# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Linc Energy Ltd v Chief Executive Administering the Environmental Protection Act 1994 & Anor* [2014] QSC 172 |
| PARTIES: | **LINC ENERGY LTD**<br>ACN 076 157 045<br>(Applicant)<br><br>v<br><br>**CHIEF EXECUTIVE ADMINISTERING THE ENVIRONMENTAL PROTECTION ACT 1994**<br>(First Respondent)<br><br>and<br><br>**KELLY FAY GLEESON**<br>(Second Respondent) |
| FILE NO/S: | BS 11001 of 2013 |
| DIVISION: | Trial Division |
| PROCEEDING: | Hearing |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 1 August 2014 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 14 and 15 April 2014 |
| JUDGE: | Philip McMurdo J |
| ORDER: | **1. It is declared that the seizure of backup tapes and the device known as the QNAP from the applicant's premises in Edward Street, Brisbane on 19 October 2013, purportedly pursuant to a warrant obtained by the second respondent on 18 October 2013, was unlawful and that the respondents are not entitled to retain those items.**<br>**2. The respondents are ordered to return such items to the applicant. Such order to be stayed until 5 August 2014.**<br>**3. Adjourn the application to 5 August 2014 at 9:30am.** |
| CATCHWORDS: | ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – SUPREME COURT – OTHER MATTERS - where the respondents, pursuant to two warrants under the *Environmental Protection Act* 1994 (Qld), copied and removed electronic material from the applicant's premises in Brisbane and Chinchilla – where the applicant |

contends that the electronic material was obtained without the authority of the warrants – whether the material was "seized" or "copied" – if the material was seized, whether the material was lawfully seized under the warrant.

*Acts Interpretation Act* 1954 (Qld), s 36
*Crimes Act* 1914 (Cth)
*Environmental Protection Act* 1994 (Qld), s 456(4), s 406, s 461, s 462

*Adler v Gardiner* (2002) 43 ASCR 24; [2002] FCA 1141, considered.
*Allitt v Sullivan* [1988] VR 621, considered.
*Bartlett v Weir* (1994) 72 A Crim R 511, considered.
*Crowley v Murphy* (1981) 34 ALR 496, considered.
*Ghani v Jones* [1970] 1 QB 693, applied.
*Hart v Commissioner of Australian Federal Police* (2002) 124 FCR 384; [2002] FCAFC 392, applied.
*JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537; [2004] FCAFC 274, applied.
*Kennedy v Baker* (2004) 135 FCR 520; [2004] FCA 562, cited.
*R v Inland Revenue Commissioners Ex parte Rossminster Ltd* [1980] AC 952, applied.
*Reynolds v Commissioner of the Police of the Metropolis* [1985] QB 881, considered.
*Trimboli v Onley (No 3)* (1981) 56 FLR 321, applied.

COUNSEL: RG Bain QC, with N Loos, for the applicant

TJH Morris QC, with M Le Grand, for the respondent

SOLICITORS: Corrs Chambers Westgarth for the applicant

Crown Law for the respondent

[1] On 18 October 2013, a magistrate issued two search warrants upon the application of the second respondent, an officer of the Department of Environment and Heritage Protection. The warrants authorised the search for and seizure of material from the applicant's premises in the Brisbane CBD and at Chinchilla. The warrants were executed and the respondents are now in possession of a very large volume of electronic material.

[2] The applicant ("Linc") challenges the execution of the warrants, contending that the electronic material was obtained without the authority of the warrants and the law under which they were issued, which is the *Environmental Protection Act* 1994 (Qld) ("the Act"). It concedes that amongst this material, there would be some things which would be within the warrants. But it says that most of the material must be outside that which the warrants permitted to be taken. And Linc contends that the warrants were executed without a necessary consideration of whether all of the material which was taken might be within the warrants.

[3] In turn the respondents concede that much of the material taken must be outside the warrants. But they say that each of the items taken away from the premises (such as

tapes) contained some material which was within the warrants and that in consequence, the warrants were duly executed.

[4] There is no significant dispute about the facts. The ultimate arguments concerned the effect of the Act and the warrants themselves.

**The facts**

[5] On 17 October 2013 (the day before the subject warrants were issued), the second respondent successfully applied for the issue of two warrants for the search of these premises in Brisbane and Chinchilla. Later that day, the execution of those warrants was underway before it was halted by an order of this court. Douglas J held that those warrants were too broad in their descriptions of the possible offences in relation to which the warrants issued. Consequently, no material was taken from either office on 17 October. I will return to the question of what was then done to identify material which was within those warrants, because that was an exercise which became relevant to the execution of the subject warrants which were issued on the following day.

[6] The subject warrants were issued in identical terms except that one related to the Brisbane office and the other to the Chinchilla office. They differed from the earlier warrants by providing particulars of the suggested offences. The magistrate who issued the four warrants recorded her satisfaction that there were reasonable grounds for suspecting that there was or might be at that office "a particular thing or activity (the evidence) … that may provide evidence of the commission of an offence or offences against the Act …", a finding which corresponded with the terms of s 456(4) of the Act.

[7] Each warrant then specified four suggested offences against the Act. Each offence was said to have been committed between 1 January 2007 and 18 October 2013. The first was that Linc had wilfully and unlawfully caused serious environmental harm[1] at what was there described as "Linc's Chinchilla site", which was an underground coal gasification demonstration facility near Chinchilla. The second was Linc had wilfully and unlawfully caused material environmental harm at that site.[2] The third was that Linc had wilfully contravened a condition of its environmental authority at that site.[3] The fourth offence was said to have been committed by the executive officers of Linc, upon the basis that an offence committed by Linc also constituted an offence by each of them by failing to ensure that Linc complied with the Act.[4] The particulars provided were the same for all four offences. Importantly, they were confined to the operations at the Chinchilla site.

[8] The "evidence of the commission of an offence" was then described in the warrants as falling within three kinds of "documents", namely those relating to Linc's operations at the Chinchilla site, those relating to "sampling" and those relating to "human resource records". Within those three categories there were some further descriptions of documents, although in no case was a certain document specified. The documents were further described by their form as follows:

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1 s 437(1) of the Act.
2 s 438(1) of the Act.
3 s 430(2) of the Act.
4 s 493 of the Act.

> "Such documents pertaining to the above may be in the form of computer print-outs, computer records, print-outs, photos, videos, handwritten notes, magnetic or electronic storage media, discs, tapes, memory sticks, hard drives, servers, notepads, laptops, handheld electronic media (capable of receiving and transmitting emails) and any other storage medium or mirror image of the above storage medium."

[9] The warrants then specified what might be done by those executing them. In this respect, in terms which warrants corresponded with the powers given to the holder of a warrant by s 460 and s 462 of the Act. In particular, the warrants provided that:

> "[A]ny authorised person may, with necessary and reasonable help and force, enter the said place and:
>
> A. search any part of the place;
> B. inspect … the place or anything in or on the place;
> C. …
> D. …
> E. take extracts from or make copies of any documents in or on the place;
> F. …
> G. …
> H. require the occupier or any other person in or on the place to give you reasonable help for the exercise of the powers described in paragraphs (a) to (g) above; and
> I. seize the evidence for which this warrant was issued or another thing if you believe on reasonable grounds -
>
> - the thing is evidence of an offence against the Act; and
> - the seizure is necessary to prevent the thing being:
>
> - concealed, lost or destroyed; or
> - used to commit, continue or repeat the offence …"

[10] Each warrant was expressed to expire 14 days from the date of its issue.

[11] Linc is based in Brisbane but it has mining interests and activities in many parts of the world. Apart from the coal gas facility at Chinchilla, it has other substantial interests in coal mines and mining tenements in Australia. It also has interests in facilities or mining activities in Poland, Uzbekistan and several States of the USA.

[12] Most of Linc's information is stored electronically. At its Brisbane office, there were three servers. One of them is, described as the file server, contained files for the Brisbane office. Each office had its own file server so that there was also one in the Chinchilla office with a different content to that in Brisbane. The Brisbane office also housed a server called SharePoint, described in the evidence as a web-based application which was used by Linc as a platform to securely store, organise, share and access information within Linc. Thirdly, there was a Microsoft Exchange email server, containing a number of data bases each containing a number of staff mailboxes. There were over 800 such mailboxes in total. Importantly, the Brisbane office housed all of the SharePoint and email exchange data for Linc across its entire global operations.

[13] Linc used a set of magnetic tapes to routinely back up the data stored on the file server and in the mailboxes on the email server. Backup tapes were made daily, weekly and monthly, the daily tapes being retained for seven days, the weekly tapes for four weeks and the monthly tapes being kept from the first backup tape which was created in July 2010.

[14] On 17 October 2013, officers from the Department, together with a Mr Whiteley, a forensic IT consultant from the firm KordaMentha, went to the Brisbane office to execute the earlier warrant for that place. They spoke to Mr Berry, Linc's global IT manager. Mr Whiteley told him that he had been given a number of search terms by the Department, which he wanted to use against the file server and SharePoint data bases. He said also that he had a list of certain staff mailboxes which he wished to obtain in their entirety, that is to say he did not propose to undertake any searches within a mailbox to distinguish between relevant and irrelevant emails. Mr Berry then began to assist Mr Whiteley in these tasks. Mr Whiteley carried out searches using his search terms across Linc's three servers. This process took about one hour, during which Mr Whiteley did not save any documents to any portable data storage device. Mr Whiteley then spoke with the departmental officers before telling Mr Berry that he required a copy of every data repository. By this stage, according to Mr Whiteley's evidence, his searches had revealed that there were a number of documents which corresponded with the search terms. His affidavit exhibits a list of documents, running to some 22 pages of various dates in the years 2009-2013, but which does not reveal the particular content of the documents or their relevance to any of the suggested offences.

[15] On that day, Mr Whiteley also learnt of Linc's practice of making backups of some of its servers. Based upon his searches of the servers, he thought that there would be data stored on backup tapes which would be relevant. Mr Berry told him that a large amount of file server backups were contained on a storage device described as the QNAP device ("the QNAP"). Mr Whiteley also arranged for Mr Berry to commence copying backups from the SharePoint server to the QNAP.

[16] The backup tapes were not kept at the Brisbane premises but they were brought there by Linc at the request of Mr Whiteley and the others executing the warrant. There were about 60 to 70 tapes in this category. Mr Whiteley says that he formed the view, based upon his keyword searches of the servers and his understanding of the process of backing up the data, that each and every monthly download of data onto a backup tape would hold material which was relevant under the search warrant.

[17] At this point, the execution of this earlier warrant was interrupted by the proceeding about it in the court. Mr Whiteley and the others then left the office without taking away any material.

[18] On the following day, at about 4.00 pm, departmental officers returned to the Brisbane office to execute the subject warrant, this time in the company of Mr Brendan Reid from KordaMentha. They were there for about nine hours. Their work was assisted by a number of Linc's employees, including Mr Berry.

[19] Mr Berry's evidence (which is unchallenged) is that Mr Reid said that he intended to take possession of the back-up tapes of the file server and email server, take a copy of the QNAP network storage, take a copy of the SharePoint data bases and

extract copies of the entire mailboxes of 10 individuals. However, some of those individuals had left Linc's employ many years earlier and Mr Berry was able to locate only the mailboxes for six of those individuals.

[20] Mr Whiteley had left at the Brisbane office some documents which he had created from his searches on 17 October. Mr Berry handed those to Mr Reid, who rang Mr Whiteley and received confirmation that these were the documents which he had created as a result of his searches. Mr Reid's evidence is that as a result of this discussion with Mr Whiteley about Mr Whiteley's document, he was assisted "in identifying the location of relevant electronic documents within the Linc Energy IT network".

[21] Mr Reid produced no list of search terms and, according to Mr Berry, he did not appear to have such a list. Nor did Mr Reid attempt to undertake any searches of the file server, SharePoint or exchange email server.

[22] Mr Berry queried whether all of the backup tapes needed to be seized because he was concerned that Linc should be left without any backup data. Mr Reid suggested that only the most recent daily and weekly backups should be seized together with each monthly backup, to which Mr Berry agreed.

[23] Mr Reid's requests were met. Consequently, the execution of this search warrant yielded a vast amount of material, a great deal of which was outside the scope of the warrant. It is unnecessary to detail the subject matters of this irrelevant detail. Clearly enough it was not limited to the Chinchilla facility let alone to potential evidence about the suggested offences.

[24] Mr Reid and the departmental officers were at the Brisbane premises until after midnight. Much of this time had been spent in discussions and negotiations on the subject of claims for legal professional privilege. As I have discussed, very little if any was been spent in an exercise of searching for relevant material.

[25] Ultimately a number of physical items were taken away by those who had executed the search warrant. Some of those items were things which belonged to Linc and which either had been used at the Brisbane office or had been brought there for the purpose of the execution of the search warrant. In the former category, there was the QNAP itself. In the latter category were the backup tapes.

[26] Other items which were taken away from the Edward Street premises were in a different category, in that the physical items did not belong to Linc. Instead, they were devices brought by the Department onto which these had been copied, during the execution of the warrant, copies of the mailboxes of those particular staff, a copy of Linc's SharePoint databases and a copy of all the data upon the file server for the Brisbane office.

[27] I go then to the Chinchilla office. Departmental officers, together with Mr Daniel Walton of KordaMentha, went there on 17 October. They were met by Mr Kruitbosch, Linc's general manager of the Chinchilla operations. According to Mr Kruitbosch's (unchallenged) evidence, Mr Walton used some search terms to search his laptop computer. This exercise took about 10 minutes, on completion of which Mr Kruitbosch was told by the departmental officers that they would be taking a copy of the entire contents of this computer's hard drive. They also gathered some documents from the office and placed them in a box with the copy

which they had made of the hard drive. But that material was left there when their search was then interrupted by the court's order about the earlier warrants.

[28] To execute the subject warrant for the Chinchilla premises, departmental officers returned on Saturday, 19 October. On this occasion, there were no searches carried out and the material which had been collected, including the copy of the hard drive of Mr Kruitbosch's computer, was then taken away.

[29] The material taken from the Brisbane and Chinchilla offices has been kept by KordaMentha on a basis which precludes access to it by Linc or the Department. Earlier this year, the court put in place a regime for the resolution of claims for legal professional privilege over any part of this material. Under that protocol, disputed claims for privilege will be determined by arbitration. But by the present application, Linc seeks to have all of this material delivered to it or alternatively, for a similar regime to be put in place for a binding determination, outside the court, of Linc's claim to the return of that material. Absent the consent of the respondents (which is not given), that latter course should not be imposed by the court.

**The Act**

[30] At the relevant time, the Act contained these provisions for the issue and execution of warrants:

> "456 Warrants
>
> (1) An authorised person may apply to a magistrate for a warrant for a place.
>
> (2) An application must be sworn and state the grounds on which the warrant is sought.
>
> …
>
> (4) The magistrate may issue a warrant only if the magistrate is satisfied there are reasonable grounds for suspecting—
>
> (a) there is a particular thing or activity (the *evidence*) that may provide evidence of the commission of an offence against this Act; and
>
> (b) the evidence is, or may be within the next 7 days, at the place.
>
> (5) The warrant must state—
>
> (a) that any authorised person or a stated authorised person may, with necessary and reasonable help and force, enter the place and exercise the authorised person's powers under this Act; and

(b) the evidence for which the warrant is issued; and

(c) the hours of the day when entry may be made; and

(d) the day (within 14 days after the warrant's issue) when the warrant ends.

…

460 General powers for places and vehicles

(1) An authorised person who enters a place … under this chapter may—

(a) search any part of the place or vehicle; or

(b) inspect, examine, test, measure, photograph or film the place … or anything in or on the place or vehicle; or

…

(e) take extracts from, or make copies of, any documents in or on the place …; or

(f) take into or onto the place … any persons, equipment and materials the authorised person reasonably requires for the purpose of exercising any powers in relation to the place …; or

…

(h) require the occupier of the place, or any person in or on the place …, to give to the authorised person reasonable help for the exercise of the powers mentioned in paragraphs (a) to (g); or

…

461 Power to seize evidence

(1) An authorised person who enters a place under this chapter with a warrant may seize the evidence for which the warrant was issued.

(2) An authorised person who enters a place under this chapter with the occupier's consent may seize the particular thing for which the entry was made if the authorised person believes on reasonable grounds that the thing is evidence of an offence against this Act.

(3) An authorised person who enters a place under this chapter with a warrant or with the occupier's consent may also seize another thing if the authorised person believes on reasonable grounds—

(a) the thing is evidence of an offence against this Act; and

(b) the seizure is necessary to prevent the thing being—

(i) concealed, lost or destroyed; or

(ii) used to commit, continue or repeat the offence.

…

462 Procedure after seizure of evidence

(1) As soon as practicable after a thing is seized by an authorised person under this chapter, the authorised person must give a receipt for it to the person from whom it was seized.

…

(5) The authorised person must return the seized thing to its owner at the end of—

(a) 6 months; or

(b) if a prosecution for an offence involving it is started within the 6 months—the prosecution for the offence and any appeal from the prosecution.

(6) Despite subsection (5), the authorised person must return the seized thing to its owner immediately the authorised person stops being satisfied its retention as evidence is necessary.

(7) However, the authorised person may keep the seized thing if the authorised person believes, on reasonable grounds, it is necessary to continue to keep it to prevent its use in committing an offence.

463 Forfeiture of seized thing on conviction

(1) Despite section 462, if the owner of the seized thing is convicted of an offence for which the thing was retained as evidence, the court may order its forfeiture to—

> (a) if the authorised person exercised the power of seizure in the enforcement of a matter devolved to a local government—the local government; or
>
> (b) if paragraph (a) does not apply—the State.
>
> (2) The forfeited thing becomes the property of the local government or State and may be destroyed or disposed of as directed by the administering executive.
>
> …".

[31] The Act thereby distinguishes between the seizure of something and the taking of extracts from or the making of copies of any documents found in the relevant place. It is common ground that "documents" would include material in an electronic form.[5]

[32] As is clear from s 462 and s 463, the subject matter of a seizure under a warrant is something which is located at and physically taken from the relevant place and which is thereafter held, to be retained or returned by the authorised person. It is something which is the property of someone other than that authorised person. Under these provisions, things which are produced by the exercise of the distinct power of copying of documents (conferred by s 460(1)(e)) are not seized and there is no like qualification upon the authorised person's entitlement to retain them.

[33] This distinction between the seizure of things and the copying of documents accords with the ordinary meaning of seizure in the context of search warrants. In *Hart v Commissioner of Australian Federal Police*, the Full Court of the Federal Court (French, Sackville and R D Nicholson JJ) said that "in its ordinary meaning, the word 'seizure' is inapplicable to the copying of information in electronic form".[6] The court was there concerned with the meaning of "seizure" in the then provisions of the *Crimes Act* 1914 (Cth) which provided for the execution of search warrants. The term was undefined in that Act. The court there said:

> "The content of the term 'seizure' is to be understood in light of its purpose which is to enable use of the things seized in the investigation of a suspected offence and at any subsequent trial arising out of the investigation. Seizure under a search warrant therefore involves a taking of possession that is temporary and for a specific purpose."[7]

[34] Each of these distinct powers of seizure (s 461) and copying of documents (s 460) was exercised in the case of the subject warrants. Relevantly for the material which is the subject of this application, the backup tapes and the QNAP which were taken from the Brisbane office were items which were seized. The copies which were made at the Brisbane office of the mailboxes, the SharePoint database and the file

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5 *Acts Interpretation Act* 1954 (Qld), s 36, Schedule 1 defining "document" to include "any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)".

6 *Hart v Commissioner of Australian Federal Police* (2002) 124 FCR 384 at 407 [91].

7 Ibid at 405 [82].

server, together with the copy made at the Chinchilla office of Mr Kruitbosch's laptop, did not involve a seizure but instead were the products of the purported exercise of the power of copying documents.

**The present application**

[35] Within the amended originating application was a claim for some relief in relation to hard copies of what were described as the Applicant's personnel records. However, any issue about them was resolved by the time of the hearing and the claimed relief in that respect was not pressed. The application seeks the following declaration:

> "1. A declaration that the seizure of particular things pursuant to a warrant obtained by the Second Respondent on 18 October 2013, more specifically described as:
>
> (a) backup tapes taken from both sites, the storage media containing the exported mailboxes, the storage media containing the SharePoint database and the storage media containing the current server as well as a copy of Hank Kruitbosch's laptop;
>
> …
>
> by the First and Second Respondents (and their agents) was unlawful."

The amended originating application also seeks a declaration that the retention of that material, described as "the documents", by the respondents was unlawful.

[36] The amended application also seeks injunctive relief in these terms:

> "3. A mandatory injunction that:
>
> (a) the Respondents return or cause to be returned the documents to the Applicant;
>
> (b) alternatively, the Respondents return or cause to be returned the documents to the Applicant in accordance with the protocol as attached (to such extent as is necessary thereunder) or the Respondents return or cause to be returned the documents to the Applicant to such extent and by such process as the Court otherwise orders."

[37] The application was thereby inconsistent with the undisputed evidence that only some of these things had been *seized*. It was made upon the false premise that the items onto which electronic material had been copied during the execution of the warrants were seized. The application sought no relief upon the premise that the distinct power of copying had been exercised and was in question.

[38] I raised this inconsistency with counsel during the hearing. Their responses took a little time whilst they clarified their instructions about the facts, before they were agreed that the facts were as I have set out. Counsel for Linc did not seek to further amend its application. Instead, they made a submission, without reference to

authority, which was to the effect that those devices onto which electronic material had been copied during the course of the execution of the warrants were themselves items which could be and were seized. The end point of that argument was that a person executing a warrant at a place could seize something which he or she took to that place and which, at all times, remained his or her own property.

[39] That submission for Linc could not be accepted. It is contrary to the ordinary meaning of seizure in this context which is employed within these provisions of the Act.

[40] It was suggested by counsel for the respondents that there was some support for this extended notion of seizure in *Kennedy v Baker*.[8] In that case, there was an issue about a copy which was made of the hard drive of the computer. It was argued that the copying was invalid because, in the terms of what was then s 3L(1A) of the *Crimes Act* 1914 (Cth), there was not a belief on reasonable grounds by the executing officer that the hard drive contained a computer file that might constitute evidential material. The absence of that belief was not established. As Branson J there observed, it was therefore unnecessary for her to determine another question which had been argued, namely whether "the removal of the imaged hard drive from the Premises constituted a seizure under the Warrant".[9] Her Honour referred to *Hart* but noted that the distinction between seizure and copying to which the Full Court had there referred had been blurred by subsequent amendments to the *Crimes Act*. It is sufficient to say that there was no opinion expressed by Branson J on the present point and in any case that opinion would have been affected by the particular terms of a statute which are not replicated in the Act.

[41] After this hearing had apparently ended, the parties returned to court to tell me that they had agreed that I should treat the items which had not been seized (the devices onto which material had been copied) as having been seized and that I should decide the case upon that premise. I am unable to do so. It is true to say that courts should resolve only disputes and that the scope of what is disputed is a matter for the parties. But where there is and could be no relevant controversy on the evidence which the parties have put before the court, their disputes should not be resolved upon a factual premise which is disproved beyond argument by that evidence. To do so, the court would be providing an advice upon a hypothesis rather than resolving the ultimate questions between the parties according to the true facts as proved by the evidence.

[42] Before that last position was taken by the parties, the respondents had objected to an anticipated application to amend the relief claimed, which would have added a case that the copying of the electronic material was outside that power. As counsel for the respondents then rightly submitted, the validity of the exercise of that power would depend upon some questions, including the proper interpretation of s 460, which were not raised by the existing application. No argument was addressed as to the validity of the exercise of the copying power. In that circumstance, taken together with the decision on behalf of Linc not to seek to amend the relief claimed, the present application must be confined to those items which were seized or purportedly seized, namely the backup tapes and the QNAP which were taken from the Brisbane office.

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8 (2004) 135 FCR 520.

9 Ibid at 548 [107].

**Validity of the seizure**

[43] The warrants authorised the seizure of anything which constituted evidence in the sense that it might provide evidence of the commission of one or more of the stipulated offences: s 456(4)(a), (5)(b). The terms of the warrants were consistent with the Act in that respect. In turn, the power of seizure was limited to something which constituted evidence in that sense. By s 461(1), those executing the warrant were entitled to "seize the evidence for which the warrant was issued". That power of seizure is not expressed according to any state of mind of the person executing the warrant. On its face, the Act provided for the validity or otherwise of a seizure of something according to whether, having regard to the terms of the warrants consistent as they are with s 456, the item in question was something which might provide evidence of the commission of a relevant offence.

[44] In the course of the arguments, I raised whether the question of the validity of the seizure in this case was affected by the proof or lack of proof of the state of mind of those who were executing the warrant. In other words, did the validity of the seizure depend only upon whether, having regard to the nature and content of what was seized, it had any potential probative value in the prosecution for a relevant offence? Or did it also depend upon some consideration of the material on the part of those executing the warrant? The submission for Linc was that it was necessary to consider the states of mind of those executing the warrant, a submission which was based on many of the authorities which are cited below. The ultimate argument for the respondents was apparently that I need not consider that matter. Alternatively, it was submitted that there was a reasonable consideration by those executing the warrant of whether the seized items were evidence within the warrant, or at least that the contrary had not been proved.

[45] A seizure in this context requires the executing officer to consider whether an item may be seized. In *Trimboli v Onley (No 3)*,[10] Holland J said:

> "As [an executing officer] is authorized to seize only the things described, a decision by him that a thing seized is a thing described is a necessary act in the lawful execution of the power to seize. The officer's authority does not entitle him to seize everything or anything he finds simply in the hope that it might turn out to be or to include something described by the warrant."

[46] Further, there is abundant authority for the proposition that this decision-making by an executing officer must be undertaken reasonably.

[47] In *JMA Accounting Pty Ltd v Commissioner of Taxation*,[11] the Full Court of the Federal Court (Spender, Madgwick and Finkelstein JJ) said that one proposition established in the general law is that "both the search and the seizure must reasonably be carried out".[12]

[48] The court there referred to like statements in *Reynolds v Commissioner of the Police of the Metropolis*[13] and *Bartlett v Weir*.[14] To the same effect, Lockhart J (with whom Northrop J agreed) said in *Crowley v Murphy*:[15]

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10 (1981) 56 FLR 321at 333.
11 (2004) 139 FCR 537.
12 (2004) 139 FCR 537 at 542-543 [16].
13 [1985] QB 881 at 889.

> "But there are limits on the powers of issuing and executing search warrants notwithstanding the difficulty of defining those limits in precise and absolute terms …
>
> The overriding obligation of the searcher is to do no more than is reasonably necessary to satisfy himself by search that in all the circumstances of the particular case he has whatever documents are necessary to answer the terms of the warrant. Plainly this must vary from case to case. What is permissible on one occasion is impermissible on another."

In *Hart*, the Full Court of the Federal Court endorsed the statement of general principles in the judgment of Lord Denning MR in *Ghani v Jones*,[16] where his Lordship described it as "settled law" that officers entering a house under a warrant were "entitled to take any goods which they [found] … which they reasonably believe[d] to be material evidence in relation to the crime … for which they enter[ed]".[17] In *Allitt v Sullivan*,[18] Brooking J expressed some doubt about this limitation of reasonableness,[19] but the established principle is that the search and seizure must reasonably be carried out.

[49] The evidence reveals that there was some consideration given to the critical question, namely whether there was evidence as described in the warrant. But that consideration went no further than identifying electronic material which contained the name of a person who, according to the instructions given to Mr Whiteley, was a relevant person in the subject investigation. There was no consideration of the content of any of the material identified by these name searches. Necessarily, there was no consideration given of the connection, if any, between any document and facts or circumstances which might be relevant to a prosecution for a relevant offence.

[50] In addition, the persons executing the warrant at Brisbane knew that only some of the electronic material within the backup tapes and the QNAP contained information could have been relevant. Yet they seized these items "as evidence" of one or more of the subject offences.

[51] In some cases, the taking of a folder or file of documents, only some of which are relevant, can be justified on the basis that the folder or file itself has a potential evidentiary value.[20] But in the present case, this was not the thinking of those who were executing the warrant. There is no suggestion in their evidence that they considered that there was some potential evidentiary value of an entire backup tape, as in some way providing "assistance in evaluating the true evidentiary significance of the document in question".[21] Rather, the item was taken so that the potentially relevant material within it could be later studied and assessed for its value or otherwise. This was not a legitimate exercise of the power of seizure. Rather, it was an instance of what Eveleigh LJ described in *R v Inland Revenue*

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14 (1994) 72 A Crim R 511 at 518.
15 (1981) 34 ALR 496 at 525.
16 [1970] 1 QB 693.
17 Ibid at 706.
18 [1988] VR 621.
19 Ibid at 649.
20 See eg *Adler v Gardiner* (2002) 43 ACSR 24 at 39-30 [21] per Hely J.
21 Ibid.

*Commissioners Ex parte Rossminster Ltd*[22] as a seizure of "a whole mass of documents, unexamined, in the hope that one of them might reveal some valuable evidential information"[23]. Eveleigh LJ there said that such an approach to the execution of a warrant would be "untenable".[24] It was an example of what Purchas LJ described in *Reynolds v Commissioner of Police of the Metropolis*[25] as a "wholesale removal of documents to be searched at some other place".

**Conclusion**

[52] Accordingly, the items which were seized were not lawfully seized and the application succeeds as to the backup tapes and what has been described as the QNAP.

[53] It will be declared that the seizure of backup tapes and the device known as the QNAP from the applicant's premises in Edward Street, Brisbane on 19 October 2013, purportedly pursuant to a warrant obtained by the second respondent on 18 October 2013, was unlawful and that the respondents are not entitled to retain those items. It will be further ordered that such items be returned by the respondents to the applicant forthwith. The amended originating application is otherwise dismissed.

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22 [1980] AC 952.
23 Ibid at 966
24 Ibid.
25 [1985] QB 881 at 902.