# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Dobbs v Ward & Anor* [2002] QSC 109 |
| PARTIES: | **GEOFFREY ROBERT DOBBS**<br>(applicant)<br>**v**<br>**RAYMOND ALLEN WARD**<br>(first respondent)<br>**MARK ANDREW COCKBURN**<br>(second respondent) |
| FILE NO/S: | S 1833 of 2002<br>S 1870 of 2002 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application for judicial review |
| ORIGINATING COURT: | Supreme Court Brisbane |
| DELIVERED ON: | 26 April 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 April 2002 |
| JUDGE: | Holmes J |
| ORDER: | **1. The time for filing the applications for statutory orders of review is extended to 27 February 2002.**<br><br>**2. The decision of the first respondent to issue the search warrant on 29 November 2001 is set aside.**<br><br>**3. I declare that the search warrant issued on 29 November 2001 is invalid and that the seizure of items pursuant to it was unlawful.** |
| CATCHWORDS: | WARRANTS, ARREST, SEARCH, SEIZURE AND INCIDENTAL POWERS – WARRANTS – SEARCH WARRANTS – ISSUE AND VALIDITY – REASONABLE GROUNDS<br>Where the applicant seeks judicial review of a decision to issue a search warrant under s 69 *Police Powers and Responsibilities Act* – whether there existed reasonable grounds for suspecting evidence of the commission of an offence – whether s 73(1)(c) *Police Powers and Responsibilities Act* should be construed as limiting the |

evidence which the warrant must state may be seized under the warrant to that evidence of the commission of the offence as to which the issuer has formed his satisfaction under s69 – whether invalid portions of the search warrant may be severed.

*Criminal Code*, s 679
*Judicial Review Act* 1991
*Police Powers and Responsibilities Act* 2000, s 69, s 73, s 74
*Statutory Instruments Act* 1992, s 7

*Andrews v Howell* (1941) 65 CLR 255
*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321
*Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 31 FCR 523
*George v Rockett* (1991) 170 CLR 104 at 115
*Hope v Bathurst City Council* (1980) 144 CLR 1
*Inland Revenue Commissioner v Rossminster Ltd* [1980] AC 952
*Malubel Pty Ltd v Elder* (1998) 88 FCR 242; on appeal 73 ALJR 269
*Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259
*O'Donoghue v Kordick ex parte O'Donoghue* [1995] 1 Qd R 278
*Parker v Churchill* (1985) 9 FCR 316
*Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24
*Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266
*Williams v Keelty* (2001) 111 FCR 175 at 213
*Wright & Anor v Queensland Police Service and Ors* [2002] QSC 046

COUNSEL: Mr Mulholland QC for the applicant
Mr McLeod for the second respondent

SOLICITORS:

*Extension of time*

[1] The applicant seeks statutory orders of review of a decision of the first respondent to issue a search warrant, and a decision of the second respondent to execute it. The applications were filed out of time by some two months, and the applicant seeks corresponding extensions of time. The first respondent, the Justice of the Peace who issued the search warrant, has previously indicated that he will abide by the order of the court. The second respondent, the police officer who executed the search warrant, does not oppose the extension of time. He, at least, was made aware during the statutory time period for review of the likelihood of a challenge to the warrant. It appears that the failure to file the applications results to a large extent from the uncertainty of the applicant's solicitor as to whether the applications would, in the event, be necessary. There is no suggestion of prejudice to either

respondent. In all the circumstances I am satisfied that it is a proper case for the exercise of my discretion to extend time for the applications to 27 February 2002, the date on which they were in fact filed.

*Grounds of review*

[2] The application for review of the first respondent's decision gives as its grounds: that the decision was not authorised by the enactment under which it was purported to be made; that it involved an error of law; and that there was no evidence or other material to justify its making. Common particulars are given of the three grounds. Essentially the applicant's case is that the first respondent could not have been satisfied on the material before him of the essential pre-condition to the issue of a warrant under s 69 of the *Police Powers and Responsibilities Act* 2000; that is, that there were reasonable grounds for suspecting evidence of the commission of an offence was at the place to be searched or was likely to be taken there within the next 72 hours. Similar grounds are set out in the application in regard to the second respondent's decision to search and seize under the warrant, with the particulars being in that case that the warrant was invalid, so that the powers conferred by s 74 of the Act to search and seize could not be exercised.

*The application for the warrant*

[3] The application for the search warrant was made on 29 November 2001. The offences in respect of which it was sought were detailed in the application by way of an annexure, 'A'. It included a 40-count indictment by which the applicant was charged with multiple counts of indecent treatment of, and maintaining sexual relationships with, children, as well as single counts of common assault, indecent assault and rape. The dates alleged for the offences range between 1 January 1974 and 31 December 1999. A list of complainants with particulars of the counts on the indictment referrable to them was also provided.

*The information supporting the application*

[4] Another annexure, 'C', sets out the information relied on as constituting reasonable grounds for suspecting evidence of the commission of an offence. It asserts that the applicant had been arrested in Melbourne in September 1999 in relation to some 40 offences of a sexual nature committed against children in that State. A search of his residence had found a quantity of videocassettes, literature and computer hardware and software, some of which contained evidence of sexual offences against children committed in Queensland. Information from a witness indicated that within two weeks of the applicant's arrest on 13 September his father had removed some property from his study. He had attended the residence of other informants with three large boxes containing child pornography in various forms which, he said, belonged to the applicant and had to be burned because it would be bad for his court case. The applicant's father destroyed that property. The same informants expressed a belief that further property of the applicant could be found at the father's residence.

[5] On 20 November 2001 the residence of the applicant's father was searched under warrant. In the main, what was seized was unspecified in the information, but details were given of a computer hard drive and two floppy disks which were taken. The applicant's father and his solicitor had indicated that information on the hard drive and disks had been prepared by the applicant on his computer in the gaol and forwarded to his father on disk, and were subject of legal professional privilege (presumably, having been assembled for the purposes of preparing a defence case in respect of the charges on the indictment.). The information goes on to assert the issue of privilege was raised in the Magistrates Court on 27 November, without resolution, but with continuing negotiation between police and the applicant's legal representatives.

[6] Later on 27 November a telephone call, the contents of which were not known, took place between the applicant's father and the applicant. On the following morning, the applicant took his computer to the reception store area of the Wacol Correctional Centre, asking that its hard drive be completely reformatted and programs reloaded. That did not take place; the computer was retained, untouched, in the reception store. Police forensic computer section staff suggested that a reformatting procedure could delete all the information previously contained on the computer. The applicant had, according to the information, a background in computer technology and a high level of knowledge of hardware and software functions.

[7] The second respondent's information goes on to express, in light of the preceding information, a concern that the applicant might be in possession of material "which may obstruct the course of justice or be directly subject to the indictments listed in Annexure 'A'".

[8] The material which the applicant is expressed to be suspected of possessing is set out in another Annexure, 'B', as follows:

> "All property currently or formerly belonging to Geoffrey Robert DOBBS, including: any notes; documents; diaries; records of counselling session; records of telephone calls; telephone accounts; all computer storage media including hard disks; tapes; and other removable media; any other devices containing programmes or data, any computer hardware and software deemed necessary to gain access to data or programs contained on the aforementioned storage media, all documentation including manuals; guides and other references which provide information necessary for the proper operation of the computer hardware, software and peripheral equipment, all computer printouts and other documents; videos and recording equipment – relating directly or indirectly to the offences subject of this warrant."

*The warrant*

[9] The first respondent issued a search warrant on that application. It expressed his satisfaction that there were reasonable grounds for suspecting evidence of the commission of the offence was at the "reception store and the cell/s domiciled [sic] by Geoffrey Robert Dobbs at Walston [sic] Correctional Centre, Grindle Road, Wacol" or was likely to be taken to that place within the next 72 hours. The offence in relation to which the warrant was issued was specified as set out in Annexure 'A', the indictment and list of complainants already referred to. There was no reference to obstruction of the course of justice. The evidence of which the warrant enabled seizure was specified, as required by s73 (1)(c) of the *Police Powers and Responsibilities Act*, as that set out in Annexure 'B'.

[10] The warrant was executed by the second respondent on 29 November 2001. The hard drive and nine floppy disks were seized, as were various other items including exercise books, note writing pads, letters, a diary and newspaper articles. All but the hard drive, the floppy disks and two newspaper articles were ultimately returned to the applicant.

*The applicant's submissions*

[11] Mr Mulholland QC for the applicant, submitted that the first respondent could not have been satisfied on that information that there were reasonable grounds for suspecting that a thing that might provide evidence of an offence or suspected offence, or that would by itself, or by or on scientific examination provide evidence of the commission of an offence or suspected offence, was or was likely to be within the following 72 hours at the Wacol Correctional Centre. The assertions in the information, he contended, could result only in speculation rather than actual apprehension. At the highest, the only reasonable suspicion to be formed from the facts presented was that the applicant was concerned to ensure that legally privileged material generated from his prison computer would not fall into the hands of correctional authorities. The width of Annexure 'B', which was so broadly stated as to enable a fishing expedition, reinforced the conclusion that reasonable grounds could not exist for the requisite suspicion.

[12] Next, Mr Mulholland pointed out, the prosecutor in the District Court proceedings had conceded upon a review that nothing relevant to the charges on the indictment had been extracted from the material seized. That may or may not have been because of damage to the computer's hard drive before it was seized. At any rate the absence of material answering the description of evidence of the commission of the offences demonstrated, Mr Mulholland said, the unlawfulness of the seizure. As I said during argument, I do not think that follows. A suspicion may come to nought; that does not of itself show that there were not reasonable grounds to hold it.

[13] In supplementary submissions responding to a matter I raised, Mr Mulholland argued that if reasonable grounds were shown to exist only in relation to some of the items seized, it was not possible to sever the remaining items from the warrant.

To do so would alter its effect in a way not envisaged by the issuer, and to an extent not contemplated by any of the authorities on severance.

*The second respondent's submissions*

[14] For the second respondent, Mr McLeod submitted that the applications constituted an impermissible attack on the merits of the first respondent's decision to issue the warrant, there being nothing which could amount to error of law. He relied on the following passage from the judgement of Mason CJ in *Australian Broadcasting Tribunal v Bond*[1]:

> "Thus, at common law, according to Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference – in other words, the particular inference is reasonably open – even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place."

[15] The information should not be examined narrowly, he said, arguing by analogy with the warning of the High Court in *Minister for Immigration and Ethnic Affairs v Wu*[2] against over-zealous scrutiny of a decision-maker's reasons. While pausing to observe that the information neither was produced by the decision-maker nor constituted his reasons, I accept that one ought not, on review of the decision to issue the warrant, take a hypercritical approach to it. The real question is whether it could give rise to the satisfaction of the existence of reasonable grounds for suspicion required, under s69 of the *Police Powers and Responsibilities Act,* on the part of the issuer of the warrant.

[16] Finally, in his supplementary submissions, Mr McLeod argued that if severance of those items not concerned with the computer hard drive were to occur, the nature and effect of the warrant would not be altered, and the balance could stand without the severed portion.

*Reasonable grounds for suspicion*

[17] The precondition for issue of a search warrant is set out in s 69 of the Act:

> "**69 Issue of search warrant**
>
> The issuer may issue a search warrant only if satisfied there are reasonable grounds for suspecting evidence of the commission of an offence-
>
> (a) is at the place; or
> (b) is likely to be taken to the place within the next 72 hours."

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1 (1990) 170 CLR 321 at 356
2 (1996) 185 CLR 259

[18] "Evidence of the commission of an offence" is defined in Schedule 4 to the Act as including:

> "(a) a thing or activity that may provide evidence of an offence or suspected offence; and
>
> (b) a thing that will, itself or by or on scientific examination, provide evidence of the commission of an offence or suspected offence; and
>
> (c) a thing that is to be used for committing an offence or suspected offence;"

[19] The statutory requirement of "reasonable grounds" for suspicion is a requirement of "the existence of facts which are sufficient to induce that state of mind in a reasonable person"[3]. Suspicion itself is "a state of conjecture or surmise where proof is lacking"[4].

> "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a position feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers dictionary expresses it. Consequently a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence … something which in all the circumstances would create in the mind of a reasonable person … an actual apprehension or fear that the situation … is in actual fact [that suspected]"[5].

[20] Suspicion is a lesser state than belief:

> "The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown"[6].

[21] Whether the formation of the view that there were reasonable grounds for suspicion was open at all on the facts, is a question of law, not merely of fact:

> "Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."[7]

[22] There may, as pointed out by Hely J in *Williams v Keelty*[8], be difference of opinion as to what amounts to reasonable grounds for suspicion. It is not appropriate for the reviewing court merely to substitute its opinion for that of the issuing justice:

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3 *George v Rockett* (1991) 170 CLR 104 at 112.
4 Supra (1991) 70 CLR 104 at 115.
5 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 per Kitto J at 303.
6 *George v Rockett* (1991) 170 CLR 104 at 115.
7 *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7.
8 *Williams v Keelty* (2001) 111 FCR 175 at 213.

> "The critical issue for decision is whether the material before the Court reasonably admits of different conclusions on the question …".[9]

Thus the question is whether, having regard to the information put before the issuer, it was open to him or her to reach the requisite state of satisfaction.

*Were there reasonable grounds in this case?*

[23] The material as to which the issuing justice was invited to form a view that there were reasonable grounds for a suspicion that it would provide evidence of the commission of an offence, and was or would be within 72 hours at the specified place, is set out in Annexure 'B'. Annexure 'C', the information, was said to provide the reasonable grounds for suspicion. However, there was nothing in the information to demonstrate the existence of any of the property sought other than the computer and its hard drive, and conceivably by inference, related software and print-outs. Much less was there any basis on which it could be supposed that the items other than those relating to the computer, if indeed they existed, would have any bearing on the offences in the indictment. It is, for example, impossible to identify any evidence giving reasonable grounds for suspecting that there would be records of counselling sessions in the applicant's cell or at the reception store; let alone that, if there were, they would provide evidence of the commission of the offences in the indictment.

[24] The one item in Annexure 'B' about which there was information was the computer hard drive. It was, I think, reasonable to infer that the applicant's sudden enthusiasm for a reformatting of his hard drive was linked to the execution of the search warrant on his father's premises. I was not greatly taken with Mr Mulholland's argument that the only reasonable inference was that his anxiety to have the computer hard drive reformatted was the product of a concern that material the subject of legal professional privilege would be seized. The privilege claim in relation to the property seized from his father's premises was being appropriately dealt with at the relevant time. It was the subject of liaison between his lawyers and the police; and there was no suggestion of any heavy-handed attempt to override privilege. There seems to me to have been no basis on which the applicant ought to have feared that any privilege attaching to the material in his possession would not similarly be respected. Thus, although the possibility existed that protection of privileged material might have been his aim, it does not seem to me that it was overwhelming.

[25] However, it does not follow that the only other available inference was an attempt to conceal evidence of the commission of the offences on the indictment. Rather, it seems entirely possible that there was something to be found on the computer hard drive which would not be regarded favourably by prison or prosecuting authorities, but which was not connected with the offences on indictment. The possibility that the material on the computer was related to the offences on the indictment seems to

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[9] *Hope v Bathurst City Council* (1980) 144 CLR 1 at 9.

me, by contrast, to come in a relatively dim third to that prospect and Mr Mulholland's hypothesis. However, having regard to the caution which one must exercise in examining such matters, I would not be prepared to say that the formation of such a suspicion would be entirely without reasonable grounds. The applicant's conduct, in context, was at least capable of raising "a state of conjecture or surmise" that there was associated with the computer hard drive evidence of the commission of the offences by which he currently stood charged on indictment.

*What is the evidence as to which reasonable grounds for suspicion must exist?*

[26] But, of course, the suspicion which the issuing justice was invited to consider related to a much wider range of property, and the warrant issued upon the formation of the issuer's suspicion related to that wider range. Section 73(1)(c) contains the following requirement:

> "The search warrant must state –
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> …
>
> (c) any evidence that may be seized under the warrant."

The warrant issued here, under the heading "Details of evidence that may be seized under this warrant", refers again to Annexure 'B'. That seems to me to raise two questions. The first is whether it is permissible in any event for a warrant to state under s 73(1)(c) a broader range of evidence which may be seized than the evidence as to which a state of satisfaction under s 69 of the Act has been achieved by the issuer. If that were so, as long as the issuer had reasonable grounds for suspecting the existence of any item of evidence meeting the s 69 criteria, he could issue a warrant enabling a more general seizure, and there could be no complaint in the present case that reasonable grounds existed only in respect of *some* of the items in the warrant.

[27] Section 69 makes satisfaction of reasonable grounds for suspecting evidence of the commission of an offence to be or shortly to be at the premises, the precondition for issue of the warrant. Section 73(1)(c) does not expressly limit the evidence which may be seized to that evidence, and s 74(1)(h)[10] clearly confers on a searching police officer a power to seize things which may go well beyond anything of which the issuer was aware; he may take anything he himself "reasonably suspects may be evidence of the commission of an offence to which the warrant relates". The absence of reference in 73(1)(c) to the s 69 requirements contrasts with s 679 of the *Criminal Code* as it stood prior to repeal. That provision, having required the issuing justice to be satisfied of reasonable grounds for suspecting the existence of anything which might, inter alia, afford evidence as to the commission of an offence, enabled the issue of a warrant directing seizure of "any *such* thing" (italics added).

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[10] Section 74(1) – A police officer has the following powers under a search warrant ("**Search Warrant Powers**") - … (h) Power to seize a thing found at the relevant place, or on a person found at the relevant place, that the police officer reasonably suspects may be evidence of the commission of an offence to which the warrant relates".

[28] On the other hand, while there is no express limitation on the evidence referred to in s 73(1)(c), clearly it cannot be intended that it be at large. The warrant would be bad for generality were that to occur. The sub-section can only be sensibly read as limited to evidence of the commission of the offence in respect of which the warrant is issued, although that limitation is not explicit. Should it further be limited to that evidence which has been identified to the issuer and in respect of which he has accepted there were reasonable grounds in terms of s 69?

[29] I have previously expressed the view[11] that this Act, as to the provisions of which there is scant authority, should be construed on the principle

> "that the court should construe a statute which encroaches upon liberty so that it encroaches upon it no more than the statute allows, expressly or by necessary implication".[12]

[30] In accordance with that principle, s 73 (1)(c) should be construed as limiting the evidence which the warrant must state may be seized under the warrant to that evidence of the commission of the offence as to which the issuer has formed his satisfaction under s69. Although the searcher has, under s 74(1)(h), wider powers of seizure on the basis of opinion formed in the course of the search, the issuer has no power to issue a warrant which extends in terms of the evidence to be seized beyond that as to which he is satisfied there are reasonable grounds for suspicion. Thus it would be no answer to say that as long as the issuer had formed the necessary view under s 69 in relation to some of the material sought, it did not matter that a larger range of material was sought by the warrant.

[31] It was not open to the issuing justice to conclude that there were reasonable grounds for suspecting, in relation to the items other than the computer hard drive and possibly the software associated with it, either their existence at the place in question, or that they would afford evidence of the commission of an offence. That was not merely a mistake as to fact, nor a failure of logic in relation to the facts; there was simply no evidence to support the conclusion. The warrant went beyond the power conferred by s69 in seeking items as to which there were no reasonable grounds for suspicion.

*Severability*

[32] The second question is that of severance. Having reached the view that reasonable grounds did not exist for a suspicion as to most of the items identified in Annexure 'B', may the warrant be saved by severance of those items? It is well established that invalid portions of search warrants may be severed[13]. Ought one to treat the warrant in this case like the curate's egg, extracting from it those parts, relating to the applicant's computer, which are good?

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11 *Wright & Anor v Queensland Police Service & Ors* [2002] QSC 046.

12 *Inland Revenue Commissioner v Rossminster Ltd* [1980] AC 952 per Lord Salmon at 1017.

13 *Parker v Churchill* (1985) 9 FCR 316; *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 31 FCR 523; *O'Donoghue v Kordick ex parte O'Donoghue* [1995] 1 Qd R 278; *Malubel Pty Ltd v Elder* (1998) 88 FCR 242; on appeal 73 ALJR 269.

[33] In *Peters v Attorney-General (NSW)*[14] McHugh J applied principles expressed by Dixon J to be applicable to statutory regulations[15] to the consideration of whether a search warrant was severable, since a warrant was, for the purposes of the *New South Wales Interpretation Act* 1987, an instrument[16]. Thus, McHugh J said:

> "It is not possible to sever a warrant where the invalid provision forms part of an inseparable context or would operate differently or produce a different result from that which was intended".

That statement was confirmed as the principle applicable to questions of severability of warrants in *Malubel Pty Ltd v Elder [No 2]*[17].

[34] Although in some instances it may be possible to sever from a warrant references to particular items of evidence not properly identified in it or even, perhaps, classes of evidence, I do not think that in this case the warrant can be saved by removal from the description of the items of evidence to be seized of all those which do not concern the computer hard drive which was the subject of the information. To do so would be to change the tenor of the warrant and the power of seizure conferred by it entirely. Properly limited, the warrant would have permitted the seizure of specific, identified objects. As it stood it enabled a fishing expedition of the broadest proportions to the applicant's cell and the reception store. There is no doubt that the warrant as severed would have operated in an utterly different way from the warrant as issued.

*Conclusion*

[35] I conclude, therefore, that the warrant is invalid as exceeding the power of the issuer under s 69, in that the warrant as issued purported to enable the seizure of items as to which it was not open to the issuer to find there were reasonable grounds for a suspicion under that section.

[36] Once the view is reached that the warrant was invalid, it follows that the seizure of items pursuant to it was unlawful, there being no attempt to rely on any justification independent of it. first. A declaration to that effect may be made, whether under the *Judicial Review Act* or otherwise, and I do not find it necessary to consider the arguments as to whether the second respondent's decision to execute the search warrant is reviewable.

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14 *Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24 at 41.

15 *Andrews v Howell* (1941) 65 CLR 255 at 281. Dixon J's view was that the burden fell on those attacking a regulation to establish either that if the regulation were cut down to its valid portions the result would be not a partial application of it but a "different plea or provision" or of establishing an intention to be found within it "that unless it receives its full intended operation it shall not operate at all"[15].

16 Similarly, as a document made under a power conferred by an Act and being of a "public nature by which the entity making [it] unilaterally affects a right or liability of another entity" a search warrant would be a statutory instrument under s.7 of the *Statutory Instruments Act* 1992.

17 (1999) 73 ALJR 269

[37] I order:

1. That the time for filing the applications for statutory orders of review be extended to 27 February 2002.

2. That the decision of the respondent to issue the search warrant on 29 November 2001 be set aside.

I declare that the search warrant issued on 29 November 2001 is invalid and that the seizure of items pursuant to it was unlawful.

I will hear the parties as to costs.