Leeming, Injunctions in Criminal Law (2021) 95 *ALJ* 18

Injunctions in criminal law

Mark Leeming

[18] Frederic Maitland said with disarming simplicity that the Court of Chancery kept very clear of the province of crime.[1] Mason J said that the right, usually regarded as that of the Attorney-General, to invoke the aid of the civil courts in enforcing the criminal law had been described as 'of comparatively modern use', and was 'confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty ... or to cases of emergency'.[2] Most recently, Gageler J referred to the "exceptional jurisdiction of a court of equity to enjoin a criminal act".[3]

This reflects a traditional view,[4] associated with the speech of Lord Herschell LC in *Institute of Patent Agents v Lockwood*,[5] regarded by Hanbury as a "great case",[6] but which is now more commonly cited in relation to its obiter references to the need to reconcile seemingly conflicting provisions in the same statute.[7] Joseph Lockwood had declined to pay the annual registration fees charged by the Institute but nonetheless held himself out as a patent agent, thereby committing an offence liable to be prosecuted summarily and subject to a fine not exceeding £20. The Institute and three competitors brought proceedings seeking declaratory and injunctive relief.[8] Lord Herschell explained why no injunction should issue:[9]

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1 F Maitland, *Equity A Course of Lectures* (Cambridge University Press, 2nd ed, 1936), p 19.
2 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49-50; [1980] HCA 44, citing Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1977] AC 435 at 481.
3 *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236; [2019] HCA 38 at [156].
4 Contrast K Amarasekara and K Aikers, "Injunctions in Criminal Law: An Anglo-Australian Analysis" (2001) 6 *Deakin L Rev* 1.
5 [1894] AC 347.
6 H Hanbury, "Equity in Public Law", in *Essays in Equity* (Oxford 1934), 80 at 85.
7 [1894] AC at 360: see especially *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [70].
8 It was a Scottish appeal, hence the references are to "interdict" rather than "injunction".
9 [1894] AC at 361-2.

> But for the enactment creating that offence, the defender has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature, having created that new offence, has prescribed the punishment for it, namely, a penalty of £20. Can it possibly under these circumstances be open to bring the individual, not before the summary Court at small expense to determine the question of his liability to a £20 penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and, then, having proved that he had rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the £20 penalty, but would be liable to imprisonment for breach of the interdict?

A narrow approach based on proprietary rights, resting in part upon *Lockwood*, was favoured by Dixon AJ writing for the Full Court in *Attorney-General v T S Gill & Sox Pty Ltd*[10] but was overturned in *Cooney v Ku-ring-gai Municipal Council*.[11] It is now clear that the Attorney General may enforce public rights arising out of statutory prohibitions by an injunction. In such a case, it seems [19] necessary for the Attorney to establish that the statutory prohibition is not merely criminal, but also gives rise to a public right. Much modern legislation has taken a different course – one which seemingly would not have been favoured by Dixon J[12] – and may expand the class of persons authorised to enforce, say, planning and environmental laws.[13]

The Attorney-General's position is special. None of the foregoing suggests any great scope for private litigants to seek injunctive relief in criminal litigation. Yet, taking a slightly broader view of "criminal law", at least four times in 2020 appellate courts have addressed claims for injunctions preventing police, prosecutors or regulators from accessing material seized compulsively: *Racing New South Wales v Fletcher*;[14] *Doyle v Commissioner of*

10 [1927] VLR 22.

11 (1963) 114 CLR 582. See also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [1998] HCA 49 at [27].

12 See *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33 at [77] for observations on Dixon J's dissatisfaction with the course legislation was taking and the adaptation of Ch III jurisprudence to accommodate it.

13 See for example *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), s 487 (persons who have engaged in activities for the protection or conservation of, or research into, the environment in the previous 2 years): see A Macintosh, H Roberts and A Constable, "An Empirical Evaluation of Environmental Citizen Suits under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)" (2017) 39 *Sydney Law Review* 85.

14 [2020] NSWCA 9.

Police;[15] *McLean v Racing Victoria Ltd,*[16] and, most importantly, *Smethurst v Commissioner of Police*.[17]

Three of those decisions involved seizure pursuant to a search warrant.[18] Let it be assumed the warrant is shown to be invalid, or that unauthorised disclosure or use of the material is proposed or has occurred. Injunctive relief may be available in such circumstances, but attention should be directed to the basis of the relief sought.

One possible basis is property. Injunctive relief may be available, in equity's auxiliary jurisdiction, to vindicate the owner's rights of property. The invalidity of the warrant will mean that there will be no defence of lawful authority to the inevitable trespass to land and to goods during the execution of the warrant. An equitable remedy of an injunction may be available, damages being inadequate.

Another possible basis is confidential information. An injunction is the canonical remedy for breach of confidence in equity's exclusive jurisdiction. In such a case, no question of the inadequacy of damages arises, but it will be necessary to establish that the information is confidential and to draft the injunction with specificity.[19]

A third possible basis may be to enforce a statutory right, typically based on the implication that statute requires those seizing documents who fail to comply with its provisions to return that which was seized.

There may be other bases available in particular cases (notably copyright, where there has been copying of documents). Naturally, a plaintiff may seek the same equitable relief on more than one basis in the alternative.

15 [2020] NSWCA 11; [2020] NSWCA 34, special leave refused *sub nom Barbeliuk & Anor v NSW Commissioner of Police & Ors* [2020] HCASL 187 (9 September 2020).
16 [2020] VSCA 234.
17 (2020) 94 ALJR 502; [2020] HCA 14.
18 The fourth, *McLean*, involved compulsive production in a stewards' inquiry.
19 See *O'Brien v Komesaroff* (1982) 150 CLR 310.

Whatever the juristic basis, Australian law is vastly different from United States jurisprudence. Indeed, the need to identify an underlying basis for relief by way of injunction or delivery up and destruction – necessarily equitable – emphasises the point. There is no constitutional prohibition of unlawful searches and seizures, nor is any remedy available as of right. Australian law reflects a balancing, as the High Court said in *George v Rockett*, between "the need for an effective criminal justice system against the need to protect the individual from arbitrary invasion of his privacy and property".[20] This is most readily seen from the *discretionary* exclusion of illegally obtained evidence found in *Bunning v Cross*[21] and [20] now found in s 138 of the various *Evidence Acts*.[22] In *Kadir v The Queen*, the High Court confirmed that "s 138 does not enact the doctrine that prevailed in the United States, requiring the exclusion of the 'fruit' of official illegality unless the impugned evidence was derived 'by means sufficiently distinguishable to be purged of the primary taint.'"[23]

In *Smethurst v Commissioner of Police,*[24] the High Court unanimously held that the warrant was invalid (for reasons which do not presently matter), but divided on relief. No physical thing was taken by the executing federal police officers. Rather, data on the journalist's handset was copied onto a police laptop, and was in turn interrogated by keyword searches with a view to identifying what answered the warrant. The hits were copied onto a USB stick owned by the police. The data was then apparently erased from the laptop and the police left with the USB stick.

The journalist sought injunctive relief for the return or destruction of the information which had been copied onto the USB stick, and to restrain the police from providing that material to the prosecuting authorities. No claim was made based on breach of confidence or copyright or invasion of privacy. Instead, Ms Smethurst's claim was based on being protected from the consequence of the trespass which occurred because the warrant was

20 (1990) 170 CLR 104 at 110; [1990] HCA 26.
21 (1978) 141 CLR 54, which remains applicable in South Australia (see for example *Matthews v The Queen* [2020] SASCFC 1) and Western Australia (see for example *Carr v State of Western Australia* [2016] WASCA 78).
22 Cth, NSW, Tas, Vic, ACT, NT.
23 (2020) 94 ALJR 168; [2020] HCA 1 at [40]; see also *Wu (a pseudonym) v The Queen; Phan (a pseudonym) v The Queen* [2020] VSCA 94 at [106].
24 (2020) 94 ALJR 502; [2020] HCA 14.

invalid, or on an implied statutory obligation. The claim based on statute was rejected. But the Court divided narrowly on the form of relief in equity's auxiliary jurisdiction consequent upon the trespass.

Four members of the Court held that there was no right at general law to such an injunction, and, further, held that if there were, it was discretionary and the discretion should not be exercised in favour of the journalist. The other judges favoured granting mandatory injunctive relief, albeit on terms which would permit a further (and possibly narrower) warrant to be sought and obtained if a proper basis were available.

Those executing the warrant were officers of the Commonwealth, and so there was a constitutional dimension to the litigation. Section 75(v) ensures that the High Court has original jurisdiction in any matter in which an injunction is sought against an officer of the Commonwealth. Gageler J, Gordon J and Edelman J took different approaches to the relevance of s 75(v). Gageler J regarded Ms Smethurst's entitlement to limited injunctive relief as grounded upon s 75(v):[25]

> The juridical basis for the final mandatory injunction sought by Ms Smethurst lies in its issue within the discretion of the Court being constitutionally appropriate to restore Ms Smethurst to the position she would have been in had her common law rights to control access to her real and personal property not been invaded by the tortious conduct of the AFP in circumstances in which money alone cannot restore her to that position.

Gordon J likewise said that it would be an error to consider the circumstances in which an injunction might issue to be confined by equitable principles governing private law cases.[26] On the other hand, Edelman J emphasised that while general law principles continued to develop, the inclusion of "injunction" in s 75(v) was not a basis for the exercise of power to depart from those developing equitable principles.[27] This accorded with what was said by the members of the majority.[28] On that approach, it would follow that the happenstance that equitable relief is sought against an officer of the Commonwealth, as opposed to warrants

25 At [130].
26 At [179].
27 At [239].
28 At [98] (Kiefel CJ, Bell and Keane JJ) and [146] (Nettle J).

obtained by State and Territory law enforcement officers, should not make much difference to the outcome.

The three members of the Court who favoured issuing limited injunctive relief also expressed different views on a line of authority, culminating in *Caratti v Commissioner of the Australian Federal Police*,[29] [21] which tended to conflate a prima facie right to return of things taken unlawfully with the discretion to withhold relief. Gordon J said that "[t]hat line of authority is wrong and should not be followed",[30] Edelman J was also critical,[31] while Gageler J declined to review the correctness of those decisions.[32] This remains to be worked out in future cases.

In *McLean v Racing Victoria Ltd*, syringes said to contain a prohibited hormone were seized in the course of executing a valid search warrant pursuant to s 465 of the *Crimes Act 1958* (Vic) on premises of Mr McLean, a horse trainer. Police provided information about the syringes (but not the chattels themselves) to Racing Victoria, which proposed to conduct a disciplinary hearing. The questions where whether the *Crimes Act* contained an implied duty of confidence preventing disclosure to Racing Victoria, or whether the disclosure was permitted under the *Privacy and Data Protection Act 2014* (Vic). A unanimous Court of Appeal held that there was no implied restriction under the *Crimes Act* nor any provision under the *Privacy and Data Protection Act* preventing the disclosure upon which the trainer could rely. The Court of Appeal also touched upon relief,[33] noting that had a breach been made out, an injunction would not have issued because the information was in the public domain, following Mr McLean's failure to apply for further confidentiality orders pending appeal, and because the Victorian Racing Tribunal could be expected to apply s 138 of the *Evidence Act* if reliance were placed on the material seized. A similar result was reached in *Racing New South Wales v Fletcher* when a professional gambler sought to limit the use which could be made of information on a mobile handset taken pursuant to a direction in the course of an inquiry into the betting activities of two others.[34]

29 (2017) 257 FCR 166; [2017] FCAFC 177.
30 At [195].
31 At [276].
32 At [133].
33 At [179]-[183].
34 [2020] NSWCA 9.

It may be seen that, contrary to the tenor of Maitland's views a century ago, injunctive relief is far from foreign to criminal litigation, including litigation which is ancillary to a prosecution. This is another area where equitable principle continues to be developed and applied.

MJL