil scheme for the recovery of literary proceeds and does not create any offence in connection with the payment of funds which might be recovered as literary proceeds) and that such knowledge would trump the plain words of the second condition. Neither assumption is justified. The AFP called no evidence explaining what occurred before

the second and third respondents. No inference may be drawn in the AFP's favour that the second and third respondents knew about the scheme of the POC Act insofar as it applies to literary proceeds or, if they held that knowledge, that it meant they did not give the search warrant its natural and ordinary meaning that each of the individuals appearing in the list under the second condition were "suspects ... that are the subject of the investigation".

60 It is convenient to state here in the form of conclusions (and explain subsequently) that I am satisfied that there are a limited range of possible ways in which these search warrants and s 246 orders were issued. Either:

- (1) the second and third respondents did not consider the terms of the orders and warrants; or
- (2) the second and third respondents knew about the scheme of the PoC Act in respect of the recovery of literary proceeds and that the scheme did not create any offence or other wrong by those paying for an interview or facilitating that payment, in which event the second and third respondents could not have issued the s 246 orders stating that "[y]ou are reasonably suspected of having committed the offence stated in the relevant warrant" or the search warrants identifying numerous individuals as "suspects" on any rational basis, had they considered the terms of the orders and warrants; or
- (3) the second and third respondents did not know about the scheme of the PoC Act in respect of the recovery of literary proceeds and, had they considered the terms of the orders and warrants, wrongly assumed that the scheme did create an offence or other wrong by those paying for an interview or facilitating that payment, in which event the s 246 orders and search warrants were issued on a fundamentally false premise induced (wrongly, but innocently) by the AFP by reason of the erroneous statements and other material placed before the second and third respondents.

61 As explained below, whichever possibility is correct (and, as will become apparent, the last possibility seems the most likely), the decisions to issue the s 246 orders and search warrants are materially affected by legal error and should be quashed. I return later to these matters.

62 In addition to the submission that the search warrants did not contain any clerical error (which I have rejected above), the AFP submitted that it could not be inferred that the

acknowledged error in the s 246 orders affected the search warrants. As the AFP put it, there was no evidence that the second respondent considered the s 246 orders before considering the search warrants on 17 February 2014 and the third respondent did not issue any s 246 orders. The submission makes no allowance for the ordinary process of the drawing of inferences. In particular, insofar as the second respondent is concerned, it is known that the applications for all the search warrants and s 246 orders were supported by a single affidavit. It is known that the affidavit was sworn before the second respondent with the second respondent acting as witness. It is known that the search warrants and s 246 orders bear file references running sequentially from CM 14/035 to CM 14/044. It is an agreed fact that the search warrants and s 246 orders were all issued at about 3.55 pm on 17 February 2014. In these circumstances, the notion that the second respondent did not have in mind the s 246 orders when he issued the search warrants and, conversely, did not have in mind the search warrants when he issued the s 246 orders is unrealistic. It does not matter that there is no evidence that the second respondent looked at the s 246 orders before issuing the search warrants. The proper inference to be drawn in the circumstances is that in deciding to issue each search warrant and each s 246 order the second respondent had in mind the whole of the material placed before him including all of the s 246 orders and all of the search warrants.

63

Two other general submissions the AFP made may be accepted but neither leads to the ultimate conclusion for which the AFP contends, that the errors in the s 246 orders and search warrants were immaterial. It is true that "[w]hether or not a particular document records what in fact were the decision-maker's reasons for the decision is a question of fact" (*Rashid v Minister for Immigration and Citizenship* [2007] FCAFC 25 at [17]). It is also true that the applicants bear the onus of establishing error on the part of the second and third respondents (*Hu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 63 at [19]). The AFP's submissions, however, gloss over the fundamental facts that, in issuing the s 246 orders under his signature, the second respondent effectively certified that he was satisfied that the recipients were reasonably suspected of having committed an offence stated in the relevant warrant and, further, in issuing the search warrants, the second and third respondents each effectively certified that they were satisfied that the individuals nominated in the second condition were "suspects...that are that are the subject of the investigation".

64

Accordingly, the AFP's conclusion that "a state of satisfaction as to a reasonable suspicion that the addressees had committed an offence was no part of the Second

Respondent's reasoning process" can be accepted only if it is also inferred that the second respondent did not consider the statements in the s 246 orders and search warrants at all. The five reasons given by the AFP in support of its conclusion, as explained below, are unpersuasive.

65 First, the AFP said that the statutory criteria to which the second respondent was required to have regard do not include the existence of a reasonable suspicion of the commission of an offence. This is true but, as noted, the s 246 orders expressly refer to the second respondent being satisfied as to the existence of such a suspicion and the search warrants refer to the named individuals as suspects the subject of an investigation. Further, the investigation is described in the affidavit of Mr Kokles (and Mr Phum) as relating to property and action which has been or could be taken as follows:

On 27 May 2005, in Denpasar, Indonesia, CORBY was convicted of an offence, being a foreign indictable offence within the meaning of the Proceeds of Crime Act 2002, deriving Literary Proceeds as defined under section 153, Proceeds of Crime Act 2002.

Proceeds of Crime action could be taken to apply for a Literary Proceeds order under section 152 of the Proceeds of Crime Act 2002 in respect of all Literary Proceeds, as defined under section 153 Proceeds of Crime Act 2002, derived by CORBY in respect to any and all agreements entered into with Seven West Media Limited and related media representative entities by CORBY or on her behalf.

66 These paragraphs are dense to say the least. The first paragraph, moreover, arguably suggests that a part of the offence Schapelle Corby committed in Denpasar in 2005 included deriving literary proceeds within the meaning of the PoC Act. Accordingly, although it formed no part of the conditions precedent to the issue of a s 246 order and/or search warrant under the PoC Act, the material before the second and third respondents either (in the s 246 orders before the second respondent) expressly identified the recipients as being reasonably suspected of having committed "the offence stated in the relevant warrant" or (in the search warrants before the second and third respondents) expressly identified many individuals, including the recipients, as suspects in the investigation and (in the affidavits before the second and third respondents) identified the investigation in ambiguous terms which did not make clear that neither the deriving of literary proceeds nor the payment or facilitation of a payment which might give rise to a literary proceeds order is, in itself, an offence.

67 In these circumstances, the fact that the statutory criteria to which the second and third respondents were required to have regard do not include the existence of a reasonable

suspicion of the commission of an offence is not indicative of the immateriality of the material before them which expressly stated that the recipients of the s 246 orders and warrants were reasonably suspected of having committed an offence or were suspects in an investigation. To the contrary, that fact is indicative of the statutory powers vested in the second and third respondents having miscarried by reason of the errors in the s 246 orders and search warrants and, possibly, also by the lack of explanation about the operation of the PoC Act in the supporting affidavits of Mr Kokles and Mr Pinn.

68           Second, the AFP said that the references in the s 246 orders to the recipients being "reasonably suspected of having committed the offence stated in the relevant warrant" disclosed that the statements were in obvious error because the only offence identified in the warrant is that of Schapelle Corby for which she was convicted, and the warrants do not identify any offence committed or suspected of having been committed by any other person. Accordingly, the AFP submitted:

The Applicants thus ask the Court to attribute to the Second Respondent a nonsensical or meaningless statement. The Court would not readily infer that the Second Respondent was satisfied of an unspecified matter. In the absence of any relevant offence being specified in the warrant, the Court would thus infer that the language in the Section 246 Order upon which the Applicants rely was a mere clerical error.

69           When this submission is unpicked, it is apparent that it conflates several considerations. The fact that the statements in the s 246 orders were the result of "clerical error" may be accepted. It is not part of the applicants' case that the AFP wrongly believed the recipients of the s 246 orders to be suspects in the commission of any offence or that the AFP intentionally misled the second respondent by including knowingly false statements in the s 246 orders. However, the characterisation of the clerical error as "mere" is more difficult to accept if by "mere" it is meant to suggest the error was trivial or insignificant. The statements are not immaterial typographical errors or errors of detail. The statements are of the most serious kind and the second respondent, by his signature, affirmed he was satisfied they were true. The second respondent did so in the context of a warrant which identifies in the second condition numerous individuals as "suspects...that are the subject of the investigation" and in the third condition describes the suspicions as relating to evidence that Schapelle Corby "was convicted of an offence, being a foreign indictable offence within the meaning of the Proceeds of Crime Act 2002, deriving Literary Proceeds as defined under section 153, Proceeds of Crime Act 2002". As noted, it is by no means clear from the

warrant that deriving literary proceeds is not itself some form of offence. Accordingly, it cannot be said that the second respondent made a meaningless or nonsensical statement in the s 246 orders by stating his satisfaction that the recipients were reasonably suspected of having committed an offence stated in the warrant. Nor can it be said, for the same reason, that the second respondent was stating he was satisfied as to an unspecified matter. The statement was wrong, but that is a different matter.

70 It is this context which leads to the three possible explanations identified above for what occurred and, if it is necessary to express any conclusion in this regard (which I do not consider it is), makes the third of those possibilities most likely.

71 A number of factors support this inference.

72 For one thing, there is no reason to assume that the second and third respondents were familiar with the scheme of the PoC Act in respect of literary proceeds. There was no cogent explanation of the scheme in the material made available by the AFP to the second or third respondents and, as explained above, the erroneous and ambiguous statements in that material, if taken at face value, arguably suggested that there was an offence in respect of deriving literary proceeds.

73 For another thing, the second and third respondents issued the s 246 orders and search warrants on an urgent basis, as disclosed by the fact that the supporting affidavits were sworn in front of the second and third respondents. It is unlikely that either would have had the time to analyse the provisions of the PoC Act given the length and complexity of that legislation. In the ordinary course, both would have been relying on the AFP to explain the statutory scheme, preferably in a cogent manner in writing in the affidavit. The affidavit, as discussed, does not provide a cogent explanation of the statutory scheme for literary proceeds.

74 Moreover, insofar as oral explanations might have been given, neither of the officers who swore the affidavits, Mr Kokles and Mr Phun, have been called to give evidence in respect of what the second and third respondents were told about the PoC Act and the circumstances calling for the issue of the s 246 orders and search warrants.

75 Further, and most importantly, the second respondent issued the s 246 orders and search warrants and the third respondent issued the search warrant in terms which contain the erroneous statements – as to the existence of the reasonable suspicion and the individuals being suspects – as identified. The issue of a search warrant and a s 246 order are solemn



acts issued under the hand of the individual magistrate. They authorise actions which would otherwise constitute trespass and, insofar as searches of the person are concerned, an assault. They represent serious intrusions into private and property rights of which the common law "has long been jealous" (*George v Rockett* (1990) 170 CLR 104 at 110). Accordingly, the orders and warrants would not have been issued lightly by the second and third respondents.

76 These circumstances make it exceedingly unlikely that the second and third respondents failed to consider the terms of what they were issuing (the first possible explanation). It is equally exceedingly unlikely that the second and third respondents considered the terms of what they were issuing and, because they knew the scheme of the PoC Act, knew also that the terms included errors involving accusing numerous people of being suspected of having committed an offence or being suspects in an investigation when there is no offence under the PoC Act, and yet dismissed those matters as "mere clerical errors" and decided to issue the orders and warrants in any event (the second possible explanation). If that was the decision-making process, then it was so unreasonable that no reasonable magistrate could have made the decisions. Yet, accepting this last proposition – attributing to the second and third respondents manifest unreasonableness – is what the AFP's submissions necessarily involve, once properly analysed. How else can it be said that the erroneous statements – such a prominent part of the s 246 orders and plainly disclosed in the search warrants – played no part in the second respondent's reasoning process, as the AFP would have it?

77 Against these extremely unlikely possibilities is the third possibility identified – that the erroneous and ambiguous statements in the AFP's material were considered by the second and third respondents as part of a proper consideration of the material as a whole and, in the circumstances of urgency and a lack of any cogent explanation in the material of how the PoC Act operated in respect of literary proceeds, led the second and third respondents to assume the AFP's statements were correct and that there thus was some offence relating to literary proceeds in the PoC Act, thereby justifying the issue of the s 246 orders and warrants.

78 While I have said it is not necessary to make a finding as to which of the three possibilities is correct because each involves legal error sufficient to quash the s 246 orders and search warrants, I have considered these matters because of the way in which the hearing proceeded. In short, the AFP was critical of the applicants for identifying the alternative ways in which they asserted there must have been legal error by the second and third

respondents. What the AFP did not acknowledge was that, when analysed, its own submissions – that the second and third respondents must be taken to have considered what was before them and treated the statements in issue as “mere clerical errors” – would have the second and third respondents acting in a manner in which no reasonable magistrate could have acted (that is, by issuing solemn documents identifying people as suspected of having committed an offence and as suspects, who could not be suspects or suspected of any offence given the terms of the legislation on the basis that those statements were a “mere clerical error”). Nor did the AFP acknowledge the fact that, had the second and third respondents done exactly what they could be expected to have done in the circumstances – that is, rely on the AFP to provide cogent and accurate information about the investigation in terms of the scheme in the PoC Act – it is not at all difficult to see how and why the second and third respondents were led into error by the AFP.

79

Third, the AFP said that no evidence was placed before the second or third respondents relevant to the commission of any offence by any person other than Schapelle Corby. As discussed above, the material placed before the second and third respondents did identify that Schapelle Corby had committed an offence. However, the problem is the combination of the erroneous statements and what the material did not say. The material did not explain that the PoC Act created no offence in respect of the derivation of literary proceeds, whether by Schapelle Corby in deriving such proceeds or by another person in facilitating that derivation. The material did not explain that a literary proceeds order is not founded upon any such offence, the scheme created by the PoC Act being a civil, rather than criminal, regime. The material did not do these things in the face of statements that the recipients of the s 146 orders were reasonably suspected of having committed an offence and the individuals listed in the third condition of the search warrants were suspects the subject of the investigation. In these circumstances, the fact that the material did not identify the commission of any offence by any person other than Schapelle Corby does not support the AFP's submission that the erroneous statements played no part in the reasoning process of the second (or, for that matter, the third) respondent.

80

Fourth, the AFP said that the erroneous statement appears in each and every one of the s 246 orders and it is “highly improbable” that the second respondent was declaring himself satisfied that each recipient was reasonably suspected of committing an offence. I disagree. The submission assumes that the second respondent, despite the urgent circumstances, the errors and ambiguities in the AFP's material, and the lack of any cogent

explanation in the affidavit as to how the PoC Act operated, knew that the PoC Act did not create any offence relating to the derivation of literary proceeds yet issued orders and warrants asserting that numerous people connected with the Corby family perhaps deriving literary proceeds were suspected of having committed an offence. It is that assumption which is highly improbable. What is not highly improbable is that the second respondent was misled by the AFP, albeit by innocent errors, and wrongly assumed that there was an offence relating to the derivation of literary proceeds and that those involved in facilitating that derivation, accordingly, were reasonably suspected of having committed an offence and were suspects in the investigation.

81 Fifth, the AFP said that the manner in which the s 246 orders were addressed (such as to "a named company or individual or any other employee of a specified entity") made it implausible that the second respondent was declaring himself satisfied that the recipients were reasonably suspected of having committed an offence. As the AFP put it:

It cannot seriously be suggested that the Second Respondent was purporting to be satisfied that every employee of the specified entities were reasonably suspected of having committed an offence. That, however, is the necessary consequence of the Applicant's submission.

82 This submission has to be assessed in the overall context. The references to "or any other employee" in two of the s 246 orders and to "any other resident" in another follows the identification, in capital letters, of the primary recipient of the order. In these circumstances it is not difficult to infer that the "you" in the statements of satisfaction is the person or entity appearing in capital letters at the commencement of the orders. Once that it is accepted, it is also not difficult to accept, for the reasons already given, that the second respondent was declaring that he was satisfied that each first named recipient of the orders was reasonably suspected of having committed an offence.

83 Another point should be made. The AFP, in its written and oral submissions, emphasised that the s 246 orders and search warrants should not be scrutinised "minutely and finely with an eye keenly attuned to the perception of error", citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; [1996] HCA 6 at 272. However, and as the applicants submitted, this observation concerns the reasons for an administrative decision-maker's decision. The s 246 orders and search warrants are not the reasons for the decision. They are the instruments authorising acts that otherwise would be unlawful. Reasons may not be obtained for a decision to issue a search warrant (s 13 and Sch 2 para

(e)(iii) of the ADJR Act). Moreover, the law in relation to search warrants is established in *George v Rockett*. In particular, "strict compliance with the statutory conditions governing the issue of search warrants" was said by the High Court to "give effect to the purpose of the legislation" (at 111), in that case the *Criminal Code Act 1899 (Qld)*, but the same conclusion applies in the present case. Further, there is imposed on the justice issuing the search warrant a duty to be satisfied that the conditions of the issue of the warrant are fulfilled and "the warrant should express the justice's satisfaction that there are reasonable grounds for the suspicion and relief" (also at 111). Accordingly, there is no scope for the operation of the principles which inform the construction of reasons for administrative decisions in the review of a search warrant. Even if there were, the error in each of the s 246 orders is egregious and that in the search warrants only slightly less so. Neither error, to a person properly informed about the operation of the PoC Act, is to be found only by an eye keenly attuned to the perception of error.

84

For these reasons, the AFP's submission that the applicants' case is based on a false premise, being the premise that the erroneous statements in question were central to the decisions of the second and third respondent when according to the AFP those statements should be inferred to have played no part in the second and third respondent's reasoning processes, cannot be accepted. The erroneous statements must be inferred to have been a central, indeed fundamental, matter which the second and third respondents considered when deciding to exercise their discretion to issue the s 246 orders and search warrants. The exercise of the discretion thus miscarried. If it is necessary to label how it miscarried it is sufficient to say that I accept that it is possible it could have been in any one of the three ways I identified above, although I consider it most likely that the second and third respondents were simply led into error by the material the AFP placed before them and assumed a critical fact – that the PoC Act created an offence relating to the derivation of literary proceeds – when there is no such offence. In any event, as I have said, whatever possibility represents the true position, be it a failure of consideration or manifest unreasonableness or an incorrect belief as to the existence of an offence, there is material error requiring intervention. The s 246 orders and search warrants, accordingly, must be quashed.

85

To the extent it is necessary to say more about these issues by reason of particular submissions, I do so in an abbreviated form.

86

While the grounds in ss 5(1)(h) and 5(3)(b) of the ADJR Act (no evidence and decision based on fact which did not exist) are confined in their scope (*Minister for Immigration and Multicultural Affairs v Rajamannikam* (2002) 210 CLR 222; [2002] HCA 32 at [58]), the grounds in s 5(1)(e) (improper exercise of the power) and s 5(1)(j) (decision was otherwise contrary to law) of the ADJR Act, also pleaded by the applicants, are not so confined. Nor is the jurisdiction under s 39B of the Judiciary Act. Even if consideration is limited to the grounds in ss 5(1)(h) and 5(3)(b) of the ADJR Act, on the third possibility as to what occurred, the test in *Rajamannikam* at [58], that the decision would not have been made but for the finding, would be satisfied. To explain, if the second and third respondents had been misled into believing the PoC Act created an offence relating to deriving literary proceeds then, given the terms of the s 246 orders and search warrants including the erroneous statements, it should be inferred that unless satisfied the individuals were reasonably suspected of having committed the offence or were suspects in the investigation, the second and third respondent would not have made the decisions under challenge. Otherwise, the first and second possibilities engage s ss 5(1)(e) and (j) of the ADJR Act.

87

I do not accept the applicants' submission that a magistrate is precluded from taking into consideration anything not expressly stated in s 246(2) of the PoC Act in deciding whether or not to issue an order under s 246(1). That would be to ignore the discretion which exists even if the magistrate is satisfied as to the required matters in s 246(2). In terms of the exercise of discretion, the law remains that relevant and irrelevant considerations, if not expressly identified, are to be determined from the "subject-matter, scope and purpose of the Act" (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40 at 40). I cannot see anything which would limit the discretion in s 246(2) to the matters specified in s 246(a) – (c). For this reason, the label of taking into account an irrelevant consideration is inapt. The problem is not that s 246(2) prohibited the second and third respondents from considering that the various recipients and listed individuals were suspected of having committed an offence. The problem is that, despite the assertions to the contrary in the s 246 orders and search warrants, there is no offence known to law which the various recipients and listed individuals could have committed.

88

I do not accept the AFPs submission that the s 246 orders and search warrants should not be considered together. As explained, I infer that is how the second respondent dealt with them and thus the errors in the one affected, and infected, the other. Further, the same error operated in respect of the search warrant issued by the third respondent on 18 February 2014.

Although the third respondent cannot be inferred to have had the s 246 orders before him, the search warrant contained the second condition in the same terms (listing numerous individuals as suspects the subject of the investigation) which, in and of itself, gives rise to the same three possibilities of error identified above.

89 For these reasons, I consider the s 246 orders and search warrants to be affected by material legal error. The AFP did not make any submission that relief should be withheld in the exercise of discretion. Nor is any basis for withholding relief apparent. The legal errors are material, go to the heart of the decisions to issue the s 246 orders and search warrants, and the decisions infected by those errors should be quashed.

90 The other arguments which the applicants put may also be considered in an abbreviated form.

#### 4.2 Failure to be satisfied of statutory condition for s 246 orders

91 Section 246(2)(b) of the PoC Act required the second respondent to be satisfied that:

- (b) the specified person is:
- (i) reasonably suspected of possessing, or having under his or her control, \*tainted property or evidential material; or
  - (ii) the owner or lessee of the computer; or
  - (iii) an employee of the owner or lessee of the computer;

92 According to the applicants, the s 246 orders failed to record the second respondent being so satisfied. Instead, the s 246 orders said only that the second respondent was satisfied that the person "uses or has used the computer".

93 It is true that the s 246 orders do not, on their face, disclose that the second respondent was satisfied as to the matters in s 246(2)(b). The terms of s 246(2)(b) may be compared with what the s 246 orders relevantly said in this regard as follows:

And whereas I am satisfied that:

- there are reasonable grounds for suspecting that evidential material is held in, or is accessible from, a computer or data storage devices at those premises;
- you are reasonably suspected of having committed the offence stated in the relevant warrant and a person who uses or has used the computer or device; and
- you have relevant knowledge of the computer or device or a computer

network of which the computer or device forms a part and measures applied to protect data held in, or accessible from, the computer or device.

94 The first and third dot points appears to refer to subs-ss 246(2)(a) and (c) respectively. The second dot point bears no resemblance to s 246(2)(b). Despite the obvious differences, the applicants' arguments are not attractive on this point.

95 The applicants submitted that the presumption of regularity did not apply to magistrates and thus the order had to show authority on its face, a requirement that would not apply to a warrant issued by a superior court which has the benefit of the presumption of regularity (*Ousley v The Queen* (1997) 192 CLR 69 at 88-89 and 108-109). Whether or not the presumption of regularity should extend to inferior courts is not a matter for present discussion. Suffice it to say that, if the presumption did so extend, this ground should fail. It is also not apparent that a s 246 order is or should be the subject of the same requirements as a warrant issued by an inferior court. An order under s 246 is intended to be ancillary to a warrant, facilitating its execution. The considerations which support the principle that a warrant must show jurisdiction on its face, if issued by an inferior court, are not readily applicable. Further, the *expressio unius* principle relied on by the applicants referring to *Ousley* at 111 (namely, that because the second respondent expressly referred to at least one statutory condition it should be inferred he was not satisfied as to the others) is of doubtful application in this context. Finally, the issue is, or at least should be, whether the second respondent should be inferred not to have been so satisfied in all of the circumstances. That question, if asked, must be answered against the applicants.

96 Given the conclusions I have reached that the s 246 orders and search warrants are invalid on other grounds I prefer not to express any decision which would be seen as giving support to the applicants' arguments on this point.

#### 4.3 Misrepresentation

97 The applicants in NSD 201 of 2014 contended that the search warrants should be quashed because the AFP unintentionally misled the second respondent by stating that the AFP was not satisfied that Seven had complied with the s 202 order for production when a consensual regime was in place for continuing compliance and by failing to disclose material information to the state of Seven's compliance.

98 The applicants in NSD 207 of 2014 contended that the AFP should be inferred to have misled (including, in some respects, deliberately misled) the second respondent as to a series of matters including that: - (i) Mr Kalantzis was reasonably suspected of having committed an offence, (ii) Mr Kalantzis was a suspect in the investigation, (iii) Mercedes Corby was a suspect in the investigation, (iv) numerous other named individuals were suspects in the investigation, (v) Schapelle Corby had entered into an agreement with Seven, (vi) Seven had finished producing documents under the s 202 order, (vii) the Mercedes Corby exclusive agreement made no reference to payments, (viii) Seven Network had agreed to pay Mercedes and/or Schapelle Corby \$1-3 million, (viii) Mr Kokles intended to comply with the guidelines as to privilege referred to in paragraph 9 of his affidavit, and (ix) Mr Koles intended to seize documents only in accordance with the terms of the search warrants.

99 The first matter which must be stated is that there was no proper foundation for the submission in NSD 207 of 2014 that the AFP deliberately misled the second respondent. The evidence simply does not support that submission and I reject it.

100 That said, it must be accepted that the material which the AFP placed before the second and third respondents was misleading insofar as it identified people as reasonably suspected of having committed an offence or as suspects. That caused the discretion to miscarry for the reasons discussed above. Apart from those matters, the essence of the applicants' complaint is that the second and third respondents were misled because they were not informed about the arrangements which had been made to extend the time for compliance with the s 202 order or that Seven was continuing to comply with the s 202 order in a co-operative manner, Seven having requested clarification of certain issues, provided further information when producing the documents, and having indicated that searches were ongoing and further documents would be produced.

101 There is no doubt that the affidavits of Mr Kokles and Mr Phun, regrettably, create an impression about the status of Seven's production contrary to the true position. Any reasonable person reading Mr Kokles' affidavit would infer that Seven had produced documents up to 14 February 2014 and this production was inadequate. That was not the true position, as the facts recorded above disclose. Any reasonable person reading Mr Phun's affidavit would reach the same conclusion, despite the fact that the very examples of alleged inadequacies in Seven's production referred to in paragraph 7(s) of each affidavit had in fact been answered in Ms Munsie's letters sent to the AFP at 4.24 pm and 5.46 pm on 17



February 2014, before Mr Phun swore his affidavit on 18 February 2014 in support of the further search warrant.

102 The AFP's submission that there is no evidence that Mr Kokles or Mr Phun knew about the status of all communications with Seven's solicitors at the time they swore their affidavits is misconceived. As the applicants submitted, Mr Kokles and Mr Phun were giving evidence in their capacity as officers of the AFP. They were giving evidence about the AFP being not satisfied as to the production by Seven. In these circumstances, this submission by the AFP has no merit.

103 I also do not accept that there were no material misrepresentations to the second and third respondent. The identification of persons as reasonably suspected of having committed an offence and as suspects in an investigation was materially misleading. So too, by material omission, was the AFP's description of the circumstances relating to compliance with the s 202 order for production. Apart from these matters, however, I do not accept that the material placed before the second and third respondents was misleading in the way the applicants in NSD 207 of 2014 contended. At worst, things said to have been intended in the material did not occur on execution of the warrants, but this does not mean that the stated intentions were not held at the time. Accordingly, these contentions must be rejected.

104 The real argument, accordingly, is the one put by the applicants in NSD 201 of 2014, an argument which the other applicants also adopted and is equally applicable in their case.

105 The position is this. If innocent but nevertheless material misrepresentations which may be inferred to have induced the issue of a search warrant and s 246 order have the effect of vitiating the warrant and order, then these warrants and orders should be quashed. This is because I am satisfied that there were innocent but material misrepresentations which induced the issue of the search warrants and orders, being those relied upon by the applicants in NSD 201 of 2014. If, however, no misrepresentation, no matter how egregious and despite it inducing the issue of the search warrant and s 246 order, can vitiate the search warrant or s 246 order if innocently made, then these warrants and orders should not be quashed on this ground. This is because I am satisfied that all of the misrepresentations were innocent. The AFP officers had no intention of misleading the second and third respondents.

106 The AFP submitted that the decision in *Lego Australia Pty Ltd v Paraggio* (1994) 52 FCR 542; [1994] FCA 1286 ('Lego') answers the issue against the applicants. In *Lego*, the

Full Court of the Federal Court rejected the notion of any free-standing duty of disclosure in the making of an application for a search warrant (at 555). It also said at 555 that, despite this:

It is true that, in an exceptional case, an administrative decision may be vitiated by fraud or misrepresentation even at common law (see, eg Sir William Wade, *Administrative Law* (6th ed, 1988), p 257). The AD(JR) Act itself makes such a provision: see s 5(1)(g).

107 Section 5(1)(g) of the ADJR Act requires fraud.

108 At least one subsequent decision has construed *Lego* as requiring deliberate misrepresentation (in effect, fraud) to enable a search warrant to be quashed on this ground (*Majzoub v Kepreotis* [2009] NSWSC 1498 at [68]). Another might be taken to be suggesting the same thing (*Jilani v Wilhelm* (2005) 148 FCR 255; [2005] FCAFC 269 at [98]-[101]). Another decision, in *obiter dicta*, concludes that fraud is required (*Firearm Distributors Pty Ltd v Carson* [2001] 2 Qd R 26; [2000] QSC 159 at [42], [44]).

109 The applicants submitted that *Lego* was distinguishable, primarily on the basis that the PoC Act contains s 266, which makes it an offence to make a statement in application in a search warrant if the statement is false or misleading or omits any matter or thing without which the statement is misleading. There was no equivalent provision in the statute under consideration in *Lego*. However, as the AFP submitted, s 266 cuts both ways. On one view, it might support the existence of a duty of disclosure. On another, it might be thought that the provision indicates the lack of any such duty and an intention not to invalidate warrants issued by reason of unintentional misrepresentation. On balance, I do not consider that s 266 is a sound basis upon which *Lego* might be distinguished.

110 The applicants submitted that *Lego* embraced innocent misrepresentations and the case (or cases) to the contrary involved a misreading of *Lego* or were simply wrong. I am not persuaded that *Majzoub v Kepreotis* involves a misreading of *Lego*. In particular, when regard is had to the reference to s 5(1)(g) of the ADJR Act in the passage from *Lego* at 555 it is difficult to conclude that the Full Court was saying that anything less than fraud would suffice as an independent ground for quashing a search warrant if the issue was one of a failure to disclose material matters. Accordingly, I consider that I am bound by *Lego* in this regard. On this basis, despite the fact that I am satisfied: - (i) the AFP misled the second and third respondent, by stating that the AFP was not satisfied that Seven had complied with the

s 202 order for production when a consensual regime was in place for continuing compliance and by failing to disclose material information to the state of Seven's compliance, and (ii) the misrepresentations by omission and incomplete statements were material to the decisions to issue the s 246 orders and search warrants, I do not consider that the s 246 orders and search warrants can be quashed on this basis because I also accept that the misrepresentations were unintentional. Whether the lack of any remedy in this regard is satisfactory is not a matter for present consideration.

111 It is appropriate here also to deal with the applicants' contention that the second and third respondents each failed to take into account the extension of time granted in respect of the s 202 order and the fact that, at the time the search warrants and s 246 orders were issued, Seven West was taking steps to comply with the s 202 order, which was said to amount to a failure to take into account relevant considerations. The apparent basis for this submission is the existence of a number of less intrusive measures available to give effect to the purposes of the PoC Act. Nothing further was advanced in support of this contention. As with the question of irrelevant considerations, the submission misconceives the nature of what is required by the PoC Act. There is nothing in the provisions which suggests that the use of and extent of compliance with other measures are mandatory considerations under the PoC Act. In any event, there is no evidence that the second and third respondents failed to consider any of the material before them in respect of the s 202 orders issued to Seven West. The applicants' complaint is really directed to the conduct of the Messrs Kokles and Phun in applying for the search warrants and s 246 orders which, for the reasons given above, does not provide any basis for quashing the search warrants and orders.

#### 4.4 No sworn evidence as to suspicion of evidential material

112 The applicants contend that the search warrants are invalid because the affidavits in support of the application for them to be issued did not contain a statement that the deponent believed that there were reasonable grounds for suspecting that there was evidential material at the premises. The argument is based on the observation in *George v Rockst* at 111 that "it is implicit in [the section] that the applicant for the search warrant should entertain the suspicion and belief to which that section refers...". When read in context as a whole, I do not accept that the High Court was saying that a search warrant would be invalid if the applicant did not give evidence on oath as to the holding of the relevant suspicion. Nor do I

consider *Williams v Keelty* (2001) 111 FCR 175; [2001] FCA 1301 at [167] to support that reading of *George v Rockett*.

113 Nothing in the PoC Act suggests that invalidity should be the result of a failure of the deponent of the affidavit supporting the application to swear that the deponent holds the relevant suspicion. Moreover, and as the AFP submitted, the PoC Act in fact suggests that there is no such requirement in respect of s 225 because other provisions contain express requirements to the effect alleged (s 17(3)(a), 18(3)(a), 19(1)(e) and 20(3)(a)).

114 Accordingly, I reject this ground of invalidity.

#### 4.5 Other grounds in NSD 207 of 2014

115 The applicants in NSD 207 of 2014 contended that the search warrant and s 246 order the subject of that proceeding was invalid because there was insufficient evidence to satisfy a reasonable person that there was evidential material of the kind listed in the search warrant accessible from the computer of, or at the premises of, Mr Kalantzis. I do not accept this ground. There was some material before the second respondent to support the belief that Mr Kalantzis held evidential material relating to the derivation of literary proceeds by Schapelle Corby or other members of the Corby family which might enable an application for a literary proceeds order. As such, it cannot be said that, in the way the applicants in NSD 207 of 2014 claim in any event, the decision of the second respondent to issue the search warrant and s 246 order was so unreasonable that no reasonable person could have made it.

116 The applicants in NSD 207 of 2014 also contended that the issue of the search warrant and s 246 order was unnecessary and that Mr Kalantzis should have been given the same opportunity as Seven to provide documents under a s 202 production order. According to the applicants, given that a search warrant is a mechanism of last resort, no reasonable person in the second respondent's position would have decided to issue the search warrant or s 246 order. I disagree. Properly analysed, this is a complaint about a decision to use one statutory power when another was available in circumstances where nothing in the statute dictates that the use of one or other power is necessary or should be preferred. Moreover, it is directed to the decision of the AFP to apply for the search warrant and s 246 order rather than the second respondent's decision to issue it.

117 The other complaints of the applicants in NSD 207 of 2014 relate to the execution of the search warrant and claims for legal professional privilege. I made an order that

paragraphs 1 to 5 of the amended originating application in NSD 207 of 2014 be heard separately from and in advance of all other issues in that proceeding. Accordingly, those other issues need not be addressed at this time.

5. CONCLUSIONS

118 The applicants in both proceedings have established that the s 246 orders and search warrants are materially affected by legal error, the consequence of which is that orders should be made quashing the s 246 orders and search warrants. I will make orders accordingly and hear further from the parties as to other consequential orders which should be made, in particular, about the material seized pursuant to the search warrants which is held by the AFP, the balance of the proceeding NSD 207 of 2014 and costs.

119 One other comment should be made. Under r 2.32 of the *Federal Court Rules 2011* (Cth), a person who is a party is entitled to inspect many documents as of right, but subject to any contrary confidentiality order. Under r 2.32(4) a person may also apply for leave to inspect other documents. I consider it appropriate to make an order that insofar as the documents filed in the Court disclose the names of the individuals identified as persons reasonably suspected of having committed an offence or as suspects, other than those individuals whose identities are already in the public domain or were placed in the public domain by counsel during the hearing (being Justine Munsie, Vasilios Kalantzis, Schapelle Corby, and Mercedes Corby), those parts of the documents should be made the subject of a confidentiality order as contemplated by r 2.32(3)(a). The reason for this is that it is common ground between the parties that none of those individuals were, or ever could have been, suspects or suspected of committing any offence as asserted in the search warrants and s 246 orders. I have made orders quashing the search warrants and s 246 orders, the effect of which is that they are taken not to have existed. Further, it is not necessary for those names to be disclosed for the public to understand the applicants' claims, the AFP's defence of those claims, and these reasons for judgment. In these circumstances, the potential for harm to those individuals by reason of the disclosure of parts of documents revealing their names substantially outweighs any public interest in such disclosure. The order I propose to make is not a non-publication or suppression order as referred to in s 37AA of the *Federal Court of Australia Act 1977* (Cth) which creates a high bar to the making of any such order (and one that could not be satisfied in this case). The effect of my order is only to prevent the disclosure by the Court, at the request of a non-party, of those parts of the documents filed in

the Court which reveal the names in question, a far more limited form of order than a non-publication or suppression order.

I certify that the preceding one hundred and nineteen (119) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate: 

Dated: 25 March 2014

u c 11  
This and the following pages comprise the annexure marked "b" to the affidavit of JUSTIN KUSIA WATSON sworn on 14 APR 2014 before me:  
*[Signature]*  
Justice of the Peace/Solicitor of the Supreme Court

HER HONOUR: The 202. Right.

MR WATSON: It's called the production order, I think, in familiar terms. Then at 201, talking again about why the warrant was issued. At line 318:

5

*That's a matter of public record. I don't know the exact figures, but it was in relation to the book, My Story.*

10 The Commonwealth DPP was litigating that matter. The AFP assisted in the investigation. The Commonwealth was able to secure over 100-odd thousand dollars, but another couple of hundred thousand dollars went off shore and was outside the jurisdiction. And at 219, I just point this up because it shows the difference between the production order which does leave it to the person to whom it's given to interpret it as to what should be produced as opposed to a search warrant  
15 when you're dealing with a matter with a relevance of urgency which had been proved by previous experience. At 431 there's a question asked. I don't think this will be a matter of contest.

HER HONOUR: Four hundred and - - -

20

MR WATSON: 219.

HER HONOUR: Yes.

25 MR WATSON: Line 431.

HER HONOUR: 431. Sorry. Okay. I've got it.

30 MR WATSON: A question is asked. This question is Mr McWilliam himself. And your Honour can see that it's somebody who knows what's going on. When you read the whole of the answer your Honour will see that it's somebody who knows intimately what was going on. I watched the matter and I know Mr McWilliam's voice. He lectured me in equity.

35 HER HONOUR: So the question is the whole from 431 to 442, yes?

MR WATSON: But I can't blame everything on him.

40 HER HONOUR: That's a question, is it?

MR WATSON: It's a long question. And your Honour can see what it is, is that material wasn't seized. It was handed over. The warrant was wider than what you asked for, wider than the production order. There's nothing wrong with that. So if you hadn't asked for it, I think if you said a reasonable expectation would have been  
45 given, why not just ask for it; the cost of one email. And then there's a shot about the faulty word processor. There's complaint of all the people coming:

*Now, I apologise you're in this terrible position of having to explain. But you started off saying it's not criminal. It was akin to civil. So why not just do the normal thing under the civil which is to say, "Okay. Well, can you give us this". All you got was an unsigned draft that was your extra material.*

5

Could I just pause there and say this is the extra material presumably under the warrant. I don't know this. The AFP doesn't know this because they haven't been able to access it, yet:

10 *All you got was an unsigned draft that was your extra material. But you didn't ask –*

and this is about a reference to the production order:

15 *...you didn't ask for unsigned drafts. You only asked for agreements.*

That's quite right. If your Honour goes right back – I won't take you to it now – but the production order itself spoke of agreements. And a good lawyer had read it and said, "Well, that doesn't capture drafts of agreements". Well, that's the nature of the production, and that's the nature of argy bargy in this kind of litigation. It's also the case that a search warrant which is a completely separate process does separate things and it acquires information which could be helpful including a draft.

25 Now, your Honour, in that respect, could I just take you briefly to – Ms Chrysanthou put many submissions around the so-called Mercedes Corby exclusive agreement. And I was going to take your Honour – it appears about three or four times in the bundle – but to the place where it appears at page 90 of the bundle. There's a reason why I'm picking that one. It's because of submissions made by Ms Chrysanthou – you will see that this is the copy of the Mercedes Corby exclusive agreement. At 30 page 91 it's signed by Mr Kalantzis as solicitor and Agent for Mercedes Corby.

Some submission have been put about whether or not this could properly provide a basis for seeking the warrant. It's been criticised and said that it can't provide a basis. With respect, that's not the question for your Honour. The question for your 35 Honour is whether or not Magistrate Curran and, then, in due course, Magistrate O'Brien issued the warrants in a way that they shouldn't be vitiated. But so far as there is a reference to this document, we would respectfully submit it well and truly supports that which needed support, that is, the holding of a suspicion. If your Honour looks at page 90 the fourth paragraph of the letter is in those terms:

40

*Of course, I understand that you've discussed our meeting and expect that you will discuss the contents of this letter with Schapelle and your lawyers. Other than that it's to be kept confidential.*

45 And then, further, there's the reference to the exclusive interviews and stories. And this is the point:



v J # This and the following 2 pages comprise  
the annexure marked "B" to the affidavit of  
JUSTIN MURPHY sworn on 14 APRIL  
2014 before me:

Justice of the Peace/Solicitor of the Supreme Court

## 5.2 Seven's Witnesses

### 5.2.1 Mr Stokes

**[385]** It is one thing for Mr Stokes to have been prepared to pursue this litigation notwithstanding the enormous outlay of costs incurred by Seven (in which he has a substantial interest). It is quite another for him to have been willing to give evidence.

**[386]** In retrospect, it may have been possible for Seven to conduct this litigation without Mr Stokes going into the witness box. In his final oral submissions, Mr Sumption was at pains to contend that issues of credit, so far as Seven's witnesses are concerned, go primarily to causation and damages, rather than liability. No doubt this submission recognises the difficulties in the path of accepting some of the evidence given by Seven's witnesses. But it also reflects the fact that Seven perhaps might have run its case without Mr Stokes subjecting himself to cross-examination. In the absence of Mr Stokes, Seven might have been foreclosed from persisting with its more extravagant claims for relief, but for the most part these have been effectively abandoned in any event.

**[387]** Mr Stokes' willingness to give evidence is somewhat perplexing. Not only must he have known that he would face a gruelling cross-examination, but it must have been apparent to him well before he stepped into the witness box, that his account of events was likely to prove vulnerable at many points. As became clear in the course of cross-examination, his evidence was repeatedly at odds with the contents of the contemporaneous documentation. Time after time, Mr Stokes asserted that important discussions had taken place at board meetings or elsewhere, when the relevant minutes or other contemporaneous records contained no reference to them. He also maintained that he had been unaware of matters that, according to the records, had been discussed in his presence. This judgment is replete with examples.

**[388]** Mr Stokes is plainly a highly intelligent, shrewd and determined person. These attributes, and others, have undoubtedly contributed to his very considerable business success. It would be surprising if a person of Mr Stokes' intelligence and shrewdness did not appreciate the difficulties in the path of accepting much of his evidence, insofar as it was a matter of dispute. It would be particularly surprising, given that Seven had access to and availed itself of legal advice at every stage of the litigation (and indeed on many occasions beforehand). This is not a dispute (or series of disputes) in which expense has been spared. Mr Stokes' legal advisers would have had every opportunity to draw his attention, in an appropriate way, to the apparent disparities between his version of events and the contemporaneous documentation.

**[389]** In assessing Mr Stokes' evidence I have taken into account a number of factors in his favour. They include the following:

- Mr Stokes was willing to give evidence in the face of the matters to which I have referred and to confront what was bound to be (and was) a searching cross-examination;
- no witness could be expected to recall accurately all relevant events that occurred six or seven years before the trial;
- some of the attacks on Mr Stokes ultimately went nowhere (such as the suggestion that certain documents were deliberately backdated);
- Mr Stokes clearly regards himself as a strategist and innovative thinker, whose role, even as CEO of Seven, was not to descend to the detail even of apparently important transactions;
- Mr Stokes' strengths (and interests) do not lie in the meticulous completion or scrutiny of paperwork (a trait that tends to be much more highly prized by lawyers than by business people); and
- Mr Stokes was required to endure a very long and challenging cross-examination and, perfectly understandably, was affected by weariness from time to time.

**[390]** I should also record that there were occasions on which Mr Stokes made concessions in a reasonably straightforward manner. An example of what I regard as an

important concession was his agreement that the successful offer Foxtel made for the AFL pay television rights (through the Foxtel Put) was 'a good price' (for Foxtel).

**[391]** Even taking these matters into account, however, there were simply too many occasions on which Mr Stokes' evidence was implausible for me to regard him as a reliable witness on disputed issues. Sometimes it is extremely difficult or impossible to reconcile his version of events with the contemporaneous records, the reliability of which there is no good reason to doubt. Sometimes Mr Stokes' evidence flies in the face of incontrovertible facts. Sometimes, he changed his evidence when confronted with material that made it virtually impossible to maintain the position he had previously adopted. Sometimes Mr Stokes' evidence conflicted with that of other witnesses (including, on occasions, witnesses called by Seven) whose accounts are, in my view, reliable.

**[392]** So far as contemporaneous records are concerned, there may be, as Mr Sumption submits, a difference between an apparently reliable record that omits reference to a discussion or event that a witness says took place, and a similar record that includes reference to a discussion or event that the witness denies occurred. However, Seven adduced no evidence to counter the inference that the minutes of board and committee meetings within Seven were intended to be reasonably reliable records of the meetings prepared by competent people. In any event, it is often difficult to think of a plausible reason why the contemporaneous records would have omitted reference to a particular discussion or event that Mr Stokes said took place, if indeed it did. Further, Mr Stokes on a number of occasions denied knowledge of important information, such as the state of C7's negotiations with Austar, that the contemporaneous documentation overwhelmingly suggests was drawn to his attention.

**[393]** A trial judge in civil proceedings should exercise caution before pronouncing that a witness has given deliberately false evidence. Often it is necessary only to determine whether the witness' evidence, insofar as it is relevant to the issues, should be accepted in whole, in part or not at all. It may not matter very much, for the purposes of deciding the litigation, whether a witness found to be unreliable has told deliberate untruths or has given unsatisfactory evidence for other reasons.

**[394]** However, in this case a sustained and vigorous attack was mounted against Mr Stokes' credit, including his honesty as a witness. I think it appropriate to observe that, although some of the particular attacks on Mr Stokes' credit lacked cogency, there were occasions on which, in my opinion, he gave evidence that he knew was not true. One example was a particularly unconvincing denial that he did not share the objective of others within Seven of 'ramping' the price that News (through Fox Sports) would ultimately have to pay for the NRL pay television rights by outbidding Seven. Mr Stokes participated in a conference at which the objective was discussed and, on his own admission, said nothing to dissociate himself from the views expressed there. Mr Gammell gave evidence that everyone at the meeting agreed with the ramping objective. Internal Seven documentation makes it clear that ramping was, at the very least, a critical (if not the only) objective underlying the bidding by Seven for the NRL pay television rights. Mr Stokes' evidence on this issue was not only implausible but, I must conclude, deliberately false.

**[395]** Similarly, I must conclude that Mr Stokes' professed ignorance about the state of negotiations between Seven and Austar could not have been a mere failure of memory. This evidence went to the damages sought by Seven and Mr Stokes understood its importance. Mr Stokes repeatedly denied that matters came to his attention over a substantial period of time, notwithstanding much documentary evidence to the contrary. The inaccuracy of Mr Stokes' evidence on this point, in my view, was not the product of inadvertence.

**[396]** Having said that, it is also appropriate to record my view that the unreliability of Mr Stokes' evidence was, in part, a product of his reconstruction of events through the prism of self-interest, layered with more than a little wishful thinking. Mr Stokes' evidence demonstrates that he was extremely resolute and persistent in pursuit of his

and Seven's business objectives, sometimes to the point of obstinacy. His relentless attempts to enlist the ACCC as an ally in Seven's battles with its opponents are examples of both persistence and, to a marked degree, apparent over-optimism.

**[397]** Mr Stokes demonstrated a tendency both in his actions and evidence to see the commercial world, particularly the propriety of his competitors' conduct, in rather black and white terms. (This trait has not proved an insuperable obstacle to Seven itself switching allegiances, as shown by its alliance with Ten in bidding for the AFL broadcasting rights in 2005.) A rather Manichaeian view of the commercial world may or may not explain Mr Stokes' propensity to engage in litigation (a propensity of which the Respondents sought to make much, although it hardly seems to be unique in the television industry). But it may help to explain how he could believe that particular discussions or events occurred, or that certain beliefs were expressed or opinions held, when the objective evidence strongly suggests otherwise. A firm grasp of the facts, in the lawyer's sense, is evidently not a prerequisite to business success.

**[398]** In summary, I cannot accept Mr Stokes as a reliable witness on matters that are in dispute, especially where there is contemporaneous documentation or cogent oral evidence that conflicts with his account.

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E<sup>A</sup>

This and the following 5 pages comprise  
the annexure marked "E" to the affidavit of  
JUSTINE MELISSA MANN sworn on 14 APRIL  
20 13 before me:



Justice of the Peace/Solicitor of the Supreme Court

**DISTRICT COURT OF NEW SOUTH WALES**

<b>Coram</b>	<b>Sorby DCJ</b>
<b>Jurisdiction</b>	<b>Sydney Civil</b>
<b>Matter Number</b>	<b>2013/204852</b>
<b>Plaintiff</b>	<b>Richard Edward PALMER</b>
<b>Defendant</b>	<b>Raymond Morris HADLEY</b>
<b>Solicitors for the Plaintiff</b>	<b>Laxon Lex</b>
<b>Solicitors for the Defendant</b>	<b>Addisons Lawyers</b>
<b>Counsel for the Plaintiff</b>	<b>Mr McCarthy</b>
<b>Counsel for the First Defendant</b>	<b>Mr Richardson</b>
<b>Hearing date</b>	<b>29 November 2013</b>
<b>Place of Hearing</b>	<b>Court 16B, JMT</b>
<b>Judgment Date</b>	<b>5 December 2013</b>
<b>Place of Judgment</b>	<b>Court 16B, JMT Building</b>

District Court of New South Wales  
At Sydney  
Civil Jurisdiction

**Matter no. 2013/204852**

**Richard Edward PALMER**

**Plaintiff / Applicant**

**-v-**

**Raymond Morris HADLEY**

**Defendant/Respondent**

**JUDGMENT:**

1. By Notice of Motion filed 24 October 2013, Mr Richard Palmer (the Plaintiff) seeks an order pursuant to s 68 of the *Civil Procedure Act* (2005) that Mr Raymond Hadley (the Defendant) be examined as to the adequacy of his answers to a subpoena to produce dated 21 August 2013.
2. On 5 September 2013, the Defendant produced documents pursuant to a subpoena, in his name (the Hadley subpoena). That subpoena ordered the Defendant to produce inter alia:

"All documents including, but not limited to, all incident reports, emails, statement, letters, memoranda, diagrams and all other documents, created during February and March 2013, referring or relating to the exchange pleaded in paragraphs 9-11 of the Statement of Claim filed in the District Court on 5 July 2013."
3. In response to that subpoena four (4) emails were produced and they are attached to the affidavit of Mr John Laxon [Exhibit A, paragraph 6].
4. On 1 November 2013, a subpoena was issued to Macquarie Radio Network Limited (the MRN subpoena), to whom the Plaintiff is contracted, ordering MRN to produce inter alia:

"All documents including, but not limited in generality to, all incident reports, emails, statements, letters, memoranda, suspension notices, reinstatement notices, warnings, records of counselling and all other documents, created between 7 February and 31 March 2013, referring or relating to an alleged incident of bullying upon Richard Palmer by Raymond Hadley by the use of allegedly intimidating and

unprofessional words and gestures that occurred in Mr Hadley's office located at Level 1, Building C, 33-35 Saunders Street, Pymont on the morning of 7 February 20130".

5. The Plaintiff's solicitors had complained to the Defendant's solicitors about the inadequacy of the response to the Hadley subpoena. The MRN subpoena is more specific and wider than the Hadley subpoena and nine (9) documents were produced in response to it which had not been produced as a result of the Hadley subpoena.
6. On or about 18 November 2013, Mr Michael Thompson, Executive Producer of the Defendant's radio program, and a Ms Baird, the Defendant's assistant, began a second search for documents of the Defendant on the Defendant's email account which is supplied and maintained by MRN [Exhibit 1 paragraph 16].
7. In the previous search (for the Hadley subpoena) which had used key words to locate emails, on this occasion, every email sent and received with this email account was searched. The solicitor for the Defendant, Ms Justine Munsie, in her affidavit [Exhibit 1, paragraphs 10-11] states:

"I am informed by Mr Hadley that:

- a. he uses an email account supplied and maintained by Macquarie Radio Network to send and receive emails. His email address is ray@2gb.com;
- b. he receives many emails, sometimes hundreds, in one day. Of these emails, Mr Hadley will delete some and leave the others in his inbox or sent items folder to be filed in his email account by Mr Thompson and Ms Sophie Baird, Mr Hadley's assistant, each of whom have access to the account;
- c. four members of his staff have access to his emails and may read his email at any time. For this reason, Mr Hadley has a practice of deleting emails which he regards as highly personal as soon as they are read by him.

I am informed by Mr Thompson that for the months of February and March there are approximately 6,000 emails presently able to be accessed in Mr Hadley's email account. Any items sent or received by Mr Hadley which are deleted are automatically cleared from Mr Hadley's

email account on a regular basis, which Mr Thompson estimates is almost daily. Once emails are deleted, they are no longer accessible by Mr Hadley or by his staff, but might be accessible by Macquarie Radio Network. As a result, at that time of receipt of the Hadley subpoena, there were no emails from the February or March period which Mr Hadley had deleted and which remained accessible by him."

8. This second search located twelve (12) additional email documents which are set out in paragraph 18 of Exhibit 1 as follows:

" Of the 12 emails comprising the Additional Hadley documents:

- a. There are eight emails which comprise correspondence between Mr Hadley and his listeners and which refer to media reports of the exchange described in paragraph 2 of the Hadley subpoena. These emails were not produced in response to the MRN subpoena.
- b. There is one email dated 6 March 2013 sent by one of Mr Hadley's staff attaching a link to a website article which refers to the exchange described in paragraph 2 of the Hadley subpoena. This email was not produced in response to the MRN subpoena.
- c. There is one email exchange dated 7 February 2013 between the plaintiff and Mr Hadley, the first part of which had previously been produced by Mr Hadley on 5 September 2013. this was produced in response to the MRN subpoena as set out in paragraph 14 below.
- d. There is one email exchange dated 13 February 2013 between Mr Hadley and Russell Tate of Macquarie Radio Network. This was produced in response to the MRN subpoena as set out in paragraph 14 below.
- e. There is one email exchange dated 15 February 2013 between Mr Hadley and Mr Loewenthal of Macquarie Radio Network. This was produced in response to the MRN subpoena as set out in paragraph 14 below.

9. The second search had uncovered and produced to the Court nine (9) email documents not previously produced by either the Hadley subpoena or the MRN subpoena and 3 documents that had already been produced by the MRN subpoena.

10. As to the 5 email documents produced by MRN that were not produced by the Defendant, which are annexed to the affidavit of Mr Laxon [Exhibit A], the Defendant submits that these were either outside the terms of the subpoena, or

not located, or an email sent to the Defendant's home address, or an MRN Board minute record not in the Defendant's possession.

11. The fact that the Plaintiff has been put to the trouble of issuing a second subpoena and forcing the Defendant to carry out further searches, as I have outlined earlier, raised what could best be described as a suspicion in the mind of the Plaintiff that there are further documents to be produced. Further, adding to the Plaintiff's suspicion is the question why didn't the Defendant carry out personal searches of himself but rather rely upon Mr Thompson, his wife and Mr Baird?

12. It was the submission of Mr McCarthy for the Plaintiff that there was a clear inference to be drawn that further documents, relevant to the case, were being withheld.

13. Mr McCarthy submitted that in these circumstances the Defendant should be summoned to appear and examined to explain why he did not produce all the documents under his power and control in answer to the subpoena of 21 August 2013.

#### The Law

14. Mr Richardson for the Defendant submitted that UCPR 33.6 mandates compliance with a subpoena. UCPR 33.12 provides that a failure to comply with a subpoena without lawful excuse amounts to a contempt of court. Section 68 of the *Civil Procedure Act (2005)* grants a power to the court to compel persons to be examined as a witness. The decision as to whether an examination is appropriate is one for judicial discretion. The test has been phrased in terms of a party establishing "some basis for supposing that the [subpoenaed party] may not fully understand the obligation imposed by the subpoena" or establishing a



sufficient basis "for it to be said that the plaintiff has a reasonable cause for wishing to test the sufficiency of the... compliance with the subpoena." *Quach v Vu* (2009) NSWSC 131 at [5].

15. The Defendant's solicitor, Ms Munsie said in evidence that her client, the Defendant, was "not very good with emails", a very broad explanation. Ms Munsie did have a meeting with her client and also Mr Thompson. She said at paragraph 20 of her affidavit:

"On the basis of my conversations with Mr Hadley and his staff as described above, I am satisfied that Mr Hadley has been properly advised and has understood his obligations regarding compliance with the Hadley subpoena. I am also satisfied that any documents in Mr Hadley's possession, custody or control have been produced in response to the Hadley subpoena."

16. I had occasion to view and listen to Ms Munsie in cross examination by Mr McCarthy both as to her evidence and demeanour and found her as an officer of the court and a witness to be a person of veracity and I accept her evidence in the witness box and as set out in paragraph 20 of her affidavit.

17. In these circumstances, I do not intend to draw the inference that there are further documents to be produced and I do not make the order sought in the Plaintiff's motion. I note order 1 is not relied upon. As the Defendant's tardiness in producing the documents sought by the Plaintiff has led to this motion, I order the defendant to pay the costs of the motion, including a fee for counsel.



I certify that this and the preceding 5 pages are a true and correct copy of the Reasons for Judgment of his Honour Judge RA Sorby, dated this 5 December 2013

*Natasha Reurts*  
Natasha Reurts  
Associate