Roman & Anor v Commonwealth of Australia & Ors
[2004] NTSC 9

PARTIES:	ROMAN & ANOR
	v
	THE COMMONWEALTH OF AUSTRALIA & ORS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Civil
FILE NO:	SC 94 of 2000 (20010681)
DELIVERED:	12 March 2004
HEARING DATES:	3-21 March 2003, 14-16, 23 July 2003
JUDGMENT OF:	ANGEL J

CATCHWORDS:

TORTS – TRESPASS TO THE PERSON

Assault – whether evidence of apprehension of imminent contact

TORTS – FALSE IMPRISONMENT

Whether deprivation of liberty – whether involuntary submission induced by threats of force

TORTS – MALICIOUS PROCEDURE

Abuse of process – warrant procured - whether defendants acted maliciously and without reasonable and probable cause in procuring and executing the warrant – consideration of “malice” – encompasses improper motive

Crimes Act 1914 (Cth), s 3E

Harts Australia Ltd & Ors v Commissioner, Australian Federal Police & Ors (1997) 75 FCR 145, considered
Gibbs v Rea [1998] AC 786, considered
Malubel Pty Ltd v Elder (1998) 88 FCR 242, considered

TORTS – TRESPASS – TRESPASS TO LAND – TRESPASS TO GOODS

Whether entry of the plaintiffs' premises and seizure of the plaintiffs' property within the authority of the warrant -

Crimes Act 1914 (Cth), ss 3C, 3F, 3L

Reg. v Inland Revenue Commissioners, Ex parte Rossminster Ltd [1980] AC 952, considered
Adler v Gardiner (2003) 43 ACSR 24, considered

TORTS - TROVER AND DETINUE

Plaintiffs free to request copies of the seized documents – seized items returned

REPRESENTATION:

Counsel:

Plaintiffs:	In person
Defendants:	R. Bruxner

Solicitors:

Plaintiffs:	Self-represented
Defendants:	Australian Government Solicitor

Judgment category classification:	A
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ang200401

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

Roman & Anor v Commonwealth of Australia & Ors
[2004] NTSC 9
No SC 94 of 2000 (20010681)

BETWEEN:

PRINCE ROMAN
First Plaintiff

AND

FELE MANN
Second Plaintiff

AND:

THE COMMONWEALTH OF AUSTRALIA
First Defendant

IAN QUIRK
Second Defendant

ELIZABETH SWAIN
Third Defendant

RAMZI JABBOUR
Fourth Defendant

ANDREW WARTON
Fifth Defendant

KYLIE PRATT
Sixth Defendant

PETER MOORE
Seventh Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 12 March 2004)

[1] The self-represented plaintiffs are husband and wife. The plaintiffs assert in paragraph 22 of the Further Amended Statement of Claim that the first plaintiff is "a royal and a religious Corporation Sole, namely Grand Duke of Lithuania and Archbishop President of Universal Family". The first plaintiff in evidence claimed that his royal rank was superior to that of Her Majesty the Queen of Australia. In the course of the lengthy hearing I pointed out to the first plaintiff that having brought the action in this Court, whatever his royal rank might be, he had submitted to the jurisdiction of the Court and that given the equality of all before the law, any royal status he might have was irrelevant to the proceedings and that it was therefore unnecessary for me to decide whether he was of royal status or not.

[2] At all material times the plaintiffs occupied residential premises at 124/7 Progress Drive Nightcliff, a seaside suburb of Darwin.

[3] The defendants Quirk, Swain, Warton, Jabbour and Moore were at all material times serving officers of the Australian Federal Police. In virtue of s 64B Australian Federal Police Act (Cth) the defendant, the Commonwealth of Australia, is liable in respect of torts committed by officers of the Australian Federal Police, save to the extent liability sounds in punitive or exemplary damages. The defendant Pratt was at all material times an

employee of the Commonwealth of Australia which is vicariously liable for any torts committed by her in that capacity.

[4] The plaintiffs claim damages, compensatory, punitive and exemplary in respect of a number of causes of action against the defendants. The second plaintiff sues the defendants Quirk, Swain, Warton and Jabbour and in turn, the Commonwealth of Australia, asserting that she was assaulted at about 12 noon on Thursday 25 May 2000 at her residence when the officers allegedly demanded entry and threatened her with force to obtain entry to her residence without her consent or lawful justification. The second plaintiff also sues the defendants Quirk, Swain, Warton and Jabbour and in turn the Commonwealth alleging she was falsely imprisoned, that is, unlawfully deprived of her liberty, first within her residence after the officers had entered without her consent and thereafter by the defendant Quirk and in turn, the Commonwealth when he walked with her to the Nightcliff shops, a distance of some five to six hundred metres for approximately 25 minutes. The plaintiffs also allege all the defendants falsely and maliciously procured and executed a search warrant to seize property of the plaintiffs at their residence. The plaintiffs claim damages, compensatory, aggravated and exemplary in respect of alleged trespass to land and to goods and for detinue and conversion of goods. The goods comprise a key to the residential premises, computer equipment and various files and documents to the details of which I shall return.

[5] To these claims the defendants say that Quirk, Warton and Swain – but not Jabbour – attended the plaintiffs' premises at about noon on Thursday 25 May 2000 with the intention of locating a female illegal immigrant who had been living in Australia under a variety of false identities. That woman, who gave evidence before me, has been variously called, amongst other names, Mehra, Nisha, Nuku, Lynette Mwado and Lynette Aliba. She was referred to as Lynette during the proceedings and I shall refer to her as Lynette. At the time of the defendants' attendance at the plaintiffs' premises Lynette was on bail awaiting trial for alleged social security frauds, a condition of her bail being that she reside with the plaintiffs at their residence. The defendants say that Quirk, Warton and Swain lawfully entered the plaintiffs' premises with the consent of the second plaintiff at a time when, as was common ground, the first plaintiff was absent overseas in the Philippines. The defendants also say that no threats were made to the second plaintiff and that the second plaintiff freely accompanied Quirk to the Nightcliff shops in search of Lynette.

[6] The defendants say that as a result of information received from Lynette later that day following her arrest, Quirk made application to Stipendiary Magistrate Wallace for the issue of a warrant under s 3E Crimes Act 1914 (Cth) to enter the plaintiffs' Nightcliff residence and to search and seize evidential material relating to possible offences by each plaintiff under the Migration Act 1958 (Cth) – giving migration assistance whilst not a registered Migration Agent contrary to s 281 Migration Act – and the

Crimes Act 1914 (Cth) – defrauding the Commonwealth contrary to the then s 29D in virtue of the then s 5 Crimes Act. The defendants deny they acted with malice and say they acted throughout honestly and in good faith in obtaining and executing the warrant. They further say the entry of the plaintiffs' premises and seizing of the plaintiffs' property were done under the authority of the warrant and were thus lawful. In respect of seizure of the computer equipment they particularly rely on s 3L(2) and (3) Crimes Act 1914 (Cth).

[7] The evidence in this case was wide ranging and the plaintiffs being self-represented a substantial portion of the evidence was not focused. It is unnecessary and undesirable that I discuss all the evidence and follow every by-way and cover every factual issue raised. I do not find it necessary to discuss in detail the credit worthiness of every witness. I have considered and scrutinised the evidence and made my findings based upon it. So far as credit goes it is sufficient for me to say that the second plaintiff was an unreliable and unsatisfactory witness in a number of respects, prone to exaggeration and quick to accuse the defendants of lying. At times she gave her evidence with an eye on how it affected what she saw to be in the plaintiffs' interests. She was obviously resentful and deeply distrusting of the defendants. I am unable to have sufficient confidence in the reliability of her evidence such as to displace the evidence I have accepted. In large part her account of events, I consider, is based on false reminiscence. I think she believes the truth of what she said happened at her premises at

about midday on 25 May 2000 but that she is mistaken. She is clearly mistaken when she said Jabbour attended her premises. Where her evidence is in conflict with those of the defendants, I accept the evidence of the defendants. In particular I find that the defendant Jabbour was a reliable truthful witness, as was the defendant Swain. Both were good historians who I am satisfied gave reliable evidence regarding their involvement in the events to which they were a party. The defendant Warton was a witness whose evidence I have accorded substantial weight. The defendant Quirk had a major role to play in the events the subject of these proceedings. He and the second plaintiff are the only witnesses in relation to her complaint that she was falsely imprisoned when he walked with her to the Nightcliff shops shortly after midday on 25 May 2000. He was in the witness box for over five hearing days and was subjected by the first plaintiff to a prolonged cross-examination. Notwithstanding his frustration at the first plaintiff's questioning I generally accept his evidence. His account of meeting the second plaintiff at the back door of the plaintiffs' residence on 25 May 2000 was matter-of-fact and contained no suggestion or pretence that he was either friendly or pleasant towards the second plaintiff. He unhesitatingly admitted that many of Lynette's allegations against the plaintiffs had proven untrue and that falsities might have been discovered in Lynette's story had it been considered in light of other facts then known. I accept Quirk as an honest witness albeit at times frustrated in the witness box who was proud of

his professional judgment and competence and who resented the plaintiffs' attack upon it.

[8] I turn to the events around mid-day at the plaintiffs' residence on 25 May 2000. In the late morning of 25 May 2000, the defendants Quirk, Warton and Swain drove to the plaintiffs' residence at 124/7 Progress Drive, Nightcliff. Contrary to the evidence of the second plaintiff, the defendant Jabbour was not present. Neither Quirk, Warton nor Swain had ever been to the plaintiffs' premises before. The purpose of the visit was to locate Lynette who at the time was bailed to reside at that address with the plaintiffs. Lynette at the time was the subject of continuing investigations by the Australian Federal Police. The defendant Quirk was overseeing those investigations which earlier that day led to the receipt by the Australian Federal Police in Darwin of a facsimile from Interpol in Fiji (Exhibit D93). For the first time the defendant Quirk and his office were informed that Lynette was really Mehrul Nisha Nuku. This information was discussed by the defendant Quirk with the defendant Jabbour. The information had a twofold significance, namely that Lynette was an "unlawful non-citizen" requiring her to be detained and that her bail document undertaking was in the wrong name. Although at the time of his attendance at the plaintiffs' premises the defendant Quirk was suspicious of the plaintiffs because of their known association with Lynette, the defendants' purpose was to locate Lynette not particularly to have anything to do with either plaintiff. Quirk had been present at the Darwin Airport earlier that May. There he saw

the plaintiffs. He believed the plaintiffs were travelling to the Philippines together. The second plaintiff was thus unexpectedly present in her residence on 25 May 2000 when the defendants attended there.

[9] The plaintiffs' residence is a two story unit in a complex consisting of several separate blocks of units. The plaintiffs' block is parallel to Progress Drive, the main visitor access being at the rear. It is an end unit with a small backyard which is fenced. A path leads to the back entrance of the unit from a gate in the fence. At the back entrance there is an outer screen door and an inside screen door. Upon arrival at the plaintiffs' unit the defendant Swain proceeded to the back door. The defendant Quirk was near the back fence and the defendant Warton was along the side of the unit towards the front. Swain knocked on the door which was closed. The second plaintiff came to the door and Swain identified herself and showed her badge. She asked the second plaintiff about the whereabouts of "Mehrul Nisha". The second plaintiff said she did not know. Swain then asked about the whereabouts of "Lynette Aliba". Swain had written the two names in her notebook which she showed the second plaintiff. The second plaintiff said she knew Lynette's name. Upon observing the presence of the second plaintiff at the premises, Quirk instructed Warton to phone Customs regarding the travel movements of the plaintiffs. Warton phoned Customs on his mobile phone. Whilst Warton was on the phone Quirk had a conversation with the second plaintiff. Quirk was unsettled by the unexpected presence of the second plaintiff having thought she was overseas

with the first plaintiff. Quirk identified himself by showing his badge to the second plaintiff and informed her they were Australian Federal Police looking for Lynette who was not whom she claimed to be. The second plaintiff informed Quirk that Lynette was not present at the premises but was at the Nightcliff shops. It is clear that Quirk at the time was irritated and was neither pleasant nor friendly towards the second plaintiff. I reject the second plaintiff's account that someone shouted "Fele Mann, open the door" or that Quirk said "Fele Mann, if you don't open the door I'll open the door". I also do not accept her evidence that she was threatened and terrified and that fearing for her safety she only then opened the door saying "Please come in." I find that the defendants Quirk, Swain and Warton entered the premises with the consent of the second plaintiff. According to Quirk's contemporaneous notes they were there for approximately 15 minutes. Although the evidence is a little unclear I am satisfied that Quirk satisfied himself that Lynette was not on the premises. The second plaintiff offered to go to the Nightcliff shops to retrieve Lynette. Eventually it was agreed that Swain and Warton would walk to the Nightcliff shops in an attempt to locate Lynette there. They departed leaving Quirk and the second plaintiff at the residence. Quirk and the second plaintiff were there alone in the plaintiffs' house for about 5 minutes. Quirk suggested that he and the second defendant walk to the shops together. She agreed. They left the premises by the front door which the second plaintiff locked behind her. Having gone as far as the front fence the second plaintiff complained about

the heat and suggested that they drive to the shops rather than walk. Quirk declined that offer and the second plaintiff went back into the house and obtained a hat. Quirk followed her back to the house and she offered to get him a hat. There was some banter regarding his lack of hair. I accept Quirk's evidence in this regard. Having collected her hat the second plaintiff and Quirk walked to the shops. In the course of that walk Quirk told the second plaintiff that Lynette would be deported. They arrived at the Nightcliff shops at about 12.30 pm. Lynette was located and apprehended in the second plaintiff's presence. Lynette handed a purse or wallet to the second plaintiff. After Lynette was apprehended Warton returned to the plaintiffs' residence and collected the Police car. Warton returned to the shops and collected Quirk, Swain and Lynette. Thereafter they collected Lynette's son Robert from school and proceeded to the Australian Federal Police office in Darwin city. The second plaintiff was left at the shops and thereafter walked home in the heat.

[10] In light of my findings above the second plaintiff has not established a restraint against her will. The evidence discloses a voluntary compliance with Police requests to locate Lynette. The second plaintiff's compliance with the Police requests in the present case can not be said to be an involuntary submission induced by threats of force whether explicit or implied. Nor is there any evidence of assault. The Police officers did nothing to create in the second plaintiff an apprehension of imminent contact. Nor did the defendants have any such intention. That day neither at

her premises nor whilst walking with Quirk to the Nightcliff shops did the second plaintiff submit herself to the control of Quirk or the other defendants. There was no deprivation of liberty: cf *Symes v Mahon* [1922] SASR 447 at 453 per Murray CJ. The second plaintiff's case for assault and wrongful imprisonment fails.

[11] Having taken Lynette to the Australian Federal Police premises in the city of Darwin Lynette was interrogated. Quirk, Warton and Swain conducted the first interview. The defendant Jabbour who was in charge of the investigation was involved in other duties at this time. In the course of the first interview Lynette made various statements concerning the plaintiffs. She claimed to have known the plaintiffs over a period of some years. She stated she first met the first plaintiff working in Sydney as a prostitute and that he later became her pimp. She claimed the first plaintiff (who was then known to her as Mr Mann) helped her get out of Australia and return to Fiji without a passport. She returned to Australia and renewed her acquaintance with the plaintiffs who were by then in Darwin. At the time the second plaintiff was working in "medical records" at the Royal Darwin Hospital. Lynette claimed the plaintiffs assisted her to create false identities. She claimed to have worked for the first plaintiff on the Gold Coast. She claimed the first plaintiff was taking money from people whom he was helping in respect of immigration papers. She claimed although she had never seen money change hands, the first plaintiff's wallet was always full of money. She gave an account of the first plaintiff having been involved in

a surrogacy arrangement involving a substantial payment. She also claimed to have been shown a bank account statement showing a balance of over $1,000,000 to the credit of the first plaintiff.

[12] The new information about Lynette from Interpol in Fiji was not put to Lynette during the first interview. Following the first interview Quirk discussed Lynette's claims with Jabbour. Jabbour was of the view that Lynette had further information to divulge and that she was not acting alone in her frauds. He confronted Lynette with the evidence of her true identity. When confronted Lynette said she had more to tell with respect to the first plaintiff's involvement. Jabbour observed that Lynette's demeanour changed and he concluded that having been confronted with their knowledge as to her real identity she decided to "come clean". Thereafter Jabbour and Swain conducted a second interview with Lynette. In the course of that second interview apart from repeating claims she made additional allegations against the plaintiffs. She claimed the plaintiffs knew of her fraudulent activities and they had advised her of ways of obtaining documents, that they had assisted her in obtaining a false birth certificate for her son Robert and that the first plaintiff suggested that she pass herself off as Aboriginal. Whilst the second interview was being conducted, a search warrant relating to the plaintiffs' residence was prepared by Quirk. Warton assisted Quirk in drafting the application. Knobel from the Department of Immigration attended with the Immigration file. Information from Lynette elicited during the second interview was passed on to Quirk. I accept the

evidence of Quirk, Jabbour, Warton and Swain that Lynette's revelations were the principal factor giving rise to the decision to seek a warrant. Both Quirk and Jabbour were well aware that Lynette was not a truthful person. Both Swain and Warton knew there were serious dishonesty charges against her. Notwithstanding her history of dishonesty, Quirk, Jabbour, Warton and Swain all believed at the time that the information concerning the plaintiffs which she gave and upon which they acted could not responsibly be ignored. I agree with the submission of counsel for the defendants that the defendants were essentially driven by their instincts as Police officers. Although Lynette was a dishonest person they all felt she had been brought to her senses and was "coming clean". The warrant application referred to a number of claims made by Lynette in the course of the interviews. Somewhat surprisingly they did not refer to her claim that the plaintiffs were providing immigration assistance for reward. I accept Jabbour's evidence that it was an oversight attributable to the haste with which it was prepared. Although the warrant was prepared in haste it is not the case that it was prepared without a care as to whether Lynette's allegations were true or false.

[13] Mr Wallace SM granted the application for a warrant. He signed the warrant which recorded, inter alia, that he, at the time, was "satisfied by information on oath that there are reasonable grounds for suspecting that there is at (the plaintiffs') premises … evidential material, as defined in the Crimes Act

1914, which satisfies ALL of the … THREE conditions" set forth in the warrant.

I set out the three conditions in full:

"**FIRST CONDITION**:

Things which are:

Originals or copies of any one or more of the following including any of them which are stored on magnetic or electronic storage medium.

- Fijian Passports
- Correspondence
- Forms of identification
- Migration entrance documents
- Medical records pertaining to Lynette ALIBA
- Bank Account Statements

SECOND CONDITION:

Things which relate to any one or more of the following:

- Lynette ALIBA
- Lynette ANIBA
- Lynette LYNETTE
- Lynette OBED
- Lynette MWADO
- Nikta BARA
- Mehrul NISHA
- Robert ALIBA
- Hudson ANIBA
- Doctor Prince ROMAN
- Prince ROMAN
- Ronald MANN
- Ronald DAMBSKI
- Fele MANN
- Feleciang MANN

THIRD CONDITION

Things as to which there are reasonable grounds for suspecting that they will afford evidence as to the commission of the following offences against the laws of the Commonwealth:

i. Between January 1994 and May 2000 Prince ROMAN, who is not a registered migration agent asked for or received a fee or reward for giving immigration assistance, contrary to section 281 of the Migration Act 1958;

ii. Between January 1994 and May 2000 Prince ROMAN was knowingly concerned in Defrauding the Commonwealth contrary to section 29 D by virtue of section 5 of the Crimes Act 1914;

iii. Between January 1994 and May 2000 Fele MANN, who is not a registered migration agent asked for or received a fee or reward for giving immigration assistance, contrary to section 281 of the Migration Act 1958;

iv. Between January 1994 and May 2000 Fele MANN was knowingly concerned in Defrauding the Commonwealth contrary to section 29D by virtue of section 5 of the Crimes Act 1914;".

[14] In his evidence Mr Wallace SM said that to the extent the warrant (Exhibit P63) purports to reflect conclusions on the night in question, they were his conclusions. He gave evidence that he issued the warrant knowing that Lynette was a person known to be extremely dishonest. Prior to issuing the warrant he pointed out to Quirk "just in passing that the primary source of Quirk's knowledge was a person whose word you would not hang a dog on or words to that effect" and that Quirk agreed. Mr Wallace SM gave evidence which I accept that on his assessment Quirk was sincerely putting the matters forward in support of the warrant and that he, Quirk, believed them himself. Counsel for the defendants, to whose industry and exemplary conduct of the defendants' case I pay tribute, submitted that Mr Wallace SM

is an experienced judicial officer of some years standing and that his assessment in this regard is to be accorded considerable weight. I agree with that submission. Mr Wallace SM's evidence supports the conclusion that Quirk acted in good faith in seeking the warrant.

[15] Mr Wallace SM's recorded belief was not put in question, that is, it was not disputed. He discharged his duty by satisfying himself on the evidence on oath before him that there were reasonable grounds for suspecting that evidential material as defined in the Crimes Act 1914 (Cth) was located at the plaintiffs' premises. As a fact, he was so satisfied. Compare *Harts Australia Ltd& Ors v Commissioner, Australian Federal Police & Ors* (1997) 75 FCR 145 at 147-9.

[16] However it is important to emphasise that the relevant point of the plaintiffs' attack is not the decision of Mr Wallace SM to issue the warrant but the actions which preceded it, particularly of Quirk and of Jabbour who was in charge of the investigation. The plaintiffs allege that Quirk and Jabbour had no reasonable and probable cause to procure and execute the warrant, that their actions were not only groundless but carried out with malice. The fact Mr Wallace SM was satisfied upon the material before him that there were reasonable grounds for suspicion does not answer the plaintiffs' claim that Quirk and Jabbour acted maliciously and without reasonable and probable cause in procuring the warrant and executing it, cf *Gibbs v Rea* [1998] AC 786 at 804.

[17] The issues arising from the defendants' entry of the plaintiffs' premises in purported pursuance of the warrant appear to be as follows:

1. Was the warrant invalid on its face?

2. Did the warrant comply with the requirements of the Crimes Act 1914 (Cth)?

3. Was the obtaining and execution of the warrant an abuse of process?

4. Was the entry of the plaintiffs' premises within the authority of the warrant?

5. Was the seizure of the plaintiff's property within the authority of the warrant?

6. If property seized was not within the authority of the warrant was it at the time reasonably believed by the defendants to be within the authority of the warrant.

The issue arising under 6 is whether the officers at the time of seizure believed on reasonable grounds that the items seized were items of evidential material in relation to the offences to which the warrant related; see s 3F(1)(d) Crimes Act (Cth). Section 3F(1)(e) Crimes Act (Cth) provides that an executing officer or constable may seize things found at premises in the course of a search which he or she believes on reasonable grounds to be a "seizable" item as defined in s 3C(1) Crimes Act; see, generally, *Adler v Gardiner* (2003) 43 ACSR 24.

[18] A search warrant authorises the entry of premises and seizure of property without the consent of the persons in lawful possession or occupation

thereof. The validity of the warrant depends upon fulfilment of the conditions governing its issue. In the present case the relevant statutory provisions are in Pt 1AA Crimes Act (Cth), the general operation of which was conveniently summarised by the full Federal Court in *Harts Australia Ltd & Ors v Commissioner, Australian Federal Police & Ors* (1997) 75 FCR 145 at 147-9 as follows:

> "**An examination of Pt 1AA of the Act**
>
> Pt 1AA was incorporated into the Act by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act* 1994 (Cth) (No 65 of 1994) which commenced on 30 November 1994. It replaced, as has already been noted, the provisions of s 10(1) of the Act which governed the issue of search warrants prior to the commencement of the 1994 Act.
>
> The 1994 amendment had its origin in the fourth interim report of the committee established to review Commonwealth criminal law (the Gibbs Committee). That report and the pre-existing law form an essential part of the context relevant to the interpretation of Pt 1AA: cf *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 71 ALJR 312 at 323-324.
>
> The relevant statutory provisions can be summarised as follows.
>
> Section 3E(1) of the Act authorises the issue of a warrant to search premises by 'an issuing officer', that being an expression defined in s 3C(1) of the Act. Section 3E(1) is in the following terms:
>
> > 'An issuing officer may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or that there will be within the next 72 hours, any evidential material at the premises.'
>
> The expression 'evidential material' is defined in the interpretation section to Pt 1AA, s 3C(1), as meaning:
>
> > ' … a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.'

The expressions ‘thing relevant to an indictable offence’ and ‘thing relevant to a summary offence’ are then defined in s 3(1) of the Act as follows:

> ‘ “thing relevant to an indictable offence” means:
>
> (a) anything with respect to which an indictable offence against any law of the Commonwealth or of a Territory has been committed or is suspected, on reasonable grounds to have been committed;
> or
> (b) anything as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of any such offence;
> or
> (c) anything as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of committing any such offence;
>
> “thing relevant to a summary offence” means:
>
> (a) anything with respect to which a summary offence against any law of the Commonwealth or of a Territory has been committed or is suspected, on reasonable grounds, to have been committed;
> or
> (b) anything as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of any such offence;
> or
> (c) anything as to which there are reasonable grounds for suspecting that it is intended to be used for the purpose of committing any such offence.’

These additional definitions appear to have been overlooked by the appellants in their submissions.

There are also to be found definitions of the words ‘warrant’ and ‘premises’ in s 3C(1).

Section 3E(5) stipulates what the warrant is to state. It is in the following terms:

> ‘If an issuing officer issues a warrant, the officer is to state in the warrant:

(a) the offence to which the warrant relates; and

(b) a description of the premises to which the warrant relates or the name or description of the person to whom it relates; and

(c) the kinds of evidential material that are to be searched for under the warrant; and

(d) the name of the constable who, unless he or she inserts the name of another constable in the warrant, is to be responsible for executing the warrant; and

(e) the period for which the warrant remains in force, which must not be more than 7 days; and

(f) whether the warrant may be executed at any time or only during particular hours.'

There are other matters required to be stated in a warrant in relation to premises set out in s 3E(6) of the Act, but nothing turns upon these provisions for present purposes.

The consequences of the issue of a warrant are set out in s 3F of the Act. Relevantly the executing officer or constable assisting is authorised to enter the premises stipulated and, inter alia, to search them 'for the kinds of evidential material specified in the warrant'. The executing officer or constable is authorised to seize things of that kind found at the premises, as well as other things found there which the executing officer or constable assisting;

'(1)(d) ..... believes on reasonable grounds to be:

(i) evidential material in relation to an offence to which the warrant relates; or

(ii) evidential material in relation to another offence that is an indictable offence; ...'

but only if the executing officer or constable believes on reasonable grounds that seizure of those things is necessary to prevent their concealment, loss or destruction or their use in committing an offence. Additionally, s 3F(c) (scilicet s 3F(1)(e)) provides that the executing officer or constable may seize other things found at the premises in the course of the search that they believe on reasonable

> grounds to be a 'seizable item' (defined in s 3C(1)). Presumably this power was thought necessary to protect the executing officer or constable should it turn out in fact that the items in question were not seizable items. A copy of the warrant is to be made available to the occupier of the premises to which the warrant relates, or another person who apparently represents that occupier present at the premises (s 3H(1))."

[19] In the present case the warrant complies in form with s 3E(5) as it states what is required to be stated. It states the offences to which the warrant relates, a description of the premises and the persons to which the warrant relates, and the kinds of evidential material to be searched for and, if found, seized under the warrant. It names the defendant Quirk as being responsible for executing the warrant and specifies that the warrant is to remain in force for seven days and that it can be executed at any time. On its face the warrant sets out the relevant satisfactions which the issuing officer, Mr Wallace SM, was required to meet and which, as I have found, were met. The warrant indicates the area of search by reference to the offences in question and the suspects in question. It specifies kinds of documents sought and expressly authorises the seizure of any other thing found at the premises in the course of the search that the executing officer or any assisting constable believes, on reasonable grounds to be evidential material in relation to the offences specified in the warrant or anything relevant to another offence which is an indictable offence: s 3E(6) Crimes Act. This being so, I conclude, subject to any question of abuse of process, that the warrant was valid in form and was properly and lawfully issued by Mr Wallace SM.

[20] The plaintiffs allege the defendants maliciously procured and executed the search warrant. As the authorities make clear, the plaintiffs alleged cause of action is an instance of the tort of abuse of process. As was said in *Gibbs v Rea* [1998] AC 786 at 797, the action is akin to malicious prosecution, its true foundation being an intentional abuse of the processes of the Court. As Gault J (on behalf of the majority) said:

> "In essence the plaintiff must show the following. 1. That the defendant made or caused to be made a successful application for the search warrant. 2. That the defendant did not have reasonable and probable cause to make the application…. It must be shown that the defendant lacked any bona fide belief that he or she was placing before the issuing judge material sufficient to meet the conditions for issue of the warrant sought…. That encompasses the subjective belief in good faith that material grounds for suspicion exist and the objective requirement that the belief is reasonably held. 3. That the defendant acted with malice. And 4. That the damage resulted from the issue or execution of the warrant."

[21] Malice in this context has that meaning common to other torts and covers not only spite and ill-will but also improper motive, that is, in the present context, any motive other than a desire to bring the plaintiffs to justice, cf *Glinski v McIver* [1962] AC 726, 766. Malice in the present context is not used in the narrow sense of an intention to injure but in the broader sense that the defendants were not acting in discharge of their public duty but from an illegitimate and oblique motive, *Gibbs v Rea* [1998] AC 786 at 804. In the present context the requirement of improper motive would be satisfied by proof of an intent to employ the process of the Court to obtain a warrant for a purpose other than to search for the nominated evidential material believed to be at the plaintiffs' premises, such as simply to conduct a fishing

expedition, or in order to harass the plaintiffs. Malice is essential. As Hardie Boys J said in *Simpson v Attorney-General (NZ)* [1994] 3 NZLR 667 at 693:

> "No honest person should be deterred from instituting legal process by the threat of suit for alleged want of care or sound judgment. The integrity and utility of the tort would be destroyed were its scope to be enlarged to encompass negligence."

[22] Improper motive in the context of abuse of process is shown when it is established that the predominant rather than sole purpose of the moving party is improper: see *Williams v Spautz* (1992) 174 CLR 509 at 529 where the Court expressly approved an earlier statement of Slade LJ that a person alleging such abuse must show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed, adding that the onus of satisfying the Court that there is an abuse of process lies upon the party alleging it and that in the words of Scarman LJ in an earlier case, the onus is "a heavy one".

[23] I agree with the submission of counsel for the defendants that the evidence supports a finding that on the evening of 25 May 2000 there were reasonable grounds for suspecting the existence of evidential material at the plaintiffs' residence. The decision to seek the warrant was based on the belief, honestly held, that the plaintiffs might be guilty of offences against the Crimes Act (fraud) and the Migration Act (unlawful immigration assistance). Quirk and Jabbour were suspicious of the plaintiffs as a result of Lynette's allegations that the plaintiffs were complicit in her frauds. As

a proven liar her allegations were to be approached with caution. In the circumstances of late afternoon 25 May 2000 that caution was only one factor to be considered by Quirk, Jabbour, Warton and Swain. The visit around mid-day had alerted the second plaintiff to the fact of Lynette's detention. The defendants saw a need to act quickly so as to minimize any possible destruction or concealment of incriminatory evidence thought likely to be at the plaintiffs' premises. It was the professional decision of Jabbour and Quirk and to a lesser extent of Warton and Swain that they should act on Lynette's claims rather than wait. The known links between the plaintiffs and Lynette – a condition of her bail was that she live with the plaintiffs – the long standing connection between the plaintiffs and the Darwin Filipino Club which had been established by the plaintiffs and of which they were office holders and the plaintiffs' previous involvement in various legal proceedings relating to immigration and refugee matters concerning various Asian persons fortified the defendants' suspicions.

[24] I have reached the conclusion that the plaintiffs have failed to prove that when the defendants made the warrant application the defendants lacked reasonable and probable cause, that is, a sound and proper basis for seeking the warrant. They have also failed to prove that the search warrant application was made for an improper or ulterior purpose. I am also of the opinion that the plaintiffs have failed to prove that the defendants executed the search warrant for an improper purpose. The first plaintiff sought in his submissions to establish that the defendants and certain associated persons

within the Immigration Department held some sort of vendetta against the plaintiffs and that the warrant was employed as a means of harassment of the plaintiffs and a deliberate and unlawful interference with the activities of the plaintiffs. These suspicions are ungrounded in the evidence. In the circumstances it can not be said that it was unreasonable for Quirk, Jabbour, Warton and Swain to act as they did upon Lynette's allegations, let alone that their acts were so irrational or unreasonable as to indicate bad faith.

[25] The plaintiffs complain that Lynette's allegations included falsities that might have been exposed had Quirk and Jabbour only checked other information, for example the whereabouts of the first plaintiff when Lynette alleged she was in his company interstate. But the question was not whether Quirk or Jabbour might have obtained more satisfactory and surer grounds of belief by further investigation but whether the information they had furnished reasonable and probable cause for their belief that evidentiary material in relation to offences under the Crimes Act and the Immigration Act was present at the plaintiffs' premises which, in the circumstances, justified them acting on that belief without further enquiry, cf *Lister v Perryman* (1870) LR 4 HL 521 at 536 per Lord Chelmsford.

[26] As Burchett J commented in *Malubel Pty Ltd v Elder* (1998) 88 FCR 242 at 245:

> "In the nature of the case, a search warrant is likely to be sought upon incomplete information, in circumstances of suspicion rather

than knowledge, and having regard to facts that may be imperfectly understood."

After pointing out that there were three broad safeguards provided by the law to safeguard citizens who may be affected, namely that a warrant must be sought from an 'issuing officer', generally a magistrate or a justice of the peace, that the s 3E criteria and requirements must be observed and that the person applying for a warrant must do so in good faith, Burchett J emphasised that the legislature in laying down the criteria and requirements for the issue of a warrant did not require the applicant to disclose "all objectively relevant facts ascertainable by the applicant for the warrant, or even of all facts actually known to him" (at 246). As the authorities to which Burchett J referred make clear there is no general duty of disclosure imposed upon an applicant and a failure to disclose a particular fact will not invalidate a warrant unless the decision to grant the warrant was induced by fraud or the application was made in bad faith.

In my opinion the allegations of Lynette, the plaintiffs' known connection with Lynette, the plaintiffs' known past keen interest in immigration proceedings relating to Filipino women and known connection to the Filipino Club of Darwin, were sufficient to justify Quirk and Jabbour proceeding to procure and execute the warrant. If I am wrong in this, in any event, it strongly supports a lack of malice on the defendants' part.

[27] Following execution of the warrant and the defendants' seizure of the plaintiffs' property the plaintiffs were neither interviewed nor charged with any offence and eventually the plaintiffs' property was returned to them. The plaintiffs say – vehemently – that they are innocent of any wrongdoing and of course they are entitled to the presumption of innocence. However the plaintiffs' guilt or innocence of offences under the Crimes Act or Immigration Act, or of anything else for that matter, is not the question. The question is whether the defendants in procuring and executing the warrant acted without reasonable and probable cause and with malice. In this regard two statements from the dissenting judgment of Lord Goff of Chieveley and Lord Hope of Craighead in *Gibbs v Rea* [1998] AC 786 are pertinent. At 805 D-E they said:

> " The prerequisites for the obtaining of a search warrant, and the stage in the process of investigation at which such warrants are commonly sought, are different from those which apply when a prosecution is initiated. Where a search of premises has revealed nothing of any value to the investigation it may be easy to conclude, with the benefit of hindsight and in the absence of any contrary evidence, that there were after all no reasonable grounds for suspecting that incriminating material was on the premises. That however is not the same thing as proof of the absence of reasonable and probable cause at the time when the police officer applied for the search warrant. In itself it takes the plaintiff nowhere so far as proof of malice is concerned."

And at 806 F – 807 E they said:

> "Where, as here, the plaintiff's case is that malice can be established by inference from the lack of reasonable and probable cause for procuring the search warrant, he must put forward some evidence to show either that the defendant did not honestly believe at the time that he had good grounds for obtaining it, or that his state of mind at

the time was such as to amount to a reckless indifference as to whether or not that was so.

It should be remembered that in order to have a reasonable suspicion the police officer need not have evidence amounting to a prima facie case. Information from an informer or a tip-off from a member of the public may be enough to satisfy him that he would be justified in applying for a warrant to search premises. The possibility that such information may have been given to him maliciously cannot be left out of account either by the police office or by the judge or magistrate whose responsibility it is to decide whether or not he should issue it. But criminal investigations would be seriously hampered if it were to be illegitimate to rely on information of that kind. Time may be short, and further inquiries may alert the suspect to the fact that the premises are to be searched. It is in the nature of such information that it may, on further inquiry when the warrant has been executed, turn out to have been mistaken or inaccurate. Yet it cannot be said that a police officer who obtains a search warrant on the basis of information which has been provided to him in the form of a tip-off was acting maliciously simply because in the event it yields no result. The position is entirely different at the prosecution stage, when the prosecutor can be expected to have gathered in all the evidence and applied his mind, with the benefit of such legal advice as may be appropriate, to the question whether the prosecution can be justified.

As Lord Devlin explained in *Hussien v Chong Fook Kam* [1970] AC 942, 948B, suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. Suspicion, unlike prima facie proof which consists of admissible evidence, can take into account matters that could not be put in evidence at all and matters which, although admissible, could not form part of a prima facie case. It is also inherent in any process of investigation that circumstances may change as it proceeds. Some avenues of inquiry may prove to be fruitless while others which were previously unobserved may produce results which had not been anticipated. So the question whether there was an absence of reasonable and probable cause for the obtaining of a search warrant must be answered, not with the benefit of hindsight, but with regard only to what was in the mind of the defendant when he applied for it. It will be difficult to identify what was in his mind at the time, unless there are other relevant surrounding circumstances, if there is no record of what he said to the judicial officer and he declines to give evidence. But this difficulty does not relieve the plaintiff who wishes to pursue an action on the ground that the warrant was procured maliciously of the onus of proving that, at the time when he

> procured it, the defendant did not have an honest belief that there were reasonable grounds for taking this step."

[28] I find that Quirk and Jabbour who made the decision to procure and execute the warrant believed and reasonably and honestly believed at the time the application for the search warrant was made that there was evidentiary material at the plaintiffs' premises which would afford evidence as to the commission by the plaintiffs of offences against the Crimes Act and the Immigration Act. The plaintiffs' claim that the obtaining and execution of the warrant was an abuse of process fails.

[29] I turn to the question whether entry of the plaintiffs' premises and the seizure of the plaintiffs' property was within the authority of the warrant.

[30] Following issue of the warrant Quirk and Jabbour returned to their headquarters where a briefing was conducted. Each of the present defendants attended. This was the first occasion on which the defendant Moore and the defendant Pratt had any direct involvement in the investigation of the plaintiffs. Following the briefing the defendants travelled in two cars to the plaintiffs' residence arriving at about 11.45 pm. Swain and Moore were positioned at the front of the premises whilst Quirk, Jabbour and Warton went to the rear. Jabbour knocked on the back door but there was no response. Jabbour, Quirk and Warton then entered the premises using a key which had been provided by Lynette. The premises were unoccupied. Jabbour, Quirk and Warton joined Moore, Swain and Pratt outside the front door. Moore and Swain were despatched by car in an

attempt to locate the second defendant and who had been expected to be present at the premises. They returned to the premises approximately an hour later. In the meantime the Northern Territory Police were asked to supply an officer to act as an independent observer, on account that neither plaintiff was present. Pursuant to that request Sergeant Tudor-Stack arrived at the premises around 12.45 am on 26 May 2000. Upon arriving at the premises and before entering Sergeant Tudor-Stack received a briefing regarding his role. He and the defendants went into the premises through the open front door and the search commenced. Moore and Jabbour searched upstairs; Warton and Quirk searched downstairs. Pratt operated the plaintiffs' computer. Swain was the property officer to whom the others reported. A substantial body of documents and a computer tower were ultimately seized. The seized items and the identity of the officer who seized them were recorded by Swain in the Property Seizure Record Book (Exhibit P 16). In the days following the search the documents were analysed back at the Australian Federal Police headquarters and a more extensive list detailing the seized documents was prepared (Exhibit P 66). Although a number of the seized documents were tendered in evidence many of the documents could no longer be located. Prior to trial the seized documents had been returned to the plaintiffs who had mixed them with other documents and as a consequence some seized documents were unable to be identified and located. Identification of some of the seized documents and their probable content was therefore only possible by reference to

Exhibits P 16 and P 66. The defendants Quirk, Morton and Moore gave evidence that at the time they seized the documents on the night in question they formed the view that the documents fell within the scope of the warrant. Jabbour, the officer in overall charge of the investigation – albeit that Quirk was the officer executing the warrant – gave evidence that he vetted all the seized items on the night in question and was himself satisfied that they fell within the terms of the warrant.

[31] The documents were voluminous. Some were in discrete bundles or folders. Generally speaking, when such a bundle or folder included a document or documents considered to fall within the terms of the warrant, the practice adopted was to seize the bundle or folder. As a consequence individual pages or folios of no apparent relevance when considered individually were also seized. Jabbour explained this approach (transcript 701): "… it's not my common practice to remove individual documents.… without conducting a full examination and analysis of all documents contained in that file." Jabbour said that sometimes the location of highly relevant material amongst material that is irrelevant can itself have evidentiary significance. Quirk gave similar evidence.

There are categories of documents which 'traditionally' have such proven evidentiary value that they are seized almost as a matter of course. These include diaries, and in investigations such as the present where financial dealings were under scrutiny, bank and other financial records.

[32] Documents which had an immigration 'flavour' were seized. These included a number of files maintained by the first plaintiff in the names of people he was helping with immigration matters. In addition, a number of piles of blank forms were seized – the fact of multiple copies being seen to have its own significance in terms of the suspicion of unlawful immigration assistance.

Different officers saw particular documents in different ways. Because Lynette's fraud involved false identity creation, material concerning the first plaintiff's names, past and present, was regarded by Quirk as potentially significant. This led him to seize the item designated FMES 16 – a bundle of documents not in evidence but apparently relating to the first plaintiff's claimed royal status. Jabbour, on the other hand, was content for that document to be seized because he thought it had potential significance in the 'assisting immigration' context.

Whilst the search was underway the apparently strong connection between the plaintiffs' immigration activities and the Filipino Club was seen as of significance.

[33] I accept the evidence of the defendants that they satisfied themselves that the documents seized fell within the authority of the warrant. In *Reg. v Inland Revenue Commissioners, Ex parte Rossminster Ltd* [1980] AC 952 at 966, Eveleigh LJ, in a passage approved by the Privy Council in *A-G of Jamaica v Williams* [1998] AC 351 at 363, said:

> "What the applicants' evidence amounts to, as I say, is that not every document was read, and not every document, as an individual document, was examined. Files were taken as files.… It seems to me that there can well be occasions when a glance at a document will tell an investigating officer whether it is the kind of document that he is entitled to take. No one can expect that they should stay on the premises to read the words and the details of every document."

In the case at hand the volume of material made it impractical to do other than as Jabbour directed, that files be seized as files and that bundles be seized as bundles once it was established they contained documents which plainly fell within the authority of the warrant. As Hely J said in *Adler v Gardiner* (2003) 43 ACSR 24 at [21], [22] and [39]:

> "[21] The executing officer or constable assisting has to make a judgment as to whether seizure of a document is authorised by the warrant. The executing officer or constable assisting has to consider whether 'there are reasonable grounds for suspecting' that the document will afford evidence as to the commission of a warrant offence. This is judgment which the executing officer must make in relation to every 'thing' which is to be seized in reliance upon the warrant. But where the relevant thing consists of a folder or file, there may well be justification for an executing officer, or constable assisting, to take the entirety of the folder or file in which he or she locates an individual document itself within the warrant, because the context in which the document is found may itself be of assistance in evaluating the true evidentiary significance of the document in question: *Harts Australia Ltd v Cmr, Australian Federal Police* [2002] FCA 245; BC200201722 at [39].
>
> [22] The judgment is one which must be made at the time of seizure. A warrant holder is not entitled to take anything which he or she chooses in purported reliance on the warrant and to leave it until later on, in the course of a subsequent examination, to determine whether any of the material taken falls within the terms of the warrant: *Harts v Cmr, Australian Federal Police*, above, at [24]. However, in an evidentiary sense, there is no necessary inconsistency between seizing documents in circumstances where the executing officer has an actual belief that there are reasonable grounds for suspecting that they will afford evidence of the commission of a warrant offence, and that same officer later coming to the conclusion

> on more detailed consideration of the document that it does not, in truth, have that effect: *Harts v Cmr, Australian Federal Police*, above, at [24].
>
> [39] The executing officer or constable assisting, has to be satisfied that there are reasonable grounds for suspecting that things seized will afford evidence as to the commission of an offence. The notion of reasonable grounds for a suspicion imports an objective test, but 'reasonable' involves a value or normative judgment (*Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 167), and there may well be legitimate differences of opinion as to what falls within the term, particularly when it is used in relation to a nebulous expression such as 'suspicion'. A court is not entitled to substitute its own opinion on that question for the opinion of the executing officer or constable assisting. That does not mean that the executing officer, or constable assisting, has an unexaminable discretion; it does mean, however, that the officer's decision is only impeachable if the decision was one which the officer could not lawfully reach on the materials before him or her: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-6; 136 ALR 481 at 493."

[34] Exhibit 66 is the list of seized material prepared by the defendants back at police headquarters. Many, though not all, the seized documents are in evidence. Whether the seized documents are within the authority of the warrant is a question of fact. The defendants' satisfaction that the documents were within the warrant is of course not necessarily conclusive of that question. In so far as documents not in evidence were seized I unhesitatedly accept the evidence of Jabbour that they were within the authority of the warrant. He satisfied himself of that on the night and I have no reason to doubt him. He was, patently, an honest and reliable witness. So far as the seized documents in evidence are concerned, they comprise various Filipino Club documents, numerous immigration and migration documents relating to various non Australians including Lynette, various

correspondence and Court documents relating to various legal proceedings concerning the disputed refugee status of various Asian persons, various protection visa applications, various documents and correspondence and a copy of the Federal Court judgment in the matter of *Antonia v Dima & Wood*, several Refugee Review Tribunal matters with associated documents and correspondence, documents relating to various Immigration and Multicultural Affairs matters, various documentation and letters signed by "Dr Prince Roman" concerning the establishment of a website, documents associated to various legal proceedings concerning immigration matters, various banking and financial documents and records relating to the plaintiffs, a photo album containing photos of various Asian women, various other photographs of Asian women, various "Application for marriage companion" forms, Taxation and Superannuation documents relating to the second plaintiff, Centrelink documents relating to the first plaintiff, various notebooks and diaries, various business cards, a hand written list of names, a newspaper article about children in Manila, and sundry other documents.

[35] As Hely J noted in *Adler v Gardiner*¸ supra, it is not the task of the Court to substitute its opinion for that of the executing officers; its task is only to ascertain whether those officers' actions are excessive and therefore unlawful. I am satisfied that the documents seized have not been demonstrated to lie outside the authority of the warrant and that it was open for Quirk and Jabbour to conclude, as they did, that the documents seized fell within the terms of the warrant. Speaking generally, the seized

documents all relate, in one way or another, to the plaintiffs' interest, concern, involvement and participation in immigration and migration matters, including legal proceedings concerning persons, principally female, from the Philippines.

[36] I turn to the issue of the plaintiffs' computer. Pratt's evidence was that she spent an hour or so operating the plaintiffs' computer before it was seized at 2.15 am. Throughout that time she experienced difficulty – first in making a 'dial-up' connection which she believed to be necessary in order to access emails stored on the computer and later in getting documents to 'open'. Specifically, when attempting by her preferred approach to open document files, she repeatedly encountered error messages to the effect that the computer system was "unstable and unsafe". By trying a different tack she was subsequently able to open "10s, not 100s" of documents. However there were still error messages. Among the documents she managed to inspect were some which in her view were within the terms of the warrant. She now has only a general recollection of what those documents were – her recollection was not assisted by being shown the printouts of documents later extracted from the computer by the AFP's computer crime team.

[37] Pratt's evidence was that it did not occur to her to attempt to print out (or make a floppy disk copy) of the documents she had located: " … I was just conscious of the amount of trouble that I was having with the computer and the error messages that I was getting, and I was trying to do as least as possible with the computer". Quirk's recollection was that he and Pratt

discussed, but decided against, printing. In any case, Pratt doubted that she would have regarded printing the documents as a satisfactory option even if there were no problems with the computer. This was because the printed copy would not include forensically significant electronic data forming part of the relevant computer file.

[38] After about 45 minutes looking at documents, Pratt spoke with Quirk and told him that she had located documents which in her opinion met the warrant terms, as well as outlining her problems with the computer. Pratt said that Quirk then had a conversation with Jabbour and then told her to switch off the computer and pack it up. Quirk's account does not refer to a conversation with Jabbour; Jabbour's account does. The inconsistency is not significant – both recall in substance that Quirk decided to seize the tower because of the documents which had been located and because of Pratt's problems with the computer. The problems experienced with the computer and the perceived instability thereof and risk of losing evidential material therein meant it was not practicable to put that material – which interestingly included a form of surrogacy agreement, a matter specifically raised by Lynette – into documentary form. In terms of s 3L(2)(a) and (3)(a) Crimes Act the defendants were therefore authorised to seize it.

[39] On 26 May 2000 Jabbour spoke to the Australian Federal Police electronic evidence team in Brisbane to make arrangements for them to attend in Darwin to 'interrogate' the computer hard drive. That discussion led him to believe that an application ought to be made under s3L of the Crimes Act for

an extension of time for retention of the tower – he had not previously thought this necessary. In fact it was not necessary because the computer had been seized. Jabbour proceeded in any event to prepare a form of application, which Quirk completed and took before Mr Wallace SM. Mr Wallace 'granted' an extension of time until 9am 5 June 2000. The computer tower was searched on 4 June 2000 (Exhibit D103) and returned to the plaintiffs (with the exception of a power cord, which was overlooked) before 9 am on 5 June 2000 (Swain diary Exhibit P74).

[40] A variety of seized items were returned to the plaintiffs in the fortnight following the execution of the warrant (Exhibit D95, Jabbour: (716-717). As to the balance, these were returned on 19 April 2002 (D49). Jabbour agreed that the period of retention of the documents was regrettably long; however, he was at pains to point out (716) that the plaintiffs were repeatedly advised, from as early as 26 May 2000, that they were free to request copies of each of the seized documents:

> "… it was not our intention to hinder you in any way and that was reiterated on a number of occasions. Any documentation – as I stated previously, we offered on a number of occasions any documentation required by you, we agreed to copy or return originals wherever possible. And that was an offer that I made myself, personally, and I understand other officers made …
> HIS HONOUR: Who did you make that offer to when you …? …
> Ms Mann. I mentioned to her the morning after and, again, reiterated that offer when I delivered the expanded spreadsheet. [This is a reference to exhibit P66.] I was certainly cognizant of your concerns and those conveyed to us by Fele Mann with respect to documentation that you may require, and that offer is a standard offer that I would always ensure was complied with. With respect to the investigation, allegations were made, sir, and it's incumbent

> upon us to investigate them with as, you know, minimal disruption to yourself was certainly in our minds. But, nonetheless, quite serious allegations had been made which we had to investigate and that was really the sole purpose of the investigation." (722-3)

In this passage Jabbour's references to "you" and "your" relate to the first plaintiff who was cross-examining Jabbour at the time. I accept this evidence of Jabbour. The plaintiffs made no demand for return of the seized items which was refused by the defendants. The plaintiffs' claim in detinue and conversion fails.

[41] I turn to consider the key used by the defendants to gain entry to the plaintiffs' premises. The defendants entered the plaintiffs' premises on 25 May 2000 using a key. The key was given to them by Lynette. Lynette had been given the key by the plaintiffs. There was an informal lodging arrangement between Lynette and the plaintiffs, involving modest weekly payments. The key appears to have been given by Lynette to Swain some time on the afternoon or evening of 25 May 2000. The key was provided by Lynette in the context of a request by her to collect certain of her and her son Robert's belongings from the plaintiffs' residence (recorded by Moore in Swain's notebook Exhibit P74). Swain provided the key to Quirk and forgot about it until the second plaintiff requested its return. Quirk used the key to open the door to the plaintiffs' residence because without the key it would have been necessary to force entry, for example with the help of a locksmith. The key was delivered to the second plaintiff on 31 May 2000 having been requested by her earlier that day. There was no earlier request, nor was

there ever any refusal by the Australian Federal Police to return the key. The plaintiffs have no cause of action relative to the key.

[42] The plaintiffs have not established their case that the defendants' seizure of their property was not authorised by the Crimes Act, or that the seizure was an improper exercise of power conferred by the Crimes Act. There will be judgment for the defendants. The plaintiffs' action is dismissed.
