FEDERAL COURT OF AUSTRALIA

Serana (WA) Pty Ltd v Mignaccu-Randazzo SM [2014] FCA 120

Citation:	Serana (WA) Pty Ltd v Mignaccu-Randazzo SM [2014] FCA 120
Parties:	**SERANA (WA) PTY LTD v GIUSEPPE MIGNACCU-RANDAZZO SM, ANDREW BAXTER, CRAIG BURLEIGH, CATHERINE CORCORAN and ANDREW WILLIAM PATTERSON**
File number(s):	WAD 3 of 2014
Judge(s):	**SIOPIS J**
Date of judgment:	20 February 2014
Catchwords:	**INJUNCTION** – interlocutory injunction – the viability of the applicant's business was adversely affected by the extent of quarantine orders made by the respondents – whether the decision to order the goods into quarantine was made by the person who purported to make the decision – whether the decision was made at the behest of another person – whether the quarantine orders were made as an incident of a search of the applicant's premises pursuant to an unlawful search warrant – whether there was sufficient evidence to justify the decision of the decision-maker to place the goods into quarantine – whether the balance of convenience supported the making of an order releasing the goods from quarantine.
Legislation:	*Quarantine Act 1908* (Cth) s 66AF(2)
Cases cited:	*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57
Date of hearing:	7 Februrary 2014
Date of orders:	7 February 2014
Place:	Perth
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	42

Counsel for the Applicant:	Mr R French
Solicitor for the Applicant:	Garvey Lawyers
Counsel for the First Respondent:	The First Respondent did not appear.
Counsel for the Second, Third, Fourth and Fifth Respondents:	Mr P Macliver
Solicitor for the Second, Third, Fourth and Fifth Respondents:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION

WAD 3 of 2014

BETWEEN:	**SERANA (WA) PTY LTD** **Applicant**
AND:	**GIUSEPPE MIGNACCU-RANDAZZO SM** **First Respondent**
	ANDREW BAXTER **Second Respondent**
	CRAIG BURLEIGH **Third Respondent**
	CATHERINE CORCORAN **Fourth Respondent**
	ANDREW WILLIAM PATTERSON **Fifth Respondent**

JUDGE:	**SIOPIS J**
DATE OF ORDER:	**7 FEBRUARY 2014**
WHERE MADE:	**PERTH**

THE COURT ORDERS THAT:

1. The 998 4.5 litre bottles which are described as "frozen material hand written/labelled in texta with date and bottle number (suspected to be bovine serum)", the subject of Quarantine Order 398962 ("labelled bottles"), are to be released from quarantine by 3 pm on 10 February 2014.
2. The parties are to cooperate in:
   (a) procuring the removal of all the tape and paraphernalia which attended the placing into quarantine of the labelled bottles and the carrying out of any such other acts as may be necessary so as to give effect to Order 1; and
   (b) the retention in quarantine of the unlabelled bottles the subject of a Quarantine Order 398962 which are stored in the same location as the labelled bottles.
3. The actions referred to in Order 2 be conducted under the supervision of a quarantine officer.

4. Parties have liberty to apply.

5. Costs are to be reserved.

6. The matter be listed for directions at 10.15 am on 13 February 2014.

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

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 3 of 2014**

BETWEEN:	**SERANA (WA) PTY LTD** **Applicant**
AND:	**GIUSEPPE MIGNACCU-RANDAZZO SM** **First Respondent**
	ANDREW BAXTER **Second Respondent**
	CRAIG BURLEIGH **Third Respondent**
	CATHERINE CORCORAN **Fourth Respondent**
	ANDREW WILLIAM PATTERSON **Fifth Respondent**
JUDGE:	**SIOPIS J**
DATE:	**7 FEBRUARY 2014**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

1 On 7 February 2014, I made orders on the urgent application of the applicant, for the removal from quarantine of 994 bottles of bovine serum. I gave short reasons for doing so. These are the expanded reasons.

2 The applicant carries on business producing bovine serum from premises located at Davenport near Bunbury in Western Australia. Ms Tamara Gahr is the managing director of the applicant and is directly involved in the conduct of the applicant's day-to-day business.

3 On 10 December 2013, the first respondent, a magistrate in Western Australia, issued a search warrant authorising the search of the applicant's premises at Davenport, on the application of the second respondent, Mr Andrew Baxter, an officer from the Department of Agriculture (the department) based in Canberra. The search warrant was issued pursuant to s 66AF(2) of the *Quarantine Act 1908* (Cth), being a provision which authorises the issue of

offence related search warrants. The suspected offences referred to in the search warrant were:

> That between September 2008 and March 2013, Serana (WA) Pty Ltd, did import into Australia things, being bovine serum, in contravention of the *Quarantine Act 1908*, section 67(3), and that importation obtained a commercial advantage over the person's competitors or potential competitors.
>
> That between September 2008 and October 2013, Tamara Gahr did import into Australia things, being bovine serum, in contravention of the *Quarantine Act 1908*, section 67(3), and that importation obtained a commercial advantage over the person's competitors or potential competitors.

4 Mr Baxter made an affidavit dated 10 December 2013, which comprised the evidence before the magistrate when he issued the search warrant. That affidavit was also before this Court but much of the content had been redacted pursuant to a claim by the second to fifth respondents for public interest immunity. However, it is apparent that the application for the search warrant was made on the basis of information which the department had obtained, I infer, from a competitor of the applicant who was complaining that the applicant was engaged in a criminal conspiracy fraudulently to import into Australia bovine serum from non-foot-and-mouth disease-free countries, and that the applicant was then blending that serum with other serum, and selling it at a lower price.

5 The search warrant authorised the searching of the applicant's premises and the removal from the premises of documents and materials which comprised "evidential material" in respect of suspected offences.

6 On 11 December 2013, Mr Baxter, acting pursuant to the search warrant, entered the applicant's Davenport premises, in the company of, among others, the third respondent, Mr Craig Burleigh, the fourth respondent, Ms Catherine Corcoran, and Dr Phoebe Readford, a veterinary surgeon employed by the department. Each of Mr Burleigh and Ms Corcoran is an officer employed by the department and is resident in Western Australia.

7 During the search of the applicant's premises, Mr Baxter removed a very considerable number of the applicant's documents and records, and a number of bottles containing what he suspected was bovine serum. The persons searching the premises also found in freezers located on the premises, 998 four and a half litre bottles of bovine serum that were labelled with stickers which contained recorded information handwritten in texta and 562 bottles of serum which contained no labels.

8 During the search, Mr Burleigh made quarantine order number 398962. Pursuant to that order, the 998 labelled bottles were placed into quarantine. Mr Burleigh also made quarantine order 398967 which ordered into quarantine 376 500 ml bottles, and 52 150 ml unlabelled bottles of bovine serum. Further, by quarantine order 398966, Ms Corcoran placed 134 unlabelled bottles of serum into quarantine. Since the making of the quarantine orders, the applicant has, by reason of the orders, been denied access to all the bottles of bovine serum, the subject of the orders.

9 The applicant made a number of written requests to have the quarantine orders lifted. By a letter dated 24 December 2013, the fifth respondent, Mr Andrew Patterson, refused the applicant's requests to lift the quarantine orders.

10 In its originating application, the applicant seeks to have judicial review orders made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in respect of the first respondent's decision to issue the search warrant, and the conduct of Mr Baxter in seizing the applicant's documents and records, the decisions of the third and fourth respondents to make the quarantine orders, and the decision of the fifth respondent not to lift the quarantine orders.

11 The applicant's major focus in the interlocutory application was on obtaining orders for the lifting of the quarantine orders because of the seriously adverse impact that the quarantine orders posed to the continued viability of the applicant's business.

12 I have, for the following reasons, decided that the quarantine order in relation to the labelled bottles of serum should be lifted.

13 In my view, there is, for the following reasons, a prima facie case, within the meaning of that term in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, that the search warrant was unlawfully issued.

14 On 24 January 2014, Mr Baxter made an affidavit to explain why he had made the application for the search warrant. In that affidavit, Mr Baxter referred specifically to a series of emails as having informed his suspicion that the applicant was engaged in illegally importing bovine serum from non-foot-and-mouth disease-free countries.

15 At para 27 and para 28 of his affidavit, Mr Baxter deposed as follows:

> 27. In particular I was aware of the following series of emails that were supplied to I&E. The emails include communications that relate to Serana and

> Ms Gahr and others. These email conversations occurred during 2012. One email discusses Serana supplying "junk FBS". I believed that "junk" refers to FBS sourced from South America or Australian FBS mixed with FBS sourced from South America.
>
> 28. Another email refers to "Serana mixes the good and the bad FBS". I believed that this comment refers to Serana and Ms Gahr mixing Australian sourced FBS with FBS sourced from another country.

16 Mr Baxter went on to refer to two other emails which he said also informed his suspicion.

17 However, by an affidavit dated 4 February 2014, Mr Baxter said that, in fact, the emails referred to in [15] above had not actually said what he had deposed in his 24 January affidavit, they had said. Mr Baxter deposed that he had subsequently found out that the words on which he said he had relied to inform his suspicion, were, in fact, comments which had been made by the informant and repeated in an internal departmental memorandum on which he had relied.

18 In his affidavit of 10 December 2013 in support of the search warrant, Mr Baxter swore that he suspected that the applicant was engaged in the commission of an offence on the basis of information which had been provided in para 5(a) and para 5(b) of that affidavit. In his 4 February 2014 affidavit, Mr Baxter deposed that para 5(a) and para 5(b) referred only to the body of the emails and did not refer to the words he deposed to on 24 January as informing his suspicion. I was not able to read that part of the 10 December 2013 affidavit for myself because of the redactions made in reliance on public interest immunity. However, it appears, therefore, that on the basis of Mr Baxter's evidence of 24 January, that the bare content of the emails was not the basis of his suspicion. Rather, Mr Baxter's suspicion appears to have been informed by comment about the emails in a departmental minute which reflected the views of the informant.

19 In my view, there is, therefore, a serious question as to whether the evidence before the magistrate as to the basis upon which Mr Baxter suspected that the applicant was engaged in illegally importing bovine serum, was accurate. There is a serious question as to whether the suspicion he deposed that he held on 10 December 2013, was actually founded upon his own assessment of the content of the emails, as he appeared to represent in his affidavit of that date; or whether it actually was based upon someone else's comments as to their interpretation of the contents of the emails.

20 In my view, there is also a prima facie case that quarantine order 398962 was unlawfully made.

21 The challenge which the applicant makes to the validity of that quarantine order includes contention that the decision was not made by Mr Burleigh himself, but rather that in purporting to make the decision, Mr Burleigh acted at the direction, or at the behest, of another person.

22 It was also contended that the quarantine order was not based on evidence capable of supporting that decision. Mr Burleigh deposed that he made the decision to issue the quarantine order on the advice of Dr Readford. However, evidence comprised by the transcript of the proceedings at the site during the search, calls that evidence into question. Extracts from that transcript are annexed to an affidavit of Dr Readford dated 5 February 2014. The transcript should have been discovered by the second to fifth respondents pursuant to orders the Court made on 17 January 2014, but it was not. Therefore, neither I nor the applicant, has had the benefit of examining the full transcript of the proceedings at the site during the search.

23 On the basis of so much of the transcript that is before the Court, it is, in my view, very seriously arguable that Mr Baxter was the controlling mind of the investigation carried out pursuant to the search warrant that day, and that he was the decision-maker as to whether the labelled and unlabelled bottles should go into quarantine or not, and that it was Mr Baxter, not Mr Burleigh, who sought advice in order to make that decision.

24 The centrality of Mr Baxter's role is evident from the fact that it was he, and not Mr Burleigh, who conducted the interview with Mrs Gahr about the labelling system used by the applicant. Further, at 72 of the transcript, Mr Baxter said to Ms Gahr:

> You've got to run your business, ah, but I think we'll have to take them all and then we'll have to start analysing information and trying to determine ourselves, um, I think if – if you can bear with us, um, we'll need to have a quick look through them at the moment to try and work out what we think. The – the – the bottles without labels I think have to go into quarantine, I don't think we have a choice there. They must be ordered into quarantine, um, and what we'll, um, do is I'll take some advice from (2.13.24), I'll also take some advice from some other colleagues, ah, around the other material that's (2.13.30) whether or not we feel we have – we're certain as to the – the origin of the material that's in those bottles and whether we – we feel it's a – a quarantine risk (2.13.46).

25 Thus, in my view, on the evidence before the Court, the applicant has a strong case that the true decision-maker was not Mr Burleigh and that Mr Burleigh acted at the direction and behest of a third party, namely, Mr Baxter.

26 The transcript also provides evidence that the cause of Mr Baxter's concern was not that he had discovered evidence to found a suspicion that the labelled bottles contained serum from a country which was not foot-and-mouth disease free, but that he disapproved of the applicant's labelling system - which, in his view, relied too heavily on an individual employee of the applicant accurately recording the source of the material coming into the plant. (See, in particular, 66-68 of the transcript.)

27 In my view, there is also a prima facie case that there was no evidentiary basis to ground the suspicion that the product that was labelled had been infected by serum from a non-foot-and-mouth disease-free country.

28 As to the balance of convenience, Ms Gahr has deposed that the quarantine orders have had, and were continuing to have, a very serious adverse impact upon her business. Ms Gahr deposed that two-thirds of the stock of the applicant has been placed into quarantine. Ms Gahr also deposed that the applicant does not have sufficient stock to meet orders and that she has had to make two persons redundant.

29 Ms Gahr also referred to a letter from the applicant's accountant, Mr Mark Ivey, that the cash flow of the company could only last until mid to late February 2014. Ms Gahr went on to depose that in the circumstances, if the quarantine orders were not lifted soon, then the applicant would have to go into external administration.

30 These factors comprise a very powerful consideration which must be weighed in the balance of convenience.

31 An important consideration to balance against the matters raised by the applicant is the consideration that foot-and-mouth disease is a serious disease which if introduced into Australia, could devastate the Australian agricultural industry. This much is apparent from the evidence of Dr Readford. It is clearly in the public interest that the risk of foot-and-mouth disease entering Australia be strenuously guarded against.

32 The *Quarantine Act* prescribes the procedures available to be taken by quarantine officers in guarding against that risk, and it is incumbent upon those charged with carrying out this important task to comply with those procedures. There is a serious question to be

tried as to whether this happened in this case. Further, the extent of the risk that, if the quarantine order is lifted, foot-and-mouth disease will be introduced because the applicant has illegally imported serum from non-foot-and-mouth disease-free countries, must be assessed by reference to the evidence on that issue.

33 In that regard, the following, in my view, are relevant factors in relation to this last consideration.

34 First, the search warrant was obtained, apparently, on the basis of a competitor's complaint, that the applicant was engaged in criminal conspiracy and fraud, by bringing in product from countries which were not foot-and-mouth disease-free. The respondents have had the benefit of all of the evidence which was taken from the applicant pursuant to the search warrant for almost two months, having seized them on 11 December 2013. Notwithstanding this circumstance, the respondents were not able to produce in evidence one document which supported the suspicion that the applicant had imported serum from a non-foot-and-mouth disease-free country.

35 Secondly, Ms Gahr has deposed to the fact that all of the serum which is in the labelled and unlabelled bottles is from Australia, or in some instances from New Zealand; in other words, from countries which are foot-and-mouth disease-free. That evidence was not challenged in cross-examination.

36 Thirdly, the application which was made to the magistrate for the search warrant alleged that there was a suspicion that the applicant had been importing, and blending, serum from non-foot-and-mouth disease-free countries since September 2008. The respondents adduced no evidence which would suggest that the products which the applicant has been producing for the last five years, contained serum from any non-foot-and-mouth disease-free country.

37 I should also mention there was in evidence correspondence which showed that after the making of the quarantine orders, the department made an offer to carry out a traceability audit in relation to all of the product which was in quarantine. The department was of the view that there should be a two-stage audit: one which was documentary, and the second, which was an audit at the site. The department said that it may release the quarantine orders if it was satisfied with the results of the traceability audit. Ms Gahr was of the view, expressed in the correspondence, that both elements of the proposed audit should be

carried out simultaneously at the site on an expedited basis. The department resisted this suggestion. This correspondence continued between the parties for some time. The correspondence does not manifest a sufficient appreciation by the department of the urgency of the applicant's plight.

38 At the hearing on 6 February 2014, I suggested to Mr Macliver, counsel for the second to fifth respondents, that perhaps it might be possible to have the traceability audit conducted much sooner than the apparently leisurely pace manifest in the correspondence. Mr Macliver took instructions. Mr Macliver obtained instructions that the documentary traceability audit could be conducted on the forthcoming weekend, with the site audit being conducted a day later. The whole traceability audit might, therefore, be able to be completed on 11 February 2014, which may or may not result in the release of the quarantine orders. Mr Macliver applied to adjourn the further hearing of the interlocutory application for a week to permit the audit to be completed.

39 However, a difficulty arose in that Ms Gahr had already booked a flight to fly to South Korea on 7 February 2014, to meet with a disgruntled client. Ms Gahr's evidence was that the disgruntlement of the client had arisen by reason of the imposition of the quarantine orders and Ms Gahr would not be able to attend the proposed traceability audit. Further, the department's letter of offer to carry out an expedited traceability audit anticipated that Ms Gahr would be there to answer questions in relation to third-party suppliers and so forth. The result, therefore, was that the expedited traceability audit offer made by the respondents, in effect, came too late.

40 The position in relation to the traceability audit appears to be that the department has an independent statutory power to undertake a traceability audit and could independently exercise this power in respect of both the labelled and unlabelled bottles.

41 However, the questions relating to the conduct of a traceability audit are really matters which fall outside of the issues which need to be considered when considering whether to grant a mandatory injunction requiring product to be released from quarantine orders. As counsel for the applicant has submitted, there are really two different and separate powers being discussed here. One is the power to conduct a traceability audit. The other is a power to order goods into quarantine. This case is concerned with the proper exercise of the power to quarantine goods. As I have said, in my view, the applicant has shown that there is a prima facie case in relation to the unlawfulness of the quarantine order which was made in

relation to the labelled product. I also find that the balance of convenience favours the making of an order releasing the labelled bottles from quarantine.

42 I do not address the position in relation to the unlabelled product. The release of the labelled product should be sufficient to meet the applicant's difficulties in relation to the conduct of its business until trial.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis.

Associate: 

Dated: 20 February 2014