IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S CR 2017 0078; S CR 2017 0079
S CR 2017 0080; S CR 2017 0081
S CR 2017 0082; S CR 2017 0104

Between:

THE QUEEN

-and-

ROBERT EDWARD CERANTONIO
PAUL JAMES DACRE
ANTONINO ALFIO GRANATA
SHAYDEN JAMIL THORNE
KADIR KAYA &
MURAT KAYA

Accused

JUDGE:	Croucher J
WHERE HELD:	Melbourne
DATES OF HEARING:	25 October, 1 November & 7 December 2017
DATE OF RULING:	28 February 2018
CASE MAY BE CITED AS:	R v Cerantonio & Ors (Ruling No 14)
MEDIUM NEUTRAL CITATION:	[2018] VSC 84

CRIMINAL LAW – Pre-trial ruling – Six men charged jointly with offence of engaging in conduct preparatory to offence of entering a foreign country with intention of engaging in a hostile activity in that country, contrary to *Criminal Code* (Cth), ss 119.4(1), 119.1(1) & 11.2A – Prior to trial, suppression order made in respect of certain prejudicial, but inadmissible, information concerning one of six accused – Articles containing such information, but published prior to making of suppression order, still accessible on websites of local and overseas media organisations – Application for "take-down" order directed at local media organisations to remove such articles from their websites – Whether take-down order would be futile, and therefore unnecessary, because of availability of same information on numerous other websites beyond reach of proposed order – Whether judicial directions to jury sufficient to ensure fair trial – Application (in the alternative) for declaration that existing suppression order prohibits maintenance of articles on local websites already – Meaning of "publication" – Construction of Court's order – Applications refused – *Open Courts Act* 2013 (Vic), ss 3, 5(1), 17, 18, 20 & 25; *News Digital Media Pty Ltd & Anor v Mokbel & Anor* (2010) 30 VR 248.

Appearances:	Counsel	Solicitors
For the Crown	Mr N Robinson QC with Ms R Sharp and Ms C Fitzgerald	Solicitor to Commonwealth Director of Public Prosecutions
For Robert Cerantonio	Mr M Cahill SC with Dr G Boas	Stary Norton Halphen Criminal Lawyers
For Paul Dacre	Mr J McMahon SC with Ms G Morgan	Slades & Parsons Criminal Lawyers
For Antonino Granata	Mr C Farrington with Mr C Terry	Patrick W Dwyer Barristers & Solicitors
For Shayden Thorne	Ms M Fox QC with Mr S Moglia	Doogue O'Brien George Barristers & Solicitors
For Kadir Kaya	Mr D Hallowes SC with Ms F Todd	Galbally & O'Bryan Defence Lawyers
For Murat Kaya	Mr D Dann QC with Mr M Goldberg	James Dowlsey & Associates Criminal Law
For: Fairfax Media Limited; and Fairfax Digital Australia & New Zealand Pty Ltd	Mr E Nekvapil with Mr P Considine	Minter Ellison Lawyers
For: The Herald & Weekly Times Pty Ltd; Nationwide News Pty Ltd; Daily Telegraph Pty Ltd; Adelaide Advertiser Pty Ltd; News Life Media Pty Ltd; Queensland Newspapers; The Australian Broadcasting Corporation; and Special Broadcasting Service	Mr T Otter	M&K Lawyers Group Pty Ltd

HIS HONOUR:

Overview

1 One of the six accused in this matter, Shayden Jamil Thorne, applies for an order – sometimes described as a "take-down order" – directing Australian media organisations to remove from their websites articles containing certain highly prejudicial information about him. He submits that such an order is necessary to ensure that his forthcoming trial in this Court be fair, by reducing the risk that prospective jurors might learn of the offending information – which would be inadmissible in evidence at that trial – *via* the internet.

2 Mr Thorne's alternative submission is that an order I made on 14 June 2017, by prohibiting "publication" of the offending information, already includes a prohibition on maintaining access on Australian media websites to articles containing the same information. As I understand it, the application is that I should declare that to be so, in order that it be made clear to the Australian media that those articles must be removed from their websites, lest they be in contempt.

3 In my view, both applications must be refused. In short, the Court of Appeal's (majority) decision in *News Digital Media Pty Ltd & Anor v Mokbel & Anor* ("the Mokbel appeal")[1] is binding and relevantly indistinguishable authority for the proposition that a take-down order would be futile in circumstances such as the present, and therefore should not be made. As to the alternative application, I think it is plain that the existing suppression order was to have only a prospective effect and that it did not, and does not, extend to requiring pre-existing articles to be removed from the internet. My more detailed reasons for those conclusions follow.

Background

4 In May 2016, Mr Thorne and five other men were arrested and charged with an offence against s 119.4(1) of the *Criminal Code* (Cth). The offence may be described as

1 *News Digital Media Pty Ltd & Anor v Mokbel & Anor* (2010) 30 VR 248.

one of agreeing to engage, and engaging, in conduct preparatory to an offence of entering a foreign country with the intention of engaging in a hostile activity in that country. Subject to some contingencies, the trial proper on that charge might commence in this Court in the next few weeks or so, but no sooner.

5 At that trial, the Commonwealth Director of Public Prosecutions ("the Director") will allege that the accused were adherents of violent jihad who engaged in conduct preparatory to an intended departure from Australia, by boat, with the intention ultimately of entering the Philippines with the intention of engaging in conduct in that country with the intention of achieving the overthrow, by force or violence, of the government of the Southern Philippines.

6 Both before and after Mr Thorne was charged, numerous articles appeared on news websites containing assertions about him, including that he had been imprisoned for a terrorism offence in Saudi Arabia and that he is the son-in-law of Abdul Nacer Benbrika, a notorious man sentenced for terrorism offences in Australia. There is no dispute that that information would be inadmissible in, and, if known to an empanelled juror, gravely prejudicial to the fairness of, Mr Thorne's trial. The Director has no intention of seeking to lead any such evidence.

7 On 15 May 2017, the magistrate hearing the committal proceedings in this matter made an order prohibiting publication of the offending information within Australia, until the matter reached this Court. On 23 May 2017, when the matter first was mentioned in this Court, Lasry J made an interim order in similar terms, until the substantive application was determined. On 14 June 2017, I made an order on the substantive application, again, in similar terms, until the conclusion of Mr Thorne's trial.[2]

8 The evidence before the Court shows that articles containing the offending information, but published prior to the making of these suppression orders, are still

---

2 One of the notable differences was that, whereas the magistrate and Lasry J within their orders defined "publication" in the terms employed in s 3 of the *Open Courts Act* 2013 (Vic), I left "publication" undefined in my order. I shall return to this difference below.

publicly accessible on websites of both Australian and overseas media organisations. For example, if the words "Shayden Thorne" are typed into a Google search, thousands[3] of links will appear, some of which, if clicked on, will reveal the offending information, or part or it. In some instances, the displayed link itself will disclose the offending information, or part of it, in the heading to and/or in an opening extract from the article.

Applications for a take-down order

The applications

9 It is this residual accessibility to the offending information that caused Mr Thorne's solicitors, on 19 October 2017, to file an application to this Court for an order directing the removal of eighteen nominated articles found across thirteen Australian news media websites.[4]

10 After it was pointed out, by the several local media organisations opposing the application, that links on numerous other Australian websites not the subject of the application also contained the offending information or articles,[5] Mr Thorne's solicitors, on 27 October 2017, filed an amended application, seeking an order directing the removal of 30 nominated articles (as well as any others caught by the general description in the amended application). Mr Thorne did, however, concede that there had not been notification of the amended application to all Australian media organisations that might be caught by the proposed order. It was submitted that, if the Court were minded to make an order of the type sought, the appropriate notice could be given to all relevant media organisations and an order could be

---

3 There was evidence that Google searches, conducted on three separate days in October 2017, using the words "Shayden Thorne", without quotation marks, would produce about 8,710, 10,700 or over 11,000 results respectively (see the affidavits of Amelia Ramsay, affirmed 23 October 2017, at [1] & Exhibit AR-1; Patrick Thomas Considine, affirmed 23 October 2017, at [7]; and Thomas John Otter, sworn 23 October 2017 (containing four paragraphs – another affidavit of Mr Otter sworn on the same date contains 33 paragraphs), at [3]).

4 That application was later to be expanded to 22 articles, before an amended application was filed.

5 See the affidavits of Patrick Thomas Considine, affirmed 23 October 2017, at [8]; Thomas John Otter, sworn 23 October 2017 (containing four paragraphs), at [4]; and Patrick Thomas Considine, affirmed 25 October 2017, at [4]-[6], [7](b), [9](a), (f)-(h) & (j), [10]-[11].

fashioned that ensured that all such articles were removed from those Australian websites.

Submissions

11 Mr Thorne submitted that a take-down order of that type is necessary to ensure a fair trial, by reducing the risk that prospective jurors will learn of the offending information during the period between the making of the order and their ending up on a jury panel for the trial. He accepted that the risk cannot be eliminated entirely by such an order, because overseas websites beyond the reach of the order still would contain and allow access to the offending information, but submitted that the removal of the nominated articles from most (if not all) Australian websites at least would reduce that risk.

12 As I have said, the applications are opposed by several local news media organisations – including *The Age*, the *Herald Sun*, the ABC, SBS and others connected with the Herald & Weekly Times and Fairfax groups ("the local media"). Their submissions include the following:

13 First, since the offending information is not in current news stories, the only way in which a prospective juror would come across that information is by a dedicated internet search of terms contained in the offending articles, such as by typing in the words "Shayden Thorne". This, it is submitted, would seem to be an unlikely event, or even speculative, especially in circumstances where there is no evidence that Mr Thorne is well-known.

14 Secondly, the evidence reveals that, even if the articles nominated in the amended application were removed from all Australian websites, a prospective juror who in fact did search for Mr Thorne's name still could come across the offending information on numerous other (overseas) websites beyond the reach of the order. Thus, the order would be futile and, therefore, unnecessary.

15 Thirdly, the local media also rely on evidence before me to the effect that, if a take-

down order directed to Australian websites were made and complied with, the articles that are beyond the reach of the order may take the place of the removed articles, or at least be elevated, in the hierarchy of search results.[6] As I understand it, the submission is that, in such circumstances, the offending information is just as likely to be noticed by a prospective juror as it would be if there were no order. On the other hand, Mr Thorne relied on evidence casting doubt on the proposition that removal of articles from local websites necessarily would result in those on overseas websites moving up the order of search results.[7] As will be seen, I need not resolve this dispute in the present case.

16 Fourthly, the media parties submit that judicial directions of the type commonly given to empanelled jurors would ensure a fair trial. Such directions might include:

a) that jurors are not to search the internet for anyone or anything connected with the case, or have anyone else do such a thing for them;

b) that it is an offence for a juror to make any inquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror;[8]

c) that jurors are to act only on the evidence properly before them in the trial; and

d) that they are to ignore anything they have seen or heard, or that they might see or hear, in the media about the case.

17 Mr Thorne accepted that judicial directions of that type would prevent prospective jurors, who have no prior knowledge of the offending information, from learning of that information once empanelled, but submitted that such directions could not remove the offending information from the minds of empanelled jurors if they had already discovered it on the internet before being empanelled. Further, it is submitted that there is no sensible way of determining whether prospective jurors have learned of the offending information without tipping them off about that very

---

6 See the affidavits of Patrick Thomas Considine, affirmed 25 October 2017, at [12]; and Dean Aaron Levitan, affirmed 31 October 2017, at [8]-[9] & Exhibits DL-1 & DL-2.

7 See the affidavit of Amelia Ramsay, affirmed 27 October 2017, esp. at [4](g).

8 See s 78A of the *Juries Act* 2000 (Vic).

information. In his submission, absent a take-down order, there is simply too great a risk that a prospective juror will learn of the offending information and end up on the jury in his trial. While the possibility of access to the information on overseas websites would reduce the utility of the order, it would not eliminate it altogether.

Discussion

18 I turn now to the applicable law, about which the parties are agreed.

19 Only eight years ago, in the Mokbel appeal,[9] an order very similar to the type of order sought here, made by Kaye J at first instance, was set aside, by a majority of the Court of Appeal (Warren CJ and Byrne AJA; Buchanan JA dissenting), principally on the basis that it was futile and therefore unnecessary. In short, I accept that, while there are some differences, to which I shall return, the present circumstances are not materially distinguishable from those that obtained in the Mokbel appeal, and that I am therefore bound to decline to make an order of the kind sought.

20 In the ruling which was the subject of the successful appeal, on the Friday before the Monday Mr Mokbel was due to face a murder trial, and some months before he was due to face multiple trials on drugs importation charges, Kaye J made an order, over objection by the media parties, directing the proprietors of *The Age*, the *Herald Sun* and *The Australian* to remove from their websites any articles containing reference to Mr Mokbel.[10] That "take-down order" was described on the subsequent appeal as "the internet order". Four months earlier, his Honour, without objection, had made an order prohibiting publication of any material containing reference to the forthcoming committal, trial and appeal proceedings concerning Mr Mokbel and/or his co-accused, his previous criminal convictions, his being charged with drug-related offences, his alleged association with, or involvement in, "gangland" killings, and his association with Carl Williams. That order had been extended, without objection, eleven days before the making of the internet order.

---

9 *News Digital Media Pty Ltd & Anor v Mokbel & Anor* (2010) 30 VR 248.

10 See *R v Mokbel (Ruling No 3)* [2009] VSC 653.

21 Three principal issues arose before his Honour with respect to the application for the internet order. The first was whether the Court had the power to make an order of that type. His Honour held that, in its inherent jurisdiction, this Court does have, where necessary, the power to prevent a continuing contempt or a continuing infraction of an accused's right to a fair trial and, where necessary, that power extends to making the type of order sought.[11]

22 The second issue, which Kaye J said was not easy to decide, was whether that power only extends to doing that which is necessary in order to protect the integrity of the system of justice and specifically to protect the right of an accused to a fair trial.[12] His Honour accepted that the foregoing is an accurate and appropriate definition of the limit of the power of this Court, and that the Court does not have any broader power to censure or restrict what is on people's websites. It was put by the media parties that it was unlikely that potential jurors would look at the offending materials and that, once empanelled, they would be subject to the usual directions of the type I referred to earlier. While his Honour accepted that, whether a potential juror in any of the forthcoming trials might become exposed to the offending material is "problematic and really speculative", he nevertheless accepted that "there is a risk that that might occur" and that, "for the test of necessity, …, given the standing of each of the [three] organisations, the Court should not countenance the coming to pass of that risk unless it was inutile for it to do so". His Honour concluded:[13]

> Thus, in my view, the test of necessity is such that, whilst it is difficult to form any educated view as to whether a juror might have become or might become exposed to the material, such is the nature of the allegations against Mr Mokbel in the forthcoming case that it is necessary for the Court to intervene if it can.

23 The third issue concerned the utility of such an order, which, again, his Honour said he found difficult. He referred to the same argument that is made by the media parties in the present case – namely, that, because of the availability of the same

11 *R v Mokbel (Ruling No 3)* [2009] VSC 653at [11]; see also [6]-[10].
12 *R v Mokbel (Ruling No 3)* [2009] VSC 653at [12]-[16].
13 *R v Mokbel (Ruling No 3)* [2009] VSC 653at [16].

information on websites not caught by the proposed order, the removal of that material from the three websites in question would have no utility in protecting the rights of Mr Mokbel.[14] His Honour then responded as follows:[15]

> [18] In my view, notwithstanding the force of those submissions, there are three important considerations which overcome the argument … . Firstly, if the materials to which I have referred were removed from the websites of *The Australian*, *The Age* and the *Herald Sun*, they would be removed from websites, to which, I consider, greater credibility would be attached than most, if not all, of the other websites on the internet. By remaining on the websites of [those organisations], the articles are given a greater credibility and greater force than they would otherwise be given. Secondly, at least to a limited extent, if the articles were removed, it would prevent further "caching" of those articles into cyberspace. Thirdly, and in my view significantly, ultimately I do not think it is right for this Court to surrender its obligation to do what it can to protect the right of litigants and accused people before it to a fair trial. To succumb to the King Canute type argument which was put to me by [counsel for the media] would, in my view, be an appalling abrogation by this Court of its role to uphold the system of justice and to protect the rights of litigants and accused people who come before it. Furthermore, it would, I think, carry with it a clear message that this Court was prepared to countenance and tolerate the type of conduct which has been brought before me in this case.
>
> [19] In my view, this Court must set a standard. Whilst [counsel for the media] may accuse me of being King Canute in this respect, I think it would be a shameful day for this Court to surrender its power to do what it can to protect the right of accused people and of litigants before it.

24 In my respectful opinion, those reasons are very persuasive. They strike a chord with me, not in just a visceral way, but also as a matter of the most fundamental and careful application of principle. Indeed, unbidden by authority, I would have applied similar reasoning to fashion an order of the type sought by Mr Thorne. In particular, while there is an element of guesswork in predicting whether a prospective juror would be moved to make a dedicated search and thereby come across the offending information on an Australian website, and while an order of the type sought would not necessarily prevent a determined searcher from learning of the same information on an overseas website, I think it would still be necessary and of some utility, albeit limited, to make an order of the type sought, because it strikes me that the risk of such a discovery would still be reduced somewhat by the making

---

14 *R v Mokbel (Ruling No 3)* [2009] VSC 653at [17].

15 *R v Mokbel (Ruling No 3)* [2009] VSC 653at [18]-[19].

of and compliance with such an order.

25 In my view, to take up an analogy employed in the course of argument, if an order of the type sought were to be made, this Court should not be regarded as providing no more than a cocktail umbrella to Wile E. Coyote as he stands trapped under the falling anvil.[16] Instead, such an order might be likened to wearing a seatbelt: it will not prevent a car accident, but it might lessen the risk of serious injury or death in the event of a crash.

26 But, as I say, I think that authority compels me to accept that the hapless coyote's fate is sealed. This is because Kaye J's internet order was set aside by a majority of the Court of Appeal in circumstances and for reasons which have direct and relevantly indistinguishable application to the present case. While, in their joint judgment, Warren CJ and Byrne AJA accepted that the Court had the power to make such an order,[17] their Honours also accepted the media parties' submission that, in the particular circumstances of the case, the internet order should not have been made.[18]

> [93] We return now to the internet order in this case. In a sense, the two parts of the order overlap. If publication of material on a website occurs every day that the material is available on the website, an order restraining a person from publishing must involve the removal of the material from the website or, in some way, making it inaccessible. It is, however, clear from the wording of the order that his Honour intended to direct the removal of material of the kind described which had in the past been posted on the websites, and to prevent the applicants from posting this material in the future.
>
> [94] We respectfully doubt the necessity for making that part of the order requiring the applicants take down the material from their websites provided the articles, the subject of the order, were no longer sufficiently current or were not presented in such a way as to be forced upon a visitor to the site who was not searching for them. We are of the opinion that a juror in this case would not be likely to have inadvertently come across material adverse to Mr Mokbel which was archived and not readily available to such a visitor. Nor do we readily accept that a juror would deliberately set about searching for such material in defiance of the trial judge's warning and direction. Moreover, if, as the evidence shows, the removal of the offending material did not prevent a determined searcher from accessing the same material from

---

16 Apologies to Chuck Jones (1912-2002) and Warner Bros.

17 *News Digital Media Pty Ltd & Anor v Mokbel & Anor* (2010) 30 VR 248 at 271[90] (*per* Warren CJ & Byrne AJA).

18 *News Digital Media Pty Ltd & Anor v Mokbel & Anor* (2010) 30 VR 248 at 272[93]-[94] (*per* Warren CJ & Byrne AJA).

> a cached website, it cannot be said that the order was necessary for the protection of the court process with respect to Mr Mokbel's pending trials. In any event, in its terms, the order which deals with 'any Articles containing reference to Antonios Mokbel' went far beyond that which might reasonably be required to protect that process. We conclude that the circumstances before his Honour did not disclose a necessity for the making of this part of the internet order. This part of the order should, therefore, be set aside.

27 In the present case, I can see nothing in the evidence before me justifying any different outcome. In particular, I do not accept that a potential juror in this case would be likely to have inadvertently come across material adverse to Mr Thorne which was archived and not readily available to such a visitor. Nor do I readily accept that an empanelled juror would deliberately set about searching for such material in defiance of the types of warnings and directions I intend to give. Further, as in the Mokbel appeal, the evidence here also shows that, in any event, the removal of the offending information from Australian websites would not prevent a determined searcher from accessing the same material from an overseas or cached website, such that it cannot be said that the order was necessary for the protection of the court process with respect to Mr Thorne's pending trial.

28 Ms Fox QC, who appeared with Mr Moglia for Mr Thorne, made a valiant attempt to distinguish the present circumstances from those that obtained in the Mokbel appeal. Thus, for example, as I understood her, Ms Fox relied on Mr Mokbel's notoriety set against Mr Thorne's comparative anonymity, which may be accepted, as making it more likely that, if a prospective juror learned of the offending information in this case, his or her mind would be shocked and polluted irretrievably against Mr Thorne, whereas it might be said that, in Mr Mokbel's case, learning of the subject information would only be more of the same and therefore less likely to risk a miscarriage of justice. Even if that argument were sustainable, and I do not think it is, it seems to me that it would be offset by the inference that Mr Mokbel's comparative notoriety would make it more likely that a prospective juror would make a dedicated search about him than any prospective juror would in the case of Mr Thorne.

29 Secondly, Ms Fox referred to the breadth of the order made in Mr Mokbel's case and

contrasted it with the targeted order sought in Mr Thorne's case. It is true that the internet order was struck down, in part, because it was held to be too broad. But, as I read the judgment of the majority, the lack of utility in the order was reason enough to hold that it was unnecessary and should not have been made.

30 Thirdly, it might be said that, whereas in Mr Mokbel's case, the murder trial was only a weekend away such that there was only a very short period for the order to have any protective effect, in the present case, the trial is still some way off, so that there is more chance that the proposed order would have some utility. The difficulty, however, is that, in Mr Mokbel's case, there were also the drugs trials to come some months hence, so that there is really no meaningful severable distinction to be drawn.

31 Fourthly, it might be said that the order sought here – which would cover all Australian websites – was more likely to be effective than the one made in Mr Mokbel's case, which was confined to the websites of three major newspapers. While I accept that there is a possible difference there, I think it is not a difference of the type or order that offsets the utility argument that succeeded in the Mokbel appeal.

32 Mr Nekvapil, on the other hand, who appeared with Mr Considine for the Fairfax interests, submitted that, far from being distinguishable from the Mokbel appeal, there are three ways in which Mr Thorne's application was even weaker than Mr Mokbel's. First, he submitted that, in the Mokbel appeal, critical to Buchanan JA's dissent was the fact that the offending material had been removed and that the effect of allowing the appeal was to reinstate it. The majority, on the other hand, were prepared to set aside the order, knowing that that would cause the material to be reinstated. Here, on the other hand, refusing the application would be to maintain the *status quo*.

33 Secondly, Mr Nekvapil submitted that there is stronger evidence in Mr Thorne's case that overseas publications containing the offending information published by

reputable websites cannot be removed by a take-down order.

34 Thirdly, he submitted that, in the present case, there is evidence about the way in which non-removed articles might be elevated in any post-take-down Google search, whereas there was no equivalent evidence in the Mokbel appeal.

35 In my view, it is unnecessary to assess the weight of Mr Nekvapil's submissions. This is because, for the reasons I have given, I am of the view that the circumstances of the present case are in any event otherwise materially indistinguishable from those that caused the majority of the Court of Appeal to set aside Kaye J's internet order.

36 Accordingly, I must refuse the application or applications for a take-down order.

37 I also note, by the way, that, since the Mokbel appeal was decided, the High Court handed down its judgment in *Dupas v The Queen*.[19] While the following observations have not contributed to my decision to refuse Mr Thorne's applications, I should add that the decision in *Dupas* might be seen as a powerful endorsement of the Court to ensure a fair trial by jury despite pervasive pre-trial publicity of the most damaging kind. The High Court unanimously dismissed Mr Dupas's appeal from the trial judge's refusal to order a permanent stay and the Court of Appeal's decision to order a retrial (instead of directing a permanent stay) on the basis that pre-trial publicity gave rise to irremediable prejudice such as would preclude his fair trial at any time. While the tests that the Court, the Court of Appeal and the High Court were all required to apply in considering the applications before them were different from the test I must apply in the application before me, it strikes me that, if it was thought by the High Court that "unfair consequences of prejudice or prejudgment arising out of extensive pre-trial publicity [of the type faced by Mr Dupas] was capable of being relieved against by the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury",[20] then I should have some confidence that the

19 *Dupas v The Queen* (2010) 241 CLR 237.

20 *Dupas v The Queen* (2010) 241 CLR 237 at 251[38] (*per* French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

same might be achieved in the present case, absent a take-down order of the type sought.

Application for a declaration regarding existing suppression order

38 I turn now to the alternative application, which I can deal with relatively briefly.

39 As I have said, Mr Thorne's alternative submission is that the order I made on 14 June 2017, by prohibiting "publication" of the subject information, already includes a prohibition on maintaining access on the local media websites to articles containing the same information. As I understand it, the submission is that I should declare that to be so, in order that local media understand that those articles must be removed from their websites, lest they be in contempt.

40 The news media's primary response is that, while "publication" can have different meanings in different contexts, it is plain from all the relevant circumstances that, in the present case, my order was not intended to extend to prohibiting media organisations from maintaining access to the pre-existing articles on their websites. In the alternative, it is submitted that, if it were, then the order was made without affording the media an opportunity to be heard, and the matter should be adjourned so that the media parties may have time to consider whether to seek leave to appeal and any further or other relief.

41 In my view, the media's primary submission should be accepted. I must say, I find it somewhat awkward to be purporting to interpret an order that I made. But, as I understood their submissions, all parties accepted that I was entitled to do so.

42 And while I hesitate to say so when it is my own order that is being considered, I can say that I did not intend the order of 14 June 2017 to extend to prohibiting media organisations from maintaining access to the pre-existing articles on their websites.

43 I think that there are three main objective considerations which compel the same conclusion. First, as Mr Nekvapil submitted, it is clear, from the transcript of the hearing on 14 June 2017, that I declined to make a take-down order at that time.

Instead, I made the broad suppression order – which was prospective in nature – and suggested that, if the media parties were not prepared to remove the articles by negotiation, Mr Thorne could bring on an application. And that is what occurred subsequently.

44 Secondly, it is also clear from the face of the order that I made the order pursuant to the inherent jurisdiction of the Court. There are two reasons. First, I expressly said as much on the face of the order in the "Other matters" section. Secondly, the additional references to ss 5(1) and 25 of the *Open Courts Act* 2013 (Vic) ("the Act") are also references to the Act's preservation of that inherent power. Now, of course, a take-down order, like a broad suppression order made by this Court, must be made in the inherent jurisdiction of this Court. However, that the order was made in the inherent jurisdiction of the Court means that it is less likely that I adopted the broader meaning of "publication" set out in s 3 of the Act, which would include a prohibition on "provid[ing] access to the public … by any means", which, it seems, would include allowing public access, by a dedicated Google search, to pre-existing material on a media organisation's website.

45 This brings me to the third factor. In the order of 14 June 2017, I employed the word "publication" *simpliciter*. I did not adopt the definition of "publication" in s 3 of the Act. This, of course, is in contrast to the orders of Lasry J and the magistrate, both of which incorporated that broader definition.

46 I am not asked to say anything, and I say nothing, about the scope of or the intention behind those orders or that choice of definition.

47 I say simply that, for the foregoing reasons, while "publication" can have different meanings in different contexts, I am satisfied that, and do declare that, in the present case, my order of 14 June 2017 was not intended to extend to prohibiting media organisations from maintaining access to the pre-existing articles on their websites.

48 In those circumstances, it becomes unnecessary to say any more about the possible meanings of "publication".

Conclusion and orders

49 Accordingly, I refuse Mr Thorne's applications.

50 I shall hear counsel on the question of costs.

Suppression of these reasons

51 Also, subject to hearing from counsel, I intend to make an order supressing these reasons until the conclusion of the trial by verdict or discontinuance. Clearly enough, to publish these reasons to the world at large at this time would defeat the purpose of the existing order prohibiting publication of the offending information.
