R v Fraser Adams & Ors [2001] NTSC 32

PARTIES:	**THE QUEEN** Plaintiff And **SUSAN FRASER-ADAMS** Defendant AND BETWEEN: **SUSAN FRASER ADAMS and OCHRE BUILDING PTY LTD** Plaintiffs and **DETECTIVE SERGEANT RONALD HEYMANS, DETECTIVE NEIL GRANT, JENNIFER MINNS and the DIRECTOR OF PUBLIC PROSECUTIONS** Defendants
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
JURISDICTION:	Civil/Criminal
FILE NO:	61 of 2001 (20105109) and 20004375
DELIVERED:	8 May, 2001
HEARING DATES:	4 and 5 April, 2001
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Plaintiff:	Mr. Tilmouth Q.C. with Mr Carter
Defendants:	Mr. Grant (2nd & 3rd Defendants)
	Mr. Grogan (5th Defendant)

Solicitors:

Plaintiff:	Thomas Berkley
Defendants:	Hunt and Hunt
	Commonwealth DPP

Judgment category classification:	A
Judgment ID Number:	Mil01240
Number of pages:	38

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Fraser Adams & Ors [2001] NTSC 32
No.s 20004375 and
61 of 2001 (20105109)

BETWEEN:

THE QUEEN
Plaintiff

And

SUSAN FRASER-ADAMS
Defendant

AND BETWEEN:

SUSAN FRASER ADAMS and OCHRE BUILDING PTY LTD
Plaintiffs

and

DETECTIVE SERGEANT RONALD HEYMANS, DETECTIVE NEIL GRANT, JENNIFER MINNS and the DIRECTOR OF PUBLIC PROSECUTIONS
Defendants

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 8 May, 2001)

MILDREN J*:*

[1] This is an application by Susan Fraser-Adams and Ochre Building Pty Ltd for certain declarations and orders relating to the seizure by Detective Sergeant Heymans and Detective Grant of a computer, the property of Ochre Building Pty. Ltd., pursuant to a warrant issued by a Justice of the Peace, Jennifer Minns, and in relation to the subsequent copying of the two hard drives thereon by Detective Senior Constable Nicolas Warren Fausett. Ms. Fraser-Adams also seeks an order permanently staying certain criminal proceedings which have been brought against her.

Background facts

[2] In April 1998 Detective Sergeant Heymans ("Heymans") received a complaint to the effect that certain persons had been defrauded into paying extra money towards the building of their home by Ochre Building Pty. Ltd. ("Ochre"). It was alleged that contractors' invoices had been altered by a person at Ochre to show an inflated amount owing, that the extra money had been paid to Ochre and that this money had been retained by Susan Fraser-Adams ("Fraser-Adams"), Ochre's Managing Director. Information was received to the effect that a number of other clients of Ochre had also been defrauded in a similar manner. Investigations were commenced, and on 18 May 1998 Heymans and another police officer attended at Ochre's offices, then located in Ludmilla, armed with a search warrant. Fraser-Adams and her solicitor, Mr. Carter, were present. Mr. Carter said that Fraser-Adams would cooperate and that the warrant was unnecessary. A

number of documents were collected and taken to the Berrimah Police Complex. During the following few weeks, Heymans attended at Ochre's office and collected other documents which were supplied voluntarily.

[3] Ochre carries on business as a project manager for building projects. It is the owner of a PUMA brand personal computer. Ochre's financial records are contained in a program called MYOB under the file names "ochre976.prm" and "ochre986.prm" which is stored on the computer. However, at least by January 2001 there was also other material stored on the computer including the financial records of four other companies related to Fraser-Adams and her husband, non financial records of Ochre and the other companies, confidential information relating to Ochre and the other companies (including quotes and proposals for projects and information relating to the structuring of finance for building projects), personal information relating to Fraser-Adams, her husband and their children, as well as certain documents for which legal professional privilege is claimed.

[4] By May 1998 Heymans became aware that Ochre used a computer program for its business accounts, and used the computer program in order to generate cheques. Heymans decided not to seize Ochre's computer records at that stage as he considered that this would disrupt the running of Fraser-Adams' business, and prevent Ochre's accounts from being audited, which he knew Fraser-Adams intended to have done.

[5] In early 2000 charges were laid against Fraser-Adams which resulted in a committal hearing. On 10 November 2000 Fraser-Adams was committed to stand trial on a number of counts of deception, forgery and uttering. During the committal hearing Heymans was advised by the prosecutor, Mr. Grogan, to seize the computer and to have the records analysed. On 11 December, 2000 an indictment was presented in this Court charging Fraser-Adams with 36 counts of obtaining property by deception, contrary to s 227 (1) of the *Criminal Code*. On 15 December 2000 Heymans obtained a search warrant issued by Jennifer Minns, a Justice of the Peace, authorising him to enter Ochre's office (which was then situated at 9 Gunbar Street, Bayview) and to search the office and seize Ochre's records and ledgers of the accounting system for the period October 1996 to December 1997 and the computer containing the accounting system records. The warrant expired on 28 December, 2000 without being executed as the officers of Ochre were away on holidays.

[6] On 3 January 2001 Heymans obtained a second warrant in identical terms to the first issued by Ms. Minns. An attempt to execute the warrant on 4 January 2001 was unsuccessful. On Monday 8 January Heymans telephoned Fraser-Adams and informed her he wished to seize more documents. When asked what it was that he required, he said that it was "in relation to computer documents". He arranged to attend at her office at 10.00am on Tuesday 9 January. Later this was altered to 10.00am on Thursday 11 January to meet the convenience of Fraser-Adams' solicitor.

[7] On 10 January, Mr. Berkley, Fraser-Adams' solicitor, telephoned Heymans on two occasions to seek more information regarding the search warrant. As a result of those discussions Berkley became aware that Heymans intended to seize the computer. Berkley informed Heymans that the computer contained information which was subject to a claim of legal professional privilege and information which was confidential and which related not only to Ochre but to other companies as well. They both discussed the question of a protocol for seizing privileged documents. Heymans said that the N.T. Police followed the "Australian Federal Police and Law Society guidelines", but that he did not believe that they applied in this case. Berkley raised the possibility of having the lawfulness of the warrant, the intended seizure of the computer and the appropriate procedures to extract information from the computer decided upon by this Court prior to any seizure, but this appears not to have been responded to by Heymans. I am told by counsel that there are in fact no guidelines existing between the Law Society of the Northern Territory and the Northern Territory Police relating to searches of solicitors' offices in the Northern Territory, and that there is no reference to this subject in the Northern Territory Police Standing Orders.

[8] Later on 10 January, Heymans searched the internet "for information relating to privilege claimed by persons other than through solicitor's offices" and also sought information "relating to procedures to be followed

when privilege is claimed on information and computers". He was unable to find any information of any assistance.

[9] By 10 January, if not before, it was plainly Heymans' intention to do more than merely print off Ochre's financial records. What he wanted to do was to forensically examine the hard drive on the computer to retrieve material deleted from Ochre's financial records. On 10 January he spoke to Detective Senior Constable Fausett ("Fausett") and arranged for him to "image" (or copy) the hard drive, extract the information required, place that information onto discs, and give him the relevant discs. By this arrangement Heymans hoped to obtain a complete record of Ochre's financial records, but nothing else. Later on 10 January he spoke to one of the prosecutors at the office of the Director of Public Prosecutions and told him what his intentions were. I am not told what, if any, advice he received.

[10] On the morning of Thursday 11 January, Heymans and Detective Senior Constable Neil Grant ("Grant") attended at Ochre's office and then met Fraser-Adams, Berkley and Dan Carroll, an inquiry agent assisting Fraser-Adams. The warrant was then handed to Berkley, and after he had read it, to Fraser-Adams. Until then neither Berkley nor Fraser-Adams had seen the warrant, nor were they told what it said, despite requests from Berkley. The warrant, which was issued pursuant to s 117 (2) of the *Police Administration Act*, provided as follows:

Northern Territory of Australia
Police Administration Act, Section 117(2)
SEARCH WARRANT
TO SEARCH LAND, VEHICLE OR VESSEL

To: Sergeant Ronald HEYMANS a member of the Police Force:-

WHEREAS I Jennifer Minns, a Justice within the meaning of the *Police Administration Act,* pursuant to Section 117 (2) of that Act, being satisfied by information on oath placed before me on the 3rd day of January 2001, that there are reasonable grounds for believing that there are in or upon land described as:-

Office of Ochre Building Pty Ltd at 9 Gunbar Street, Bayview the following thing(s):

- Records and ledgers of the accounting system for the period October 1996 to December 1997
- Computer containing the accounting system records

being a thing (s) related to or in connection with an offence against a law in force in the Northern Territory, namely an offence of Criminal Deception (sect 227 *Criminal Code*)

AUTHORISE you, with such assistance as you think necessary to enter into or upon and search the land, described above, if necessary by force, and to seize the thing(s) described above, that are found in or upon the land.

This warrant expires on the 17th of January 2001, unless sooner executed.

DATED THE 3RD DAY OF JANUARY 2001

Signed (J. Minns)
JUSTICE OF THE PEACE

[11] Heymans said he intended to seize Ochre's computer. The computer had placed on it a label stating that it contained material the subject of legal professional privilege. It is not disputed that the computer contains documents of that description. The matters for which the privilege is claimed includes advices on evidence from senior counsel briefed to defend Fraser-Adams in the criminal proceedings brought against her, as well as

e-mail correspondence passing between her and her legal advisers relating to that same matter, and a copy of her statement to her legal advisers. Once again Berkley pointed out that material subject to legal professional privilege was stored on the computer, and Fraser-Adams also referred to privileged material as well as other material not relevant to Ochre being stored therein. Berkley suggested that the procedures relating to searching a solicitor's office should be followed. Heyman said he did not believe that that procedure was appropriate. Berkley said it was appropriate, as the privilege belonged to the client, not the solicitor. Heyman said that he was not up to date with procedures outside of solicitors' offices and had not read any law on that matter. An offer to print out the records on the computer or to provide the records in diskette form was rejected, Heyman saying he required information on the hard drive. Berkley suggested that they go to Court to resolve whether the computer should be removed. Heyman said he did not agree with that, and that he intended to seize it. Fraser-Adams then showed the police where the relevant records were kept, opened the MYOB files, found the period they were interested in, and printed off a copy of the information required which she kept for her own purposes. After recording some other details, the computer was seized by the police and taken to the Peter McAuley Centre at Berrimah.

[12] After going through the process of being "exhibited" at the front counter, it was taken to a secured room in the presence of Fausett, where Fausett was requested to image the hard drive as soon as possible as Heyman intended

returning the computer to Fraser-Adams. Heyman then left Fausett, although it appears that Grant remained whilst Fausett removed the case and photographed the inside with a digital camera. Fausett then removed the hard drives, and using software called "EnCase" made an exact copy of both hard drives. The hard drives were then replaced. Using another computer, Fausett then checked the copy of the hard drive. He looked at a MYOB file called Ochre006.prm and the main MYOB screen on one of the hard drives and shut the application down. He did not check the second hard drive.

[13] In the meantime, Berkley had made an urgent application to this Court which was heard by Bailey J on 11 January 2001 seeking interim relief. The defendants were represented by counsel and gave an undertaking to this Court to deliver the copies and the computer to the Registrar of this Court, not to view any material stored on the computer or the copies, and not to communicate any information therein stored to any other person. The matter was stood over until the following Monday 15 January, before me. After that, Heymans, who was present in court at the time of Berkley's application, telephoned Fausett from the courthouse and requested him to bring the computer and the copied hard drives into the courthouse. Fausett arrived a little later on with those items which were then secured in an exhibit room in the custody of the Registrar, where they still remain.

[14] All the evidence given before me is in affidavit form. Heymans and Grant have sworn that they have not seen any material stored on the computer or on the copied hard drives. Fausett has sworn that the only material he

accessed is that set out in paragraph [12] above. They were not cross-examined. There is therefore no evidence that any of the material which is not part of the financial or accounting records of Ochre has been seen by the police.

[15] On 15 January, the matter came before me. Counsel for Jennifer Minns appeared and submitted to the jurisdiction of the court. She has not otherwise sought to be heard. Counsel representing the other parties sought directions as to the further hearing of this matter. I ordered that this matter be heard before me on 2 and 3 April, 2001, and made some further preliminary orders which it is unnecessary to relate. The matter was then adjourned until 2 April.

[16] At the hearing on 2 April, a number of issues emerged, the principle issues being:

1. It was submitted that there was no power to issue a warrant after Fraser-Adams had been committed for trial.

2. It was submitted that the warrant did not authorise the seizure of the computer.

3. It was submitted that the warrant had to be executed reasonably, and that the method of execution was not reasonable, and that the execution was therefore unlawful.

4. It was submitted that the copying of the hard drives was not authorised by the warrant and was therefore unlawful.

5. It was submitted that irreversible and incurable damage had been occasioned to the accused by the polices' unlawful conduct, as a result of which the court ought to grant the only remedy available, namely a permanent stay of the indictment.

Was the power to issue a warrant spent?

[17] Subsections 117 (2) and (3) of the *Police Administration Act* provide:

> (2) Where an information on oath is laid before a justice alleging that there are reasonable grounds for believing that there is in or upon any land, vehicle or vessel, anything relating to an offence, the justice may issue a search warrant authorizing a member of the Police Force named in the warrant, with such assistance as he thinks necessary, to enter into or upon and search the land, vehicle or vessel, if necessary by force, and to seize any such thing that he may find in or upon the land, vehicle or vessel.
>
> (3) A justice shall not issue a warrant under subsection (1) or (2) in relation to an information unless –
>
> (a) the information sets out or has attached to it a written statement of the grounds upon which the issue of the warrant is sought;
>
> (b) the informant or some other person has given to the justice, either orally or by affidavit, such further information, if any, as the justice requires concerning the grounds on which the issue of the warrant is being sought; and
>
> (c) the justice is satisfied that there are reasonable grounds for issuing the warrant.

(4) Where a justice issues a warrant under subsection (1) or (2) he shall record in writing the grounds upon which he relied to justify the issue of the warrant.

(5) There shall be stated in the warrant issued under this section the following particulars:

(a) the purpose for which the search or entry is authorized;

(b) a description of the nature of the things authorized to be seized; and

(c) the date, not being a date later than 14 days after the date of issue of the warrant, upon which the warrant ceases to have effect.

(6) A member may, at any time before a warrant issued under subsection (1) or (2) is executed, make application to a justice to withdraw the warrant.

[18] There is nothing in these subsections which precludes the issue of a warrant after a person has been charged, or at any other time such as after a person has been committed for trial. There are no other provisions of the Act which suggest that some such limitation on the power is to be inferred. Counsel for the plaintiffs, Mr. Tilmouth Q.C., submitted that once the stage had been reached where Fraser-Adams had been committed for trial other considerations applied, such as the right to silence, the presumption of innocence and the privilege against self-incrimination predominate, to the exclusion of the statutory power of search and seizure. Mr. Tilmouth Q.C. further submitted that since, at the time of the warrant an indictment had been presented, the appropriate forum for dealing with disclosure and other pre-trial orders was this court exercising the powers under chapter 1A of the

Supreme Court Rules which deals with matters of procedure in criminal trials. It was suggested that an application ought to have been made under rule 81A .29 (1) by the Director for the preservation of the computer's hard drive and for orders dealing with access. No authority was cited in support of this submission.

[19] Counsel for the defendants Heymans and Grant, Mr. Grant, referred me to the decision of Young J in *Rowell v Larter* (1986) 9 NSWLR 21, at 22 where his Honour rejected what counsel described as a self evident proposition, that once committal proceedings had commenced no search warrant could be issued. His Honour said:

> I do not find the proposition self evident nor have I been able to find any reference to the proposition in any of the materials which I have consulted which includes Carter on the *Law of Search Warrants* (1939) the article by Reaburn ("Search and you shall find: Some Recent Developments in the Law of Search Warrants") in (1970) 9 University of Western Australia Law Review 242, articles in [1967] Crim LR 3 and 20 and the article by Pearce in (1970) 44 ALJ 467 ("Judicial Review of Search Warrants and the Maxwell Newton Case") and Leigh, "Recent Developments in the Law of Search and Seizure" (1970) 33 Mod L R 268.

[20] At p 29 in the same case his Honour said:

> There is certainly a privilege on a defendant in criminal proceedings not to incriminate himself and this includes not having to produce documents or answer questions but this is a very different situation to conferring some immunity on the defendant. It has not been demonstrated to me why there should be such an immunity or whether there is in law such an immunity to prevent the prosecution obtaining documents from him, or from his agents such as his bankers or accountants etc.

[21] There are no authorities which I could find which discuss this aspect of the decision in *Rowell v Larter*. Despite an extensive search of the available literature, I have been unable to find anything where this problem has been discussed. I therefore am forced back to first principles.

[22] The first observation that needs to be made is that the warrant in question is a statutory one to which the principles relating to common law warrants do not apply. I note for instance, that the section does not have anything to say about when the warrant is to be executed, other than that s 117 (5) (c) requires the justice to fix a date after which the warrant ceases to have effect. Also, there is nothing in s 117 to indicate that the premises, vehicle or vessel to be searched must belong to or be in the possession or control of any person suspected of having committed an offence. There is therefore no link between the warrant and any arrest. A warrant could be sought although no arrest had been made, or it could be sought after an arrest. The question then is, whether there is any principle of statutory interpretation which would compel me to conclude that the warrant could not be sought after the accused had been committed for trial, or after an indictment had been presented. I am unable to think of any such principle, and like Young J, I can think of no rule of law which leads to the same conclusion. It may be that a warrant which is obtained fraudulently or obtained for an improper purpose would be bad, or if not bad, would give rise to injunctive relief: (*Puglisi and Another v Australian Fisheries Management Authority & Others* (1997) 148 ALR 393 at 400 per Hill J. But that is not claimed here.

No doubt there are some limits. If the offence to which the warrant is called in aid is one where the offender has already been convicted, it would no doubt be improper for the warrant to issue, absent there being some other offender involved.

[23] However, I see no reason why, merely because an indictment has been presented, a warrant to search and seize should not issue. The premises to be searched need not be the premises of the accused, but even if they were, there is no requirement that the accused must be present during the search, and no requirement that if he is present that he assist in the search. There is no basis for saying that he will be in jeopardy of losing any of his basic rights, such as his right of silence or his right not to produce documents.

[24] Further, the argument, so far as it is based on rule 81A.29 (1) does not support the plaintiffs. Chapter 1A of the *Supreme Court Rules* only came into force on 2 May 2000. S 117 (2) of the Act has been in force since 1 August 1979. A rule of court cannot effect a modification to a statutory power, absent some statutory provision enabling such a course to occur. Rule 81A.29 in any event applies only to property in the possession, custody or power of a person other than the accused.

[25] Nor am I assisted by an argument along the lines that the investigatory stage of the proceedings has concluded once a charge has been laid. Whilst there may be some limitations placed upon the interrogation of persons once that stage has been reached which may give rise to the rejection of confessional

evidence in certain circumstances, those principles apply only to confessions made to police officers and not to other evidence. The public interest does not require any limitation upon the statutory power; rather it favours the gathering of material evidence which is likely to be relevant to the issues to be determined at the trial. To the extent that the discovery of further evidence after the committal hearing could prejudice the accused, there are adequate remedies available, such as the quashing of the committal, or the holding of a Basher inquiry.

[26] The conclusions I have reached is that the power to issue the warrant was not spent; the warrant was not invalid, nor is the evidence gathered to be restrained from being used merely because the warrant was issued at a time after the indictment had been presented. I therefore reject the first of Mr Tilmouth Q.C.'s arguments.

Did the warrant authorize the seizure of the computer?

[27] Mr. Tilmouth Q.C. submitted, on the authority of *Baker v Campbell* (1983) 153 CLR 52, that s 117 (2) of the Act did not authorize the seizure of privileged material. I accept this submission, which is clearly correct. In *Baker v Campbell* the question which arose for determination was whether documents the subject of legal professional privilege which has been maintained could properly be made the subject of a search warrant under s 10 of the *Crimes Act 1914* (Cth). The Court, by a majority (Murphy, Wilson, Deane and Dawson JJ; Gibbs CJ, Mason and Brennan JJ dissenting)

held that the question should be answered "No", as the section did not evince an intention to oust the privilege. There is no substantial difference between s 10 of the *Crimes Act 1914*, and s 117 (2) of the *Police Administration Act*. Moreover, there is no other provision of the latter Act which demonstrates such an intention. Mr. Grant for Heymans and Grant did not contend otherwise.

[28] That being so, Mr. Tilmouth Q.C. submitted that the seizure of the computer, including the hard drives, was unlawful, because the police not only seized that which they were authorized to seize, but they seized material not authorized by the warrant, namely everything else on the hard drives not being the records and ledgers of the accounting system of Ochre for the period October 1996 to December 1997, including, of course, the privileged material.

[29] There is no doubt that the fact that the privileged documents were in the office of Ochre and in the possession and control of Fraser-Adams, rather than in a solicitor's office, is irrelevant. The principles to be applied in relation to search and seizure are the same wherever the privileged documents may be found: see *Commissioner of Taxation & Others v Citibank Ltd* (1989) 20 FCR 403 where the privileged documents were located in a bank; *Question of Law Reserved (No. 1 of 1998)* (1998) 70 SASR 281, where the documents were found in the office of a private investigator; see also the observations of Murphy J in *Allitt v Sullivan* [1988] VR 621 at 630.

[30] It is necessary at this point to explain in more detail the practical problem which faced the parties. Of course, the police could have been given either hard copies or diskette copies of the accounts but what Heymans wanted to do was access the hard drives to retrieve material which had been deleted from Ochre's financial records. This could not be done without special equipment, namely another computer in conjunction with a specially developed computer program known as EnCase. This software is not capable of copying data selectively. It either takes an image of an entire hard drive or it allows a search of hard drive for evidence. When EnCase "images" or copies a hard drive, it locks the hard drive so that no further information can be written on it. In this way, alteration to the data stored on the hard drive is prevented. When the software takes an image of all of the material on the hard-drive it copies the entire hard drive including information deleted by the previous user or users. The police clearly wanted this deleted material to see if there was evidence showing modification of the invoices in question. However, as was conceded by Mr Grant, this would still raise practical difficulties, because it is not possible to delete files from the copy taken without destroying the whole copy. Mr. Grant conceded that the only practical solution would be for the original hard drive to be now partly erased by a special programme which could leave only the material on it which the police wanted, and for the copies to be given to the plaintiffs. Even this solution would involve the employment of

an independent honest broker agreed upon by the parties with the skill and equipment to make the necessary alterations to the original hard drive.

[31] Thus, the problem is reminiscent of Portia's instruction to Shylock that he could have his pound of flesh but not one ounce of blood. Here, the police cannot seize the computer without also seizing material not covered by the warrant. The police were well aware that privileged material was stored on the computer, and that Fraser-Adams was asserting her right to maintain her privilege. Does that mean that the whole seizure is invalid?

[32] One way of looking at the problem is to consider the information contained on the computer as documents. I have no doubt that that information may be so classified. There are two English cases which have apparently held that such information is a "document" for the purposes of discovery: *C v P.B.P.* (1995) 12 CL 448; *Alliance and Leicester Building Society v Gharemani* [1992] 32 RVR 198. In Scotland the position is the same. In *Rodo v H M Advocate* (1996) SCCR 874 at 877 Lord Milligan said:

> It seems to us that the essential essence of a document is that it is something containing recorded information of some sort. It does not matter if, to be meaningful, the information requires to be processed in some way such as translation, decoding or electronic retrieval.

[33] A similar position has been taken in Australia with respect to tape recordings: see *Butera v Director of Public Prosecutions* (Vic) (1987) 164 CLR 180 at 197 per Dawson J and cases therein cited.

[34] It is also necessary to observe that in this case it is not contended that Fraser-Adams' privilege in the documents has been lost. It is therefore not necessary to consider the authorities referred to by Gibbs CJ at p 67 to 68, by Mason J at p 80 and by Dawson J at p 129, in *Baker v Campbell*, *supra* and whether or not those authorities should now be followed.

[35] I have been referred to a number of authorities which have a bearing on the answer to the question posed. The first is *Baker v Campbell*, *supra* to which I have already referred. That case does not specifically deal with this problem, but some of their Honours made observations which have influenced the way this problem has subsequently been approached. At pp 71-72, Gibbs CJ thought that Parliament should interfere and that "a means should be made available for the prompt and independent determination of disputes as to whether the privilege exists in the case of particular documents sought to be seized with a warrant." At p 97, Wilson J said:

> It is asserted that a claim for privilege in circumstances where the proceedings in respect of which it is made have not begun immediately raises procedural difficulties if the claim is contested. There is no judge already seized of jurisdiction in the matter to determine the disputed claim. The interests of all parties must be protected pending a determination of the dispute. In my experience the procedural difficulties can be overcome consistently with that objective if the members respectively of the police force and the legal profession co-operate in a reasonable and responsible way.

[36] Dawson J did not think there was any real difficulty. At p 132 his Honour said:

> However, it does not seem to me that there is any real difficulty. In the first place, the doctrine of legal professional privilege is not ordinarily difficult to apply and there is no reason to suppose that its application in a non-judicial context is any less appropriate than the application of the many other rules of law which must frequently be applied in proceedings other than judicial proceedings. Moreover, should any dispute arise, the means exist whereby a judicial determination of the dispute may be obtained as is indicated by this and the other cases in which such a dispute has arisen.

[37] In the light of those remarks, general guidelines have been promulgated as a result of an agreement entered into between the Law Council of Australia and the Australian Federal Police, the first of such guidelines being made in June 1990. They have now been replaced by further guidelines which came into effect from 3 March 1997. One of the reasons for the guidelines were perceived difficulties in the ability of superior courts to lay down such guidelines, notwithstanding that the European Court of Justice has done so. Nevertheless, as these proceedings demonstrates, Australian superior courts do have ample powers to deal with such contests, with or without guidelines, and whether or not the problem arises in respect of pending proceedings as in this case, or in the respect of an investigation which may or may not lead to proceedings being brought. The now familiar weapons are the equitable remedies of injunctions and declarations, including consequential orders requiring the return of unlawfully seized property, and damages for trespass. The extent to which other consequential orders can be made in order to provide appropriate relief does not yet arise to be considered.

[38] Before discussing the next case, *Allitt v Sullivan* [1988] VR 621, it is necessary to observe that in the present case, there is now no attempt to

challenge the issue of the warrant by Jennifer Minns. It was not suggested that she failed to exercise her powers properly. It was not suggested that at the time of the application for the warrant, Heymans knew that the computer had privileged documents stored thereon. There is therefore no question that the warrant in this case was invalidly issued.

[39] Turning now to *Allitt v Sullivan*, *supra*, (which was a case where the validity of the warrant was in issue), that was a case where a search warrant was issued by a justice to search a solicitor's office. The solicitor claimed privilege for a number of the documents. He refused to hand them over, and wanted to have the issue tested by a court. The police insisted, and threatened to arrest him if he resisted. One of the police moved to search the files, the solicitor tried to stop him, he was arrested and charged with hindering the police in the execution of their duty. An order *nisi* to review the decision of the Magistrate to discharge the defendant was, by a majority of the Full Court (Murphy and Brooking JJ, Hampel J dissenting) made absolute. The statute pursuant to which the warrant was issued (s 465 of the *Crimes Act 1958*) was very different from the provisions of s 117 (2) of the *Police Administration Act*, principally because the warrant required the police to take anything seized to be brought before a justice to be dealt with according to law. It was submitted that, once the claim for privilege had been made, "the executing officer should have called a "stand off" until the issue could be resolved." Murphy J, at 632, rejected this:

> Something may depend upon just what is meant by a 'stand off', *for it is the duty of the executing officer to execute the warrant reasonably*. But I fail to see why, if the solicitor simply claims professional privilege for all documents, the authority of the warrant ceases, so that the executing officer thereafter has no warrant to proceed. I would be inclined to accept that, if the executing officer took any step in connection with the documents seized, other than carry them directly to the justice, he would be acting in excess of his authority. (emphasis mine)

[40] Brooking J approached the matter consistently with Murphy J but was more open about why the executing officer could take the documents before a justice. His Honour recognised the conundrum. If the warrant did not authorize the seizure of privileged documents, they could not even be taken before a justice in accordance with the terms of the statute. His Honour held that the statute should be interpreted as authorising the seizure, even of privileged documents, for the purpose of having them brought before a justice, where the question of privilege could be resolved: see pps 640-642. However it is clear that his Honour would have been of the view that such an approach would not have been open in relation to a warrant issued under s 10 of the *Crimes Act 1914*. His Honour also, at 649, expressed reservations as to whether or not there is a rule of law that a search warrant must in all respects be executed reasonably.

[41] Hampel J differed in the result, but not in the construction to be given to the Victorian section. Moreover his Honour considered that a warrant must be executed reasonably. At pp 660-661 his Honour said:

> It is also clear, in my view, that there is an obligation on those seeking to obtain a warrant and later to execute it to ensure that all

> reasonable steps are taken to protect privileged communications. This may be achieved, first, at the time when information is given to the justice, and second, at the time of execution, or at both stages. There is a duty on the police when executing the warrant to act reasonably. In this context, that in my view, means to act in a way which will enable a claim of legal professional privilege, raised and maintained during the search of a solicitor's office, to be tested in a way that will not deprive the police of the fruits of their search, and at the same time, not destroy any privilege which may exist.
>
> Once it is recognised that the doctrine of legal professional privilege is not confined to judicial and quasi-judicial proceedings, but extends to search warrants, it is not surprising that the Courts have been attempting to develop restrictions and safeguards, where those are not provided by legislation, in order to protect such a fundamental right. It has been said that this right is in conflict with the right to obtain evidence of the commission of crime. Theoretically this may be so, but in reality it need not be if those who issue the search warrants, the police who execute them and the lawyers whose role it is to protect their client's privileged communications, act reasonably and with sufficient restraint.

[42] An examination of the cases decided in the Federal Court of Australia show a similar approach when considering warrants (including warrants under s 10 of the *Crimes Act*) In *Arno and others v Forsyth* (1986) 9 FCR 576, Fox J said that a warrant must be executed reasonably:

> The question whether there is privilege, and its extent, falls to be dealt with when it is sought to execute the warrant. Before a justice could decide a question of legal professional privilege there would be the hopeless matter of seeing the documents to which it relates, how, and for what purpose, they came into existence and between whom the relevant confidences lay.
>
> If documents the subject of privilege are examined or removed, those doing so will be liable to an action at law (in some cases, possibly criminal proceedings) and their admissibility in any subsequent legal proceedings will be subject to the rules respecting documents illegally obtained: see *Bunning v Cross* (1978) 141 CLR 54. The documents may also be excluded from admissibility in proceedings before administrative tribunals.

> These sanctions may not be adequate so far as concerns the person whose premises are to be searched or whose documents they are, or for that matter satisfactory to the police. There may be a failure on the part of the police officers to advert to the problem, either generally or in a particular case, and they will probably, in any event, have an unsuperable problem in determining just what is privileged and what is not. On the other hand, in order to effectuate the purpose of s 10, and the public interest it represents it may not be desirable to give an opportunity to the person whose premises are in question to remove or tamper with documents before any claim of privilege can be determined.
>
> It is not easy to determine what practice should be followed to deal with this dilemma. The whole matter may have to be the subject of legislation. The solution will be found in agreement or by recourse to judicial proceedings. There is an existing requirement that the execution of a warrant be carried out "reasonably". This requirement should take full account of the factors concerning the possibility of documents being the subject of legal professional privilege.
>
> It is unnecessary for me, in this case, to attempt to prescribe what course is best to be adopted. An important step, as it seems to me, will be for the matter to be dealt with adequately in police regulations or instructions. These will have to make provision for the giving of prior notice (of greater or less extent, depending upon the circumstances) to persons who may have documents (or other "things") in respect of which it appears that privilege may reasonably be claimed. The results may well be that these are immediately placed in neutral custody, pending a decision, or agreement respecting their status. In some cases, the police officers may not have any desire to inspect or seize any documents, the subject of the warrant, to which privilege does attach.

[43] Lockhart J said, at p 587:

> Once the law recognises that the doctrine of legal professional privilege extends to extra judicial search and seizure the question immediately arises as to when and how questions of privilege are to be raised. Sometimes the privilege question will be raised at the stage of execution of a search warrant rather than at the time of its issue. A search must be conducted reasonably in order to be lawful and the requirement of reasonableness has infinitely variable application. In some cases the police officers conducting the search, may, in order to conduct a reasonable search, be obliged to

> communicate with the person whose premises are to be searched or the person whose documents are expected to be found in the premises (whether they are his premises or not) either before or after entry and allow him the opportunity to obtain legal advice. The methods of search and seizure may also require discussion. There are numerous possibilities. But the searcher must remember that he is authorised by the warrant issued under s 10 to do what otherwise would be a trespass.

[44] Similar observations have been made in *Crowley v Murphy* (1981) 52 FLR 123 at 129 per Franki J; at 144 per Lockart J; by Beazley J in *Bartlett v Weir & ors* (1994) 72 A Crim R 511 at 518; *Commissioner of Taxation & Others v Citibank Limited* (1989) 20 FCR 403 at 419-422 per Bowen CJ and Fisher J; at 437-8 per French J; by Gibbs CJ in *Baker v Campbell* at 70.

[45] It was submitted by Mr Grant that the decision of Doyle CJ with whom Cox and Matheson JJ agreed, in *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281 at 296-7 is to the contrary and that I should prefer that opinion. But a close reading of that decision leads me to conclude that the South Australian Full Court did not go so far as to reject outright the proposition that an executing officer is obliged to act reasonably where a claim for legal professional privilege is raised; what their Honours did was to reject the notion that every aspect of entry, search and seizure is subject to a requirement, limiting the validity of the search, that the power be exercised reasonably, although their Honours did reject the proposition, expressed in *Citibank*, that "a failure to allow a reasonable opportunity for legal professional privilege to be claimed means that the power is exercised invalidly." (see, at p 297). Nevertheless, Doyle CJ said, at 297:

> In other words, the relevant principle is not in my respectful opinion, that the powers conferred by a general search warrant must be exercised reasonably because they interfere with common law rights. The principle is that the force used to effect the authorised entry and search and seizure must be reasonable, as must the extent of the search and of the seizure.

[46] In the view I take, it is not necessary for me to decide whether I should follow *Citibank*, in preference to the views of the South Australian Full Court in Q*uestion of Law Reserved (No. 1 of 1998).* In the latter case, there were in fact no privileged documents, and there was no claim made that any of the documents were subject to such a claim. As *Citibank* and the other authorities show, the circumstances which arise where there may be a need to afford an opportunity to obtain legal redress to protect a claim of privilege will vary considerably. In this case, a claim was made, and forcefully made, by Fraser-Adams and Mr. Berkley. The conclusion I have reached is that the seizure of the computer and the taking of the computer to the Police Station was not authorised by the warrant because the computer contained privileged material on it, which claim to privilege was being maintained, and which privileged material could not be severed from the material on the hard drives in respect of which the warrant did authorize seizure and search. Where there is a direct and insoluble clash between the competing public interests of maintaining the right to legal professional privilege, and of furthering the interests of the state in gathering evidence needed to bring criminal proceedings against those who are charged or to be charged with breaches of the criminal law, the balance is to be struck in favour of maintaining the privilege. However, because the warrant

expressly authorised the computer to be seized, in so far as it did contain Ochre's accounting system records it would not have been unreasonable for the police to have held the computer for a time sufficient to enable Mr. Berkley to obtain a court order without removing it or examining it, or to have taken the computer to this Court in the company of Mr. Berkley to enable an order to be obtained as to whether or not privileged documents or other documents not authorised by the warrant existed on the computer, and if so, what should be done about that. If Fraser-Adams, having asserted her privilege, did not then act promptly in order to protect her rights, the privilege may have become lost either by waiver, in which case the police would then have been entitled to seize the computer absolutely and search it for whatever was to be found, or, perhaps, by the fact that the documents had passed into the possession of the police, and thereby had lost their privilege: see *Baker v Campbell*, *supra* at 67-8; 80; and 129.

Was the execution of the warrant unlawful?

[47] As the warrant did not authorise the seizure of the computer it follows that the seizure of the computer was unlawful. It is therefore not necessary to consider whether the execution of the warrant was unlawful because the police did not act reasonably in the execution of the warrant.

[48] Nevertheless, I consider that I should offer some comments on the argument addressed to me by Mr. Tilmouth Q.C. In my view, the weight of the authorities to which I have already referred hold that in the circumstances of

this case the police were subject to a legal requirement to act reasonably in the execution of the warrant so as to afford Fraser-Adams an opportunity to maintain her claim to privilege and I do not consider that the police acted reasonably in removing the computer. Although there are no guidelines existing between the Northern Territory Police and the Law Society of the Northern Territory relating to searches of solicitors' offices, the guidelines which exist between the Australian Federal Police and the Law Council of Australia provide a suitable basis for measuring what is and what is not, a reasonable approach to have been taken in this case, even though those guidelines in their terms apply only to a solicitor's office or the office of a Law Society. The police in the circumstances ought to have acceded to Mr. Berkley's report that the computer be taken to this Court (or to some other independent third party such as Ms Minns) and placed in the custody of the court (or Ms Minns) pending the bringing and determining of legal proceedings to be brought by Fraser-Adams to protect her privilege: c.f. guideline 28.

[49] It is unfortunate that there are no guidelines existing between the Law Society and the Northern Territory Police, and that the matter is not covered by the Standing Orders issued by the Commissioner. I consider that this needs to be attended to, and urge the Law Society and the Police to enter into arrangements similar to the existing arrangements between the Australian Federal Police and the Law Council of Australia. Those arrangements should apply not only to solicitors' offices, but wherever

privileged documents are situated, and should be enforced by Standing Orders.

Was the copying of the hard drives lawful?

[50] In view of the findings I have made, it follows that the police acted unlawfully in copying the hard drives.

Should the computer and the copies of the hard drives be released to the plaintiffs?

[51] Even if the seizure of the computer and the copying of the hard drives were unlawful, it does not follow automatically that these items will be ordered to be returned to the plaintiffs. That depends on two considerations. First, whether it is now possible for a process to be undergone to delete from the hard drives all material not authorised by the warrant. Secondly, whether, although illegally obtained, the court ought to now decide whether the hard drives (as deleted) ought to be excluded from evidence. There is often also a third question, namely whether any privileged documents ought be excluded from evidence.

[52] As to the third question, that does not arise in this case because, firstly, the police and the prosecution have indicated no interest in them whatsoever; secondly, it is conceded that the privilege has not been lost; thirdly, it is fundamental that privileged documents are inadmissible, unless the privilege has been lost: see for instance *Carter v Northmore Hale Davy and Leake*

(1995) 183 CLR 121, esp. at 133 per Deane J where his Honour said that there is no question of balancing the considerations favouring the protection of confidentiality against any considerations favouring disclosure.

[53] Assuming that it is possible to arrange for the hard drives to be partly erased by a special programme so that only the Ochre records remained, as suggested by Mr Grant (para 30 above), it was submitted that nevertheless the Court ought to retain the hard drives. However, the Court will not usually order the return of material relevant to the prosecution of criminal proceedings because the material was illegally obtained: see *Rowell v Larter* (1986) 6 NSWLR 21 at 29-33; *Cassaniti v Croucher* (1997) 37 ATR 269 at 280 per Dunford J; *Puglisi and Another v Australian Fisheries Management Authority and Others* (1997) 148 ALR 393 at 403-405. In *Puglisi*, Hill J, after referring to *Bunning v Cross* (1978) 141 CLR 54, said, at 405:

> The existence of this discretion suggests to me that I should not interfere with the pending prosecution by requiring the documents seized to be returned but leave instead to the judicial officer presiding on the prosecution the question whether the material illegally obtained should be admitted into evidence in the prosecution.

[54] In this case, there exists authority in this court for a Judge to rule on questions of admissibility before a jury has been empanelled: see s 26 L of the *Evidence Act*. However, the practice has always been to require the accused to plead to the indictment before embanking on this course, the

reason being, that it is at that point that the trial is said to have begun: see *Criminal Code*, s 336 (2). That stage has not yet been reached.

[55] No argument was pressed as to why the Court ought to order the return of all of the items seized and copied, apart from the illegality, although Mr Tilmouth Q.C. urged that I should find that the taking was a contumelious and deliberate invasion of the plaintiffs' rights. This submission is relevant to the *Bunning v Cross* discretion, which in this case would have relevance only as to whether or not documents which did fall within the terms of the warrant ought to be excluded. To the extent that this may be a relevant consideration in determining whether or not the computer and the hard drives should now be returned to the plaintiffs, I would not be prepared to find that Heymans and Grant knew that they were acting unlawfully and in deliberate and contumelious invasion of the plaintiffs' rights, for the following reasons. First, Heymans gave notice that he wanted to seize the computer before the warrant was executed. This gave the plaintiffs an opportunity to apply to the Court before the warrant was executed. Secondly, Heymans considered the Federal Police Guidelines did not apply. It is difficult to be critical of that decision because on their face the guidelines did not apply to this situation except by analogy. Thirdly, there are no decisions of this Court on point. In fact, the law is not in a settled state in this area. Heymans apparently tried to find out what he could by searching the internet. Fourthly, neither Heymans nor Grant was cross-examined. It would be unfair to draw the inference that they had

knowingly acted illegally in those circumstances. Fifthly, Heymans has acted consistently with his stated intention that he was only interested in the Ochre records (in so far as they might be revived from the hard-drive). There is no evidence that he or anyone else has sought to access the privileged documents. Finally, it was put that Heymans acted hastily, by immediately requesting Fausett to image the hard drive, and indeed, did nothing to stop the process until the order of Bailey J was made. From this it was suggested that he not only acted improperly but the inference can be drawn that he must have known that he was acting improperly. But Heymans understood that the computer was needed by the plaintiffs in order to draw cheques and for the purposes of running Ochre's business, and for that reason was anxious to return the computer as soon as possible. The police were under a duty to return the computer as soon as was reasonably practical: see *Ghani v Jones* (1970) 1 QB 373; *Bartlett v Weir & Ors* (1994) 72 A Crim R 511 at 520 per Beazley J. It is difficult to draw an adverse reference in those circumstances.

[56] I conclude that no order should be made for the return of the computer or the copies of the hard drives at this stage.

Should there be a permanent stay of the indictment?

[57] The argument of Mr Tilmouth Q.C. in his written outline (para 12) was that, by seizing the material and copying it the privilege was lost. However, in oral submissions, that argument was not pursued, and as I have said before,

it was the position of all parties that the privilege had not in fact been lost. Indeed, these proceedings have been taken to protect the privilege and to prevent it from being lost: see *Lord Ashburton v Pape* (1913) 2 Ch 469; *Islam v Duncan* (2000) 9 NTLR 193.

[58] Nevertheless I was asked to infer that, notwithstanding the evidence of the police (which was not challenged) the police did in fact access the privileged material. There is no basis for any such inference. Mr Tilmouth Q.C. submitted that the plaintiffs were in no position to prove that the police had accessed the material, and that, in effect, I should draw on adverse inference from the circumstances. I might have done so if the police had not sworn otherwise, but they did, and they were not cross-examined upon the point, and I do not think, taken over all, that their denials should be swept aside because the evidence is so compelling that the inference should nevertheless be drawn, for the reasons already discussed in para [55] above.

[59] The principles upon which a permanent stay will be granted are well established. In *Regina v Tolmie* (Court of Criminal Appeal, New South Wales, 7 December 1994, unreported) Hunt CJ at CL said, at pps 4-5:

> As to these matters, it is necessary to examine briefly the basis upon which a permanent stay will be granted. To justify such a stay, there must be a fundamental defect which goes to the root of the trial of such a nature that nothing which the trial judge could do in the conduct of the trial could relieve the applicant against its unfair consequences: *Barton v The Queen* (1980 147 CLR 75 at 111; *Jago v District Court* (1989) 168 CLR 23 at 34, 75; *The Queen v Glennon* (1992) 173 CLR 592 AT 615-616. The right to a fair trial is entrenched in the criminal justice system, to ensure that innocent people are not convicted of criminal offences, and a stay of

> proceedings may be granted to prevent an unfair trial: *Jago v District Court* (at 29, 56, 72). But that right must be balanced against the right of the community to expect that persons charged with serious criminal offences are brought to trial: *ibid* (at 33, 72). In that sense, fairness to the accused is not the sole criterion when a court decides whether a criminal trial should proceed: *ibid* (at 30). The grant of a stay of proceedings is discretionary, and the circumstances will usually have to be extreme for such relief to be given: *ibid* (at 31, 60, 75); *The Queen v Glennon* (at 605, 615-616). The onus lies on the applicant for a stay to demonstrate that the disadvantage or prejudice which he would suffer by the refusal of a stay is in the relevant sense unacceptable, to the extent that the trial would be unfair: *Barron v AG* (1987) 10 NSWLR 215 at 219, 233; *Regina v Basha* (1989) 39 A Crim R 337 at 338; *Regina v Laurie Peter Helmling* (CCA, 11 November 1993, unreported) at 4.

[60] In *Regina v Farhat* (1999) NSWCCA 174, Adams J said, after referring to the judgment of Mason CJ in *Jago v District Court of New South Wales* (1989) 41 A Crim R 307:

> ….his Honour held that even if the documents were removed unlawfully and even if the search warrants were obtained in an unauthorised manner and contrary to law, those matters would not provide a reason for a permanent stay of proceedings. Having regard to the statements of principle which I have set out from *Jago v District Court of New South Wales,* it is obvious that this must be the case. The mere fact that evidence is improperly or illegally obtained will not necessarily involve its rejection as evidence (see *Bunning v Cross* (1977) 141 CLR 54 and now s 138 of the *Evidence Act* 1995), let alone provide a basis for a permanent stay.

[61] Mr. Tilmouth Q.C. submitted that because I should draw the inference that the material had been accessed, there is no other effective remedy. I am not prepared to draw that inference, but even if the inference could be drawn that the police had read the material, I would not grant a permanent stay. There is no evidence that the material has been passed on to the prosecution, or that the prosecutors were involved in any misconduct. I appreciate the

importance and sensitivity which the privileged information is likely to have, but even were it to have fallen into the hands of the prosecutor it by no means follows that there is no other effective remedy. Indeed there are a wide range of remedies available, including declarations, injunctions, orders excluding the evidence from the trial if any of it is sought to be lead, and costs orders, including is an appropriate case, indemnity costs. Furthermore, the evidence does not persuade me that there cannot now be a fair trial in the sense discussed in the authorities. The application for a permanent stay is therefore refused.

Orders

[62] The question now is whether I should make the declarations sought by the plaintiffs, the remedy sought being discretionary. Whilst the utility of declaratory relief may be questionable, the courts have long recognised the importance of that relief when the executive arm of government does not act in accordance with their statutory powers, because the effect of the grant of relief is to require those in charge to give general directions to the organisation concerned to act in conformity with the declaration: see *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 71 per Brennan J. Declaratory relief is now frequently given where search warrants are concerned in order to encourage Police Commissioners to take appropriate action, if necessary, by amendments to Standing Orders.

[63] I consider that the first three declarations sought by the plaintiffs, (with some slight alterations to the language to reflect those reasons), ought therefore to be made.

[64] There remains outstanding the question of whether some solution can be arrived at whereby the police will be able to preserve so much of the hard drives as relates to Ochre's financial records for the period referred to in the warrant without their being able to access any other material. Mr. Tilmouth Q.C. made it clear that the evidence of Fausett on this topic was not necessarily accepted as it came late in the hearing and the plaintiffs wished an opportunity to investigate that matter further. There may also be a question as to whether this Court can make appropriate orders to facilitate that exercise, and if so, what orders the Court should make. Obviously it would be preferable if the parties are able to reach agreement on that matter, and I would urge them to use every endeavour to do so. Depending on the outcome of those issues, I will review the plaintiffs' application for the return of the computer.

[65] The formal orders of the Court are as follows:

(1) Declare that execution on 11 January 2001, by Detective Sergeant Ronald Heymans and Detective Neil Grant of the warrant issued by Jennifer Minns on the 3rd day of January 2001, at 9 Gunbar Street, Bayview was unlawful.

(2) Declare that the retention by Detective Sergeant Ronald Heymans and Detective Neil Grant of the computer seized at the time of the execution of the warrant was unlawful.

(3) Declare that the copying of the two hard drives of the said computer on 11 January 2001 was unlawful.

(4) I will hear the parties on the question of costs.

(5) Further consideration of the summons is adjourned to a date to be fixed with liberty to apply.