

SUPREME COURT OF QUEENSLAND

CITATION: *Flori v Commissioner of Police & another*[2014] QSC 284

PARTIES: **RICKY ANTHONY FLORI**

(applicant)

AND

COMMISSIONER OF POLICE

(first respondent)

AND

**DEPUTY COMMISSIONER STEPHAN
GOLLSCHEWSKI**

(second respondent)

FILE NO/S: SC No 3669 of 2014

DIVISION: Trial

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court of Queensland

DELIVERED ON: 25 November 2014

DELIVERED AT: Brisbane

HEARING DATE: 23 September 2014

JUDGE: Atkinson J

ORDERS: **I declare that the respondents are not entitled to use, rely on or otherwise take into account property seized pursuant to a search warrant issued by Magistrate Thacker on 14 March 2012 in respect of premises situated at 6 Carool Street, Ashmore in the State of Queensland or which is the subject of a post-approval order made by Magistrate Thacker on 19 March 2012 ("the seized property") or any data, evidence or information derived from the seized property in proceedings for disciplinary action against the applicant under s 7.4 of the *Police Service Administration Act 1990* and commenced by Disciplinary Hearing Notice dated 30 July 2013.**

CATCHWORDS: EVIDENCE – ADMISSIBILITY AND RELEVANCE – IN GENERAL – OTHER CASES – where the applicant was suspected of committing offences under s 92A and s 408C of the *Criminal Code 1899* (Qld) in providing News Limited with a CCTV recording that had not been authorised for release – where a search warrant was issued in respect of the

applicant's residence for investigation of these offences – where search investigators located and seized a copy of the CCTV recording and eight computers – where a recommendation was made not to prosecute any criminal charges against the applicant but instead to commence disciplinary proceedings against him - whether the evidence seized pursuant to the search warrant for investigation of the commission of criminal offences may be used in a disciplinary proceeding which is not based on conviction.

Criminal Code 1899 (Qld) s 92A, s 408C

Police Powers and Responsibilities Act 2000 (Qld) s 150(1)(a)

Police Service Administration Act 1990 (Qld) s 7.4, s 10.2

Police Service (Discipline) Regulations 1990 (Qld) s 9(1)(f)

ASIC v Rich [2005] 220 ALR 324; [2005] NSWSC 62, considered

Grollo v Macauley (1995) 56 FCR 533, cited

Hart v Australian Federal Police (2002) 124 FCR 384, considered

Johns v Australian Securities Commission (1993) 178 CLR 408, considered

Marcel v. Commissioner of Police of the Metropolis [1992] Ch 225, cited

Morris v. Director of the Serious Fraud Office [1993] Ch 372, cited

Williams v Keelty (2001) 111 FCR 175, considered

COUNSEL: M J Burns QC with A D Scott for the applicant
P J Davis QC with S A McLeod for the first and second respondents

SOLICITORS: Police Union Legal Group for the applicant
Public Safety Business Agency for the first and second respondents

- [1] On 16 April 2014 the applicant Ricky Flori, a Sergeant of the Queensland Police Service ("QPS"), applied for injunctive and declaratory relief in the following form:

"1. An injunction restraining the Respondents, their servants and agents, in proceedings for disciplinary action against the applicant under s 7.4 of the *Police Service Administration Act* 1990 and commenced by Disciplinary Hearing Notice dated 30 July 2013 ('the Disciplinary Proceedings'), from using, relying on or otherwise taking into account any property seized pursuant to a search warrant issued by Her Honour Magistrate Thacker on 14 March 2012 in respect of premises situated at 6 Carool Street, Ashmore in the State of Queensland or which is the subject of a Post-Search Approval Order issued by Her Honour with respect to the

same premises on 19 March 2012 ('the Seized Property') or any data, other evidence or information derived from the Seized Property;

2. In the alternative to paragraph 1, a declaration that the Respondents are not entitled to use, rely on or otherwise take into account the Seized Property or any data, other evidence or information derived from the seized property in the Disciplinary Proceedings."

- [2] On the hearing, both the applicant and respondents accepted that a declaration would be sufficient and that injunctive relief was not required to ensure compliance by the respondents with the court's order.
- [3] The issue for determination is whether evidence seized pursuant to a search warrant for an investigation of the commission of a criminal offence may be used in a disciplinary proceeding rather than, or in addition to, a criminal proceeding.

Factual background

- [4] The factual background to this application is not in dispute and is taken from the affidavit material filed by the applicant and the common ground between the parties in their submissions.
- [5] A report by Senior Sergeant Winter of the Internal Investigations Branch with the Ethical Standards Command of the QPS dated 16 May 2013 records that in the early hours of the morning on 29 January 2012, Noa Begic was arrested at Surfers Paradise for offences of public nuisance and obstructing police. Mr Begic was transported to the basement of the police station at Surfers Paradise. A struggle occurred between Mr Begic and arresting officers when he was being transferred between police vehicles. This struggle was visually recorded by the Closed Circuit Television (CCTV) recording equipment at the police station.
- [6] The amount of force used to restrain Mr Begic has been the subject of an internal investigation (CSS 12/00265). On 6 February 2012, Mr Begic attended the Surfers Paradise police station and made a formal complaint concerning the use of excessive force during his arrest on 29 January 2012. Ethical Standards Command commenced an investigation into this complaint of excessive force on 8 February 2012. Sergeant Flori was aware that that investigation had commenced.
- [7] On 15 February 2012 the *Courier Mail* newspaper and commercial television published the CCTV recording of Mr Begic's struggle with police officers in the basement of the police station. The CCTV recording had not been authorised for release under s 10.2 of the *Police Service Administration Act 1990* ("PSA Act"). A discipline investigation was immediately commenced with respect to the unauthorised release to the media.
- [8] Investigations revealed that News Limited, the publisher of the *Courier Mail*, received an email dated 10 February 2012 from the email address Harvey.peter@mail.com. The email offered to provide News Limited with the CCTV recording. Investigations also revealed that the email was sent via a

computer router/modem situated at the home address of the applicant. The actual email was later located on the applicant's personal Black Acer Aspire laptop.

- [9] On 14 March 2012, Magistrate Thacker issued a search warrant with regard to the applicant's residence. The application for the search warrant was made pursuant to s 150(1)(a) of the *Police Powers and Responsibilities Act 2000* (PPRA) which provides that:

"A police officer may apply for a warrant to enter and search a place (a **search warrant**) -

(a) to obtain evidence of the commission of an offence."

- [10] Section 150(5)(a) of the PPRA provides that an application for a search warrant must be sworn and state the grounds on which the warrant is sought.
- [11] The application by Senior Sergeant Winter set out the reasons for his suspicion that Sergeant Flori has committed criminal offences as follows:

"Reason for suspicions

I reasonably suspect Sergeant Rick Flori has dealt with the CCTV recordings with the intent to cause a detriment to Senior Sergeant Joachim and has dishonestly applied to his own use the CCTV recordings belonging to the Commissioner of Police for the following reasons:

- (1) Investigations revealed that Sergeant Rick Flori **reviewed the promotion of Senior Sergeant David Joachim** because Sergeant Flori believed he was a better applicant for the position and believed he was not rated fairly during the interview process. This review process result was in favour of Senior Sergeant Joachim and interviews with Surfiers Paradise Police officers have indicated that the review issue caused significant stress for Sergeant Flori and he indicated a dislike towards Senior Sergeant Joachim;
- (2) Immigration records revealed **Sergeant Rick Flori left the country** on 12 February 2012 and is not expected to return until mid March 2012. This travel is consistent with the author of the above mentioned email to News Limited (dated 10 February 2012) stating 'I will not contact you again for a lengthy period of time';
- (3) The above mentioned email to News Limited (dated 8 February 2012), speaks of an **internal police investigation which involves the brother** of Sergeant Rick Flori;
- (4) Sergeant Flori **accessed the CCTV room at Surfiers Paradise** at 20:08 hours on 9 February 2012 without making any occurrence sheet notations explaining the reason for him entering the room;

- (5) Computer records reveal that at the time of accessing the computer in the CCTV recording room on 9 February 2012 Sergeant Rick Flori was not typing within Qprime indicating he **could have been away from the computer** he was logged on to;
- (6) A check of Sergeant Rick Flori's shifts reveals **he was not rostered for duty** on each of the four occasions where emails were sent to the media by Harvey.peter@mail.com indicating he was in a position to send all four emails to the media;
- (7) News Limited (The Gold Coast Bulletin) provided investigators with the email 'headers' from three emails sent from Harvey.peter@mail.com. These 'headers' reveal the three emails were sent from the (Internet protocol) IP 58.174.60.12. Enquiries with Telstra revealed this IP address is allocated to the '**router**' **used at the residence of Sergeant Rick Flori** at 6 Carool Court, Ashmore, Gold Coast, and the account name of Mrs Cheryl Flori (wife of Rick Flori);
- (8) As part of Sergeant Rick Flori's **official functions**, he is authorised with access to the restricted CCTV recording room within Surfers Paradise Police Station;
- (9) The **CCTV recording room door access** log has registered Sergeant Rick Flori entering at around 8.08pm on 9 February 2012;
- (10) The hard drive within the CCTV recording room shows between 8.08pm and 8.14pm 9/2/12 a **search has been conducted on recordings** held within the system (the search cannot show what was actually recorded or viewed);

Conclusions

As a result of the above findings it is reasonably suspected that on 9 February 2012 Sergeant Flori has moved a copy of the CCTV recording of Mr Begic's arrest to a personal storage device. He has then **dishonestly applied this recording to his own use** by taking the recording and storage device from the Police Station **without the permission of the Commissioner of Police**. On Sergeant Flori's first day of recreation leave (and just two days prior to him leaving for the USA) at 1.38pm on 10 February 2012 Sgt Flori forwarded the aforementioned email dated 10 February 2012 to News Limited via the email address Harvey.peter@mail.com and later provided them with a copy of the recording which was released by the media to the public on 15 February 2012. It is reasonably suspected Sgt Flori emphasised the name Senior Sergeant Joachim (in the email dated 10 February 2012) to the media for the purpose of dishonestly **causing Senior Sergeant Joachim detriment** in the form of embarrassment and departmental investigation. Sergeant

Flori's motivation for causing the detriment to Senior Sergeant Joachim is because Joachim was promoted to a position that Sergeant Flori unsuccessfully applied for.

As the relevant emails were forwarded from the home address or vehicle of Sergeant Rick Flori I reasonably suspect a copy of the CCTV recordings of Mr Begic's arrest, the emails relevant to the CCTV recording being released and other evidence of its release to the News Limited will be stored within the premises situated at 6 Carool Court, Ashmore. Locating the computer router at Sergeant Flori's address will provide evidence of the source of emails sent from account Harvey.peter@mail.com."

- [12] On 16 March 2012, investigators from the Ethical Standards Command conducted a search of the applicant's residence and seized certain evidence. The search and seizure were authorised by the warrant issued under the PPRA for the purpose of investigating particular criminal offences. The offences being investigated were offences found in s 92A and s 408C of the *Criminal Code* 1899:

"Criminal Code, Section 92A, Misconduct in relation to public office

That on a date unknown between 28 January 2012 and 16 February 2012 at Gold Coast in the State of Queensland one Rick Anthony Flori being employed as a public officer with intent to dishonestly cause a detriment to another person namely David Joachim dealt with information namely recordings obtained from closed circuit television gained because of the said Rick Anthony Flori office

And further

Criminal Code, Sect 408C(1)(a)(i), Fraud

That on a date unknown between 28 January 2012 and 16 February 2012 at Gold Coast in the State of Queensland one Rick Anthony Flori dishonestly applied to his own use recordings obtained from closed circuit television belonging to the Commissioner of Police."

- [13] During the search investigators located a copy of the CCTV recording and seized eight computers for forensic analysis.
- [14] During the search Sergeant Flori was not directed to answer questions. He said that he possessed the CCTV recording for training purposes. He denied operating the email account Harvey.peter@mail.com and denied releasing the CCTV recording to the media.
- [15] During the execution of the search warrant, Sergeant Flori was given a direction not to discuss the issues discussed during the search other than to a legal representative or union representative. He was also given a direction to attend a disciplinary interview at QPS headquarters on the following Monday.
- [16] After the investigators left the residence they realised that one of the computers they intended to seize was still at the residence. They returned and seized it using

emergent search powers. On 19 March 2012, Magistrate Thacker issued a post-search approval order under s 161 of the PPRA in relation to that search.

- [17] On 18 April 2012, the examination of the property seized from Sergeant Flori's residence was completed. Of the eight computers seized, three were found to contain evidence implicating Sergeant Flori as being responsible for maintaining and operating the email account held in the name of Harvey.peter@mail.com.
- [18] Forensic analysis of Sergeant Flori's computers revealed evidence a computer in the possession of Sergeant Flori:
- emailed News Limited and offered to provide the CCTV recording of Mr Begic's arrest;
 - operated the email account Harvey.peter@mail.com since November 2008;
 - provided News Limited with arrest statistics concerning "Schoolies 2011";
 - provided News Limited with details of multiple QPS misconduct matters;
 - authored one anonymous letter to the Commissioner for Police concerning Gold Coast management and misconduct; and
 - authored a letter, assuming the identity of Senior Sergeant Craig McGrath, to the Crime and Misconduct Commission (CMC) concerning misconduct matters.
- [19] On 19 April 2012 Sergeant Flori declined to participate in a criminal interview. However he participated in a discipline interview as directed.
- [20] On 16 May 2013, a recommendation was made not to prosecute any criminal charges against Sergeant Flori but instead to commence disciplinary proceedings against him. On 30 July 2013, the second respondent issued a disciplinary hearing notice. No criminal charges have to date been laid. Senior Sergeant Winter's report, referred to earlier in these reasons, outlines why Sergeant Flori's actions were not protected under the *Public Interest Disclosure Act* 2010. The report also sets out reasons why disciplinary proceedings should be commenced including the following:
- "5.42 Maintaining integrity is not only an integral part of policing it is a vital attribute required for all officers who are essentially professional witnesses for a court system responsible for adjudicating serious offences within our community. Proven integrity issues against a serving police officer has the potential to adversely impact on that officers credibility in future court proceedings, his respect and trust with members of the public, and his overall ability to perform his role.
- 5.43 Sergeant Flori's dishonest behaviours extend beyond what occurs within the workplace. His disappointment with the promotional systems effect on his career, and the bitterness that disappointment has generated towards certain officers, has caused Sergeant Flori to show consistently dishonest

behaviours extending into his after-work hours activities (i.e. establishing an email account from home and using that account to release police information to the media). The amount of sensitive information Sergeant Flori is exposed to whilst performing his duties can not be significantly reduced and the manner in which he deals with that information, once leaving the workplace, can not be controlled, monitored or supervised.

5.44 Sergeant Flori has failed to display the level of responsibility expected of an operational Sergeant. His denials and failure to accept responsibility for his actions heighten the risk of him continuing to behave in a dishonest manner. His behaviour could be considered that of a person not suitable to hold a supervisory position within the QPS."

[21] Two matters were raised as misconduct in the disciplinary hearing notice issued to Sergeant Flori. Misconduct is a ground for disciplinary action under s 9(1)(f) of the *Police Service (Discipline) Regulations 1990* (PSDR). The first allegation of misconduct was that between 8 February 2012 and 16 February 2012 his conduct at the Gold Coast was improper in that he:

- (a) inappropriately accessed and obtained official and confidential police service information without official purpose relating to the performance of his duties; and
- (b) inappropriately released the official and confidential police service information without official purpose relating to the performance of his duties.

The second allegation of misconduct was that on 19 April 2012 his conduct was improper in that he was untruthful to Senior Sergeant Winter during his disciplinary interview.

[22] These allegations of misconduct are not the same as the offences being investigated under s 92A and s 408C of the Criminal Code which founded the application for and issue of the warrant. If the applicant were to be convicted of those offences then the relevant ground for disciplinary action against him would be s 9(1)(g) of the PSDR relying on that conviction.

[23] On 13 February 2014 Calvin Gnech from the Queensland Police Union Legal Group wrote to Deputy Commissioner Gollschewski seeking an undertaking from him not to use the evidence obtained from the warrant or any information derived from it in the disciplinary proceedings against Mr Flori. On 1 April 2014 Deputy Commissioner Gollschewski wrote to Mr Gnech refusing to give such an undertaking and advising that any evidence derived from the execution of the warrant would be considered for his determination in the disciplinary hearing.

[24] Hence the issue for determination is whether the evidence which was seized under the search warrant issued by Magistrate Thacker for police to obtain evidence of the commission of a criminal offence by a police officer can be used in disciplinary proceedings against that police officer not based on conviction for that offence.

The applicant's submissions

- [25] The applicant submitted that the statutory scheme of the PPRA led to the following propositions:
- (1) the purpose of the search and seizure powers under the PPRA is, relevantly, for the investigation and prosecution of offences;
 - (2) the PPRA has nothing at all to do with the discipline of police officers. Indeed, discipline is something that is provided for under an entirely separate statutory scheme - the *Police Service Administration Act* 1990 and the Regulations made thereunder;
 - (3) the specific provisions governing search warrants and Post-Search Approval Orders indicate that such powers are conferred for the purpose of investigating offences, rather than for the discipline of police officers;
 - (4) once evidence is seized, it must be dealt with in accordance with Part 3 of Chapter 21, no provision of which authorises police to use that evidence for internal disciplinary purposes.

The respondent's submissions

- [26] The respondents submitted nothing in the PPRA suggests that the use to which evidence is seized during the execution of a search warrant is limited to criminal proceedings. If the power of search and seizure is validly exercised, but proof of the commission of the offence specified in the warrant is a necessary element of proof in disciplinary proceedings, then the evidence seized during the execution of the warrant can be used for that proof.

Discussion

- [27] Where information or material is obtained under compulsion authorised by statute, the use that can be made of that information or material is limited by the statute. In dealing with the related topic of dissemination or release of information obtained under compulsion, Brennan J¹ held in *Johns v Australian Securities Commission*:²

"... when a power to require disclosure of information is conferred for a particular purpose, the extent of dissemination or use of the information disclosed must itself be limited by the purpose for which the power was conferred. In other words, the purpose for which a power to require disclosure of information is conferred limits the purpose for which the information disclosed can lawfully be disseminated or used. In *Marcel v. Commissioner of Police of the Metropolis*³ Sir Nicolas Browne-Wilkinson V.-C. said, in reference to a statutory power conferred on police to seize documents:

¹ With whom Dawson, Gaudron and McHugh JJ agreed.

² (1993) 178 CLR 408 at 423-424.

³ [1992] Ch 225 at 234.

'Powers conferred for one purpose cannot lawfully be used for other purposes without giving rise to an abuse of power. Hence, in the absence of express provision, the Act cannot be taken to have authorised the use and disclosure of seized documents for purposes other than police purposes.'

And in *Morris v. Director of the Serious Fraud Office*,⁴ Sir Donald Nicholls V.-C. said in reference to information acquired by exercise of statutory powers:

'The compulsory powers of investigation exist to facilitate the discharge by the S.F.O. of its statutory investigative functions. The powers conferred to s. 2 are exercisable only for the purposes of an investigation under s. 1. When information is obtained in exercise of those powers the S.F.O. may use the information for those purposes and purposes reasonably incidental thereto and such other purposes as may be authorized by statute, but not otherwise. Compulsory powers are not to be regarded as encroaching more upon the rights of individuals than is fairly and reasonably necessary to achieve the purpose for which the powers were created. That is to be taken as the intention of Parliament, unless the contrary is clearly apparent.'

A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose. If it were otherwise, the definition of the particular purpose would impose no limit on the use or disclosure of the information." (emphasis added)

- [28] In this case there is no suggestion that there was any abuse of process in obtaining or executing the search warrant or in seizing material covered by the warrant. It was executed and materials were seized under the warrant for the purpose found under s 150(1)(a), ie to obtain evidence of the commission of an offence.⁵
- [29] However, it is now not intended to use the material seized to prosecute the offence which it was alleged was committed but rather to pursue disciplinary proceedings for misconduct against the police officer.
- [30] In *Grollo v Macauley*,⁶ the Full Court of the Federal Court upheld the validity of the search warrant which had been issued on an application of the Australian Federal Police and executed by them to obtain evidence of criminal offences. At the time the warrants were executed, proceedings were pending in the Federal Court between the appellants and members of the Federal Police concerning the validity of the execution of other search warrants. There were also proceedings pending between the appellants and the Commissioner of Taxation and the Commonwealth Director

⁴ [1993] Ch 372 at 381.

⁵ See *Hart v Australian Federal Police* (2002) 124 FCR 384 at [65].

⁶ (1995) 56 FCR 533.

of Public Prosecutions. The court observed that if the warrants had been sought for an ulterior purpose, such as to obtain information to be used in legal proceedings other than the criminal offences specified in the application for the warrants, then the warrants would be invalid because they were sought for improper purposes. There was however no suggestion that the respondents had such an improper purpose.

- [31] It is implicit in the court's reasoning that use of the information obtained by the search warrants in the pending civil proceedings would have been improper. Northrop and Ryan JJ held with regard to the material seized:⁷

"At this stage, it should be noted that the things seized pursuant to the warrants have been identified in the material before the Court. Each of those things satisfied the third condition specified in the warrants, namely that there are reasonable grounds for believing that they afford evidence as to the commission of the offences specified in the warrants. There was no suggestion that the things so seized would be used at the trial of the other proceedings. Indeed, it is extremely unlikely that they would be so used since they were obtained for a particular purpose and could not be used for any other purpose."

- [32] In *Williams v Keelty*,⁸ Hely J citing *Grollo v Macauley*, made a similar distinction between the validity of a warrant and the use of material or information obtained as a result of the execution of the warrant. His Honour held:⁹

"If an application for a warrant is not a bona fide application for a warrant on the grounds stated, but is made for the ulterior purpose of obtaining information to be used in legal proceedings other than the criminal proceedings contemplated by the application, the warrant will be invalid, not because it authorises interference with the administration of justice in pending legal proceedings, but because the warrant was issued for an improper purpose: *Grollo v Macauley* at 551.

But what if the warrant is not issued for an improper purpose? In *Grollo v Macauley* at 551 Northrop and Ryan JJ said:

'In many instances, in the course of executing search warrants, the persons making the search may discover information that could be used in pending legal proceedings. That fact, of itself, could not make the search warrants invalid. The remedy lies in action against a person making improper use of that information ... the fact that there is a possibility that information might be discovered that could be used in pending legal proceedings cannot, by itself, invalidate a search warrant which otherwise complies with the law.'

⁷ At 550.

⁸ (2001) 111 FCR 175.

⁹ At [228], [229] and [233].

...

If entry is gained to premises by means of the compelling nature of a search warrant, and documents are seized, in my view **it would be consistent with general principle to hold that it would be improper for documents seized pursuant to the warrant to be used for any purposes outside those comprehended by the warrant.**" (emphasis added)

[33] In *Williams v Keelty*, the Australian Securities and Investment Commission ("ASIC") was investigating the applicant under the *ASIC Act*. ASIC commenced civil proceedings for a pecuniary penalty and other relief against Williams and Adler, who were directors of HIH Insurance. The investigation of criminal offences with regard to the same behaviour by the directors continued. ASIC obtained a search warrant to search for and seize documents relevant to criminal offences. It would have been improper for ASIC to obtain search warrants to assist it in the civil rather than criminal proceedings. The search warrants were not issued for that purpose or for any other collateral or ulterior purpose and so were not invalid. Nevertheless the court held that it would be improper for ASIC to use the documents or the information obtained pursuant to the warrants other than for the criminal proceedings, ie the prosecution of the criminal offences, the investigation of which was the purpose of the warrants.

[34] The cases herein referred to were considered by Austin J in the Supreme Court of New South Wales in *ASIC v Rich*¹⁰ regarding the admissibility in civil proceedings brought by ASIC against directors of One.Tel of material obtained by the execution of search warrants issued in relation to suspected criminal offences. In that case, ASIC was investigating the directors for both criminal and civil liability. The warrants set out that "there were reasonable grounds for suspecting the things to be seized would afford evidence as to the commission of [specified] offences." Austin J referred to the decision of Full Court of the Federal Court in *Hart v Australian Federal Police*¹¹ in observing that "the purpose of search and seizure provisions is to provide for the gathering of information to determine whether offences have been committed and to facilitate proof of them."

[35] This is reflected in the wording of s 150(1)(a) of the PPRA which provides that a warrant may be executed to obtain evidence of the commission of an offence. That is the only ground for the validity of the search warrant in this case. However Austin J observed of similar wording in the *Crimes Act 1914 (Cth)*:¹²

"All of this falls well short of an express prohibition on any use of the seized things, by the executing officer ..., for the purposes other than the investigation and prosecution of criminal offences to which the seized things relate."

[36] His Honour then asked if such a limitation could be implied from the statutory scheme. He reviewed the cases referred to and concluded that such a limitation was implied:¹³

¹⁰ [2005] 220 ALR 324; [2005] NSWSC 62.

¹¹ (2002) 124 FCR 384 at [65].

¹² *ASIC v Rich* [2005] 220 ALR 324; [2005] NSWSC 62 at 372, [244].

¹³ *Ibid* at 376, [262]-[263].

"It appears from the cases that the search warrant materials cannot be used for a later civil proceeding even if those materials have been used for the purposes of a single investigation with criminal and civil elements, prior to the commencement of the civil proceedings.

This entails that if a regulatory agency has used search warrant materials during the course of an investigation, and decides to initiate a civil proceeding, care will need to be taken not to use, for evidentiary purposes or otherwise in connection with the civil proceeding, any of the search warrant materials"

[37] This problem was overcome in *ASIC v Rich* because the liquidators of One.Tel consented to ASIC retaining the documents seized. The liquidator's consent meant that the documents seized could be used in civil litigation.

[38] This conclusion was summarised as follows:¹⁴

"[305] The constraint upon use of the seized materials as evidence in a civil proceeding is not itself an express statutory constraint. It is, as I have shown, **an implied limitation emerging out of the structure and purposes of the search warrant legislation, combined with the general proposition that if a power is conferred for a particular purpose it is limited by the purpose for which the power is conferred.** *Williams v Keelty* and the *Marshall Bell Hawkins* case drew from this general proposition the more particular conclusion that seized materials could not be used as evidence in civil litigation. But it was not necessary for the judge in either case to consider whether that proposition was subject to a qualification that would permit the owner of the seized documents freely to consent to their prospective use in proposed civil litigation from which the owner would benefit." (emphasis added)

[39] His Honour concluded that the freely formed consent of the owner of seized documents to their prospective use in a proposed civil proceeding for the owner's potential benefit is effective to remove the constraint that would otherwise prevent their use in civil proceedings.¹⁵

[40] There has been no such consent to the use of the seized material by Mr Flori. The implied limitation arising from the structure and purposes of search warrant legislation applies to the use of the material seized pursuant to the search warrant in this case. The material may not be used for purposes other than those comprehended by the warrant.¹⁶

Conclusion

[41] The material obtained pursuant to the compulsion of a search warrant may only be used for the statutory purpose for which the warrant was granted, that is to obtain

¹⁴ Ibid at 386, [305].

¹⁵ Ibid at 388, [310].

¹⁶ See also *Pratten v Commonwealth Director of Public Prosecutions* [2013] NSWSC 594 at [81].

evidence of the commission of an offence. The evidence seized pursuant to the warrant may be used in the investigation and prosecution of criminal offences to which the seized things relate but cannot be used as evidence in disciplinary proceedings against Sergeant Flori.

Order

- [42] Accordingly, I declare that the respondents are not entitled to use, rely on or otherwise take into account property seized pursuant to a search warrant issued by Magistrate Thacker on 14 March 2012 in respect of premises situated at 6 Carool Street, Ashmore in the State of Queensland or which is the subject of a post-approval order made by Magistrate Thacker on 19 March 2012 ("the seized property") or any data, evidence or information derived from the seized property in proceedings for disciplinary action against the applicant under s 7.4 of the *Police Service Administration Act* 1990 and commenced by Disciplinary Hearing Notice dated 30 July 2013.