SUPREME COURT OF QUEENSLAND

CITATION:	*Chief Executive Administering the Environmental Protection Act 1994 & Anor v Linc Energy Ltd* [2015] QCA 197
PARTIES:	**CHIEF EXECUTIVE ADMINISTERING THE ENVIRONMENTAL PROTECTION ACT 1994** (first applicant/appellant) **KELLY FAY GLEESON** (second applicant/appellant) **v** **LINC ENERGY LIMITED** ACN 076 157 045 (respondent)
FILE NO/S:	Appeal No 10743 of 2014 SC No 11001 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 172
DELIVERED ON:	16 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2015
JUDGES:	Gotterson and Philippides JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the declaration (Order 1) made on 1 August 2014.** **3. Refuse relief sought in the originating application filed on 21 November 2013 insofar as it relates to the backup tapes and the QNAP device.** **4. Respondent to pay the appellants' costs of the appeal on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – OTHER MATTERS – where a magistrate issued warrants for a place in respect of two office premises of the respondent on the information of the second applicant/appellant and authorised entry into the two office premises – where the warrants detailed circumstances by which the respondent may have offended against provisions

in the *Environmental Protection Act* 1994 (Qld) – where during the execution of the warrants DEHP officers seized a number of items of property, including backup tapes for computer-stored data, a hard drive disk, and a storage device described as "the QNAP device" – where DEHP officers downloaded computer-stored data on to devices in their possession which, together with the seized items of property, they removed from the premises – where the respondent initiated proceedings by way of originating application in the Supreme Court for a declaration that both the seizure and the retention of the backup tapes and the devices was unlawful and a mandatory injunction for their return – where at first instance it was declared that the seizure of the backup tapes and the QNAP device was unlawful and that the appellants are not entitled to retain them – where the persons executing the warrant at Brisbane knew that only some of the electronic material within the backup tapes and the QNAP contained information that could have been relevant – whether the seizure of the backup tapes and the QNAP device was unlawful and whether the applicants/appellants are entitled to retain them

Acts Interpretation Act 1954 (Qld), s 36
Crimes Act 1914 (Cth), s 3K
Environmental Protection Act 1994 (Qld), s 430(2), s 437(1), s 437(2), s 445, s 447(1), s 456, s 456(4), s 456(4)(a), s 456(5)(a), s 456(5)(b), s 460(1)(a), s 460(1)(e), s 460(8), s 461, s 461(1), s 461(2), s 461(3), s 461(3)(a), s 461(3)(b), s 461(4), s 461(4)(a), s 493
Fair Trading Act 1989 (Qld), s 89, s 89(1)(e)(i), s 89(3)
Taxes Management Act 1970 (UK), s 20C
Uniform Civil Procedure Rules 1999 (Qld), r 767(b)

Adler v Gardiner (2002) 43 ACSR 24; [2002] FCA 1141, cited
Allitt v Sullivan [1988] VR 621; [1988] VicRp 65, cited
Bartlett v Weir (1994) 72 A Crim R 511; [1994] FCA 1143, cited
Clough v Leahy (1904) 2 CLR 139; [1904] HCA 38, cited
Crowley v Murphy (1981) 34 ALR 496; [1981] FCA 31, cited
Entick v Carrington (1765) 2 Wils 275; [1765] EWHC J98 (KB), considered
Ghani v Jones [1970] 1 QB 693, cited
Hart v Commissioner of Australian Federal Police (2002) 124 FCR 384; [2002] FCAFC 392, cited
Inland Revenue Commissioners v Rossminster Ltd [1980] AC 952; [1979] UKHL 5, cited
Island Way Pty Ltd v Redmond [1990] 1 Qd R 431, cited
JMA Accounting Pty Ltd v Commissioner of Taxation (2004) 139 FCR 537; [2004] FCAFC 274, cited
Reynolds v Commissioner of Police of the Metropolis [1985] QB 881, cited
TLC Consulting Services Pty Ltd v White [2003] QCA 131, cited
Trimboli v Onley (No 3) (1981) 56 FLR 321, considered

COUNSEL:	P J Davis QC, with M D Nicolson for the applicants/appellants R G Bain QC, with N D Loos, for the respondent
SOLICITORS:	Litigation Unit – Department of Environmental & Heritage Protection for the applicants/appellants Corrs Chambers Westgarth for the respondent

[1] **GOTTERSON JA:** On Tuesday 15 October 2013, a magistrate issued two warrants for a place pursuant to s 456 of the *Environmental Protection Act* 1994 ("EP Act"), on the information of the second appellant, Kelly Fay Gleeson, an officer of the Department of Environment and Heritage Protection ("DEHP"). The warrants[1] authorised entry into the respondent's office premises at 32 Edward Street, Brisbane and its underground coal gasification demonstration facility at 357 Kummerows Road, Chinchilla respectively.

[2] On Thursday 17 October 2013, authorised persons employed within the office of the first appellant entered the respondent's two places in order to execute the warrants. Later that day, a judge of the trial division stayed the warrants until further order.[2] On the following day, his Honour stayed them permanently and declared them invalid for describing too broadly the possible offences in relation to which the warrants were issued.[3]

[3] Later, on 18 October 2013 a different magistrate issued warrants for a place in respect of each place.[4] These warrants, too, were issued on the information of the second appellant and authorised entry into the two places. Each warrant was to expire at a fixed time during the afternoon of 1 November 2013.

[4] These warrants were issued on information which detailed circumstances by which the respondent, or its executive officers, may have offended against provisions in the EP Act, namely, s 437(1) (wilfully and unlawfully causing serious environmental harm); s 437(2) (unlawfully causing material environmental harm); s 430(2) (wilfully contravening a condition of the environmental authority); and s 493 (as executive officers, failing to ensure compliance by the respondent with the EP Act in respect of the preceding three offences). Those circumstances were set out in these warrants.

[5] Execution of the warrant for the Edward Street premises was undertaken on 18 October 2013 and concluded at about 1 am on the following day. During the course of executing the warrant, DEHP officers seized a number of items of property, including backup tapes for computer-stored data and a storage device described as "the QNAP device". As well, DEHP officers downloaded computer-stored data onto devices in their possession which, together with the seized items of property, they removed from the premises. The warrant for the Chinchilla facility was executed on Saturday 19 October 2013. Property seized included a hard drive disk from the computer used by the general manager of the facility.

[6] The respondent initiated proceedings by way of originating application in the Supreme Court on 21 November 2013 for a declaration that both the seizure and the retention of the backup tapes and the devices referred to in the immediately preceding paragraph was unlawful and a mandatory injunction for their return.[5] The application

---

1 AB211-213; 214-215.
2 AB216-217.
3 AB218-219.
4 AB220-229; 231-240.
5 Amended Originating Application: AB448-450.

was heard by a judge of the trial division on 14 and 15 April 2014. By order made on 1 August 2014,[6] it was declared that the seizure of the backup tapes and the QNAP device was unlawful and that the appellants here are not entitled to retain them.[7]

[7] On 7 November 2014, the appellants filed an application pursuant to rule 767(b) of the *Uniform Civil Procedure Rules* for an extension of time to appeal. On 22 May 2015, this Court ordered that time be extended until that date. A Notice of Appeal, which corresponds with that exhibited to an affidavit in support of the application,[8] was then filed and read by leave. This document describes the judgment appealed against as "reasons for judgment published 1 August 2014 orders pronounced 1 and 5 August 2014".

The warrants

[8] Section 456(4) of the EP Act provides:

> "(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."

Each warrant stated that the magistrate was satisfied on the material provided to her that there were "reasonable grounds for suspecting that there is or may be within the next seven days a particular thing or activity (the evidence) at [the place], that may provide evidence of the commission of an offence or offences against the [EP Act]".

[9] In each case, the warrants stated the evidence for which it was issued as required by s 456(5)(b) EP Act. It did so by the descriptor "(the evidence)" to which I have referred and the elaboration which follows it, namely, the phrase "such evidence consisting of:" below which there was a boxed area. The box referred to documents relating to three topics, namely, the respondent's underground coal gasification operations at Chinchilla, to its sampling activities on the site, and to its human resources records. For each of these topics, documents of specific types were listed. Each list of documents was said to be non-exhaustive. The lists were supplemented with the following notation:

> "Such documents pertaining to the above may be in the form of computer printouts, computer records, printouts, 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]

There was no challenge in the proceedings to the ambit of the documents described as "the evidence" in the warrants.

---

6 AB482.

7 A second order was made for return of the items. It was set aside on 5 August 2014 on the basis that the items had been returned by agreement to the respondent on 27 February 2014 in circumstances which are not relevant for present purposes: AB498.

8 AB515-520.

9 AB228, 238.

[10] Each warrant also stated that any authorised person might, with necessary and reasonable help and force, enter the place: see s 456(5)(a) EP Act. Next, it listed those of the general powers exercisable by an authorised person under a warrant set out in ss 460(1)(a) to (h) EP Act, as are applicable for a place;[10] and then summarised the seizure powers set out in ss 461(1) and (3) thereof.[11] Those latter provisions are as follows:

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

The reason of the learned primary judge

[11] The learned primary judge detected an inconsistency in the relief claimed. It was implicit in the formulation of the claim to relief that the property found at premises, the backup tapes and the QNAP device of which possession was taken by the authorised persons, and the property brought to the premises, the devices used for the downloading which at all times were in the possession of the authorised persons, had been seized. His Honour was of the view that whilst the latter devices had been subjected to the exercise of the power to make copies conferred by s 460(1)(e), they had not been seized. Those devices therefore were beyond the scope of the respondent's challenge in the application to the exercise of the power to seize conferred by s 461(1). Hence the relief granted at first instance did not extend to them. This aspect of his Honour's reasoning is not subject to a cross-appeal.

[12] In the course of argument before the learned primary judge, two issues which are central to his determination of the application were debated. One of them, which arose from a question posed by his Honour, concerned the state of mind that an authorised person need have in exercising the power to seize a thing under s 461(1).[12] The other concerned whether a particular thing on which information is electronically stored may be seized under that section notwithstanding that some only of the information so stored may provide evidence of the commission of an offence against the EP Act.

[13] The submissions of the parties on the first issue were refined and clarified during the course of oral argument at first instance. In written submissions, the respondent had submitted that an objectively reasonable belief that the material being seized is likely

---

10 At A to H at AB228, 239, including at E, the power to take extracts from, or make copies of, any documents in or on the place: s 460(1)(e).

11 At I at AB228, 239. It did so in a way which drew a distinction, on the one hand, between "the evidence for which the warrant was issued": s 461(1); and, on the other, "another thing if you believe on reasonable grounds" it meets the criteria in s 461(3)(a) and (b).

12 It was not in issue before the learned primary judge that an electronic storage tape or a QNAP-style device was a data storage medium of a type described in the notation to the lists of documents in the warrant for the Edward Street premises.

to be of evidential value was required.[13] In oral argument the submission put was that the state of mind is relevant in this way: objectively viewed, there needs to have been reasonable grounds for forming a belief that each thing seized is within the scope of the warrant.[14] The authorised person must have the belief that the thing seized answers the description in the warrant.[15]

[14] For the appellants, it was put that there is no requirement for the court to form a view as to the evidentiary value of the thing seized. The court is not required to enquire into the state of mind of the authorised person executing the warrant. The question is simply whether the thing seized meets the description of what, by the warrant, is authorised to be seized.[16]

[15] His Honour did not address these issues completely separately. His consideration of the second of them was linked to and followed upon his consideration of the first. He reasoned:

> "[45] A seizure in this context requires the executing officer to consider whether an item may be seized. In *Trimboli v Onley (No 3)*,[17] Holland J said:
>
> 'As [an executing officer] is authorised 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*,[18] 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 seizure must reasonably be carried out'.[19]
>
> [48] The court there referred to like statements in *Reynolds v Commissioner of the Police of the Metropolis*[20] and *Bartlett v Weir*.[21] To the same effect, Lockhart J (with whom Northrop J agreed) said in *Crowley v Murphy*:[22]

---

13 At paragraph 72: AB472.

14 AB32; Tr1-32 ll12-13. At AB33 Tr1-33 ll33-37, counsel for the respondent appears to confirm this submission and also state that ulterior purpose or bad faith on the part of those executing the warrants was not alleged. In absence of an allegation of that kind, senior counsel for the appellants elected not to cross-examine the respondent's deponents or to read the extensive affidavit material that had been filed on his clients' behalf: AB33; Tr1-33 ll41-43.

15 AB48; Tr2-2 ll31-33.

16 AB20; Tr1-20 ll16-19.

17 (1981) 56 FLR 321 at 333.

18 (2004) 139 FCR 537.

19 (2004) 139 FCR 537 at 542-543 [16].

20 [1985] QB 881 at 889.

21 (1994) 72 A Crim R 511 at 518.

22 (1981) 34 ALR 496 at 525.

> '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*,[23] the Full Court of the Federal Court endorsed the statement of general principles in the judgment of Lord Denning MR in *Ghani v Jones*,[24] 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 [believed] to be material evidence in relation to the crime … for which they [entered]".[25] In *Allitt v Sullivan*,[26] Brooking J expressed some doubt about this limitation of reasonableness,[27] 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.[28] 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

---

23 *Hart v Commissioner of Australian Federal Police* [2002] FCAFC 392; (2002) 124 FCR 384 at [71].
24 [1970] 1 QB 693.
25 *Ibid* at 706.
26 [1988] VR 621.
27 *Ibid* at 649.
28 See eg *Adler v Gardiner* (2002) 43 ACSR 24 at 39-30 [21] per Healy J.

question'.[29] 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 Commissioners Ex parte Rossminster Ltd*[30] as a seizure of 'a whole mass of documents, unexamined, in the hope that one of them might reveal some valuable evidential information'[31]. Eveleigh LJ there said that such an approach to the execution of a warrant would be 'untenable'.[32] It was an example of what Purchas LJ described in *Reynolds v Commissioner of Police of the Metropolis*[33] as a 'wholesale removal of documents to be searched at some other place'."

[16] It was on the basis of these reasons that the learned primary judge made the declaration that the seizure of the backup tapes and the QNAP device was unlawful.

Grounds of Appeal

[17] The appellants' Notice of Appeal sets out the following appeal grounds:

"(1) The Learned Primary Judge's finding that "the seizure of the backup tapes and the device known as the QNAP from the Applicant's premises in Edward Street, Brisbane and Chinchilla 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" was in error, in that:

(a) The Learned Primary Judge erred in finding that it was necessary to consider the state of mind of those executing the warrants. Under subsection 461(1) of the *Environmental Protection Act 1994* [the Act], the state of mind of the warrant holder is irrelevant;

(b) The Learned Primary Judge erred in reaching his decision that the state of mind of the Second Appellant and those assisting her was relevant and failed to take into account the formal concessions made by the Respondent that the lawfulness of the seizures did not depend upon the state of mind of the second Applicant and those assisting her;

(c) In reaching his decision the Learned Primary Judge made erroneous factual findings:

(i) that there was no significant dispute on the facts;

(ii) that the consideration by the Second Appellant, of 'whether the seized documents was evidence as

---

29 *Ibid*.
30 [1980] AC 952.
31 *Ibid* at 966.
32 *Ibid*.
33 [1985] QB 881 at 902.

described in the warrant, went no further than identifying electronic material which contained the name of a person, who according to the instructions given to Mr Whitely, was a relevant person in the subject investigation'; and

[(iii)] that no consideration had been given by the Second Appellant and those assisting her as to any connection between the seized documents and the facts or circumstances which might be relevant to a prosecution for a relevant offence;

(d) The Learned Primary Judge failed to consider and give effect to the decision of the Queensland Court of Appeal in *TLC Consulting Services Pty Ltd v. Paul Michael White* [2003] QCA 131 that the Second Applicant was satisfied that there was some information relevant to the warrant, she was entitled to seize the entire electronic storage mediums comprising the QNAP and backup tapes."[34]

Grounds 1(a) and (b)

[18] It is convenient to consider Grounds 1(a) and (b) together. Ground 1(b) brings to focus what was in dispute between the parties with respect to the state of mind issue before the learned primary judge. As noted, the respondent's submission at the hearing was that the authorised person must have the belief that the thing seized answers the description in the warrant. The respondent's position on the issue was clarified by senior counsel on the second day of the hearing of the application in the following exchange with the learned primary judge:

> "MR BAIN: Thank you, your Honour. Your Honour, may I tidy up what was left yesterday. Our learned friend and I have spoken. It is not necessary to recall any evidence or to call or cross-examine anyone. The difference between us is exposed on the outlines that we'll shortly show your Honour. In answer to your Honour's question which was put to me yesterday twice - sorry, because of my approach to it.
>
> Your Honour asked, having said that assume that you rejected the argument that our learned friend advanced, and then - that is to say, whether there was anything which was taken which was not within the warrant objectively viewed. My answer to that was yes, that is the question, and then your Honour added - and related to that question is a question of whether your side suggests that there is something in the state of mind of those who executed the warrant which is relevant to the question of whether the seizure was lawful. That is, the seizure was lawful.
>
> The answer to that is no, but I should make very plain that it always has been an argument and remains an argument between us, as our learned friend accepts, that the person seizing had to form the view that the thing being seized, in that person's opinion, corresponded with the warrant.
>
> I take that to be part of what your Honour put as the first part of the exchange yesterday, but it doesn't pose any problem so far as evidence or the course of the proceedings today is concerned.

---

34 AB516-517.

> HIS HONOUR: Just let me write that down.
>
> MR BAIN**: In short, the officer named in the warrant must have the belief that the thing seized answers the description in the warrant**, but that's taken up, I think, in your Honour's first question.
>
> HIS HONOUR: **So is it part of your case that any of these officers did not have the belief - - -**
>
> MR BAIN: **No, it is not**. The next thing I was going to say, there is no challenge, factually, on that basis, and I add it just for the avoidance of any misunderstanding in our submissions.
>
> HIS HONOUR: So there's no issue about it, is there, because it would be for your side to prove it.
>
> MR BAIN: Yes, it would be. We have the onus throughout showing the matter has miscarried, to put it neutrally. That's why I was unconcerned about it, and, in particular, it lies, I think, within your Honour's first of the three questions, what we find yesterday.
>
> HIS HONOUR: Yes."[35] (emphasis supplied)

[19] This formulation of the respondent's submission defined the state of mind required as one of belief that the documents seized answers the description in the warrant. In context, such a requirement would be met by a belief that the thing to be seized is a document which relates to any one of the three topics set out in the boxed area on the warrant.

[20] Also, this formulation did not define the state of mind in terms that would require the authorised person also to consider and reach a conclusion about the evidential quality of each thing to be seized. That is to say, it did not propose that in order to seize a thing under s 461(1), the authorised person must be satisfied on reasonable grounds that the thing does, or may, provide evidence of the commission of an offence against the EP Act. The appellants, of course, had submitted that the authorised person need not be so satisfied.

[21] Notwithstanding the state of the submissions, the learned primary judge evidently concluded that such a state of mind as to relevance to a prosecution for a relevant offence was necessary for a valid seizure under the section. So much is apparent from paragraphs [48] and [49] of the reasons.

[22] I am unable to reach a similar conclusion. To my mind, the relevant provisions are structured in such a way that the validity of a seizure of a thing under s 461(1) is not dependent upon the authorised person being satisfied on reasonable grounds that it has evidential relevance to an offence nominated in the warrant.

[23] Section 456(4) of the EP Act conditions the power to issue a warrant upon satisfaction on the part of the magistrate that there are reasonable grounds for suspecting that a particular thing or activity that may provide evidence of the commission of an offence against the EP Act is, or may be, at the place named in the warrant within the next seven days. The magistrate must be of a state of mind that he or she is so satisfied in order to issue the warrant.

---

35 AB48 Tr2-2 l6 - AB49 Tr2-3 l2.

[24] In this section, the particular thing or activity is accorded the descriptor "the evidence". Thus the section employs the descriptor to describe a particular thing or activity. The qualifying phrase which follows it employs the word "evidence", not as a descriptor of a particular thing or activity, but as a component of a characteristic descriptive of the evidential quality of a particular thing or activity.

[25] Section 461(1) empowers the authorised person to seize "the evidence" for which the warrant is issued. That is to say, the authorised person may seize that which is stated on the warrant to be "the evidence", and, as to which, the magistrate held the required state of mind. This section does not require the authorised person, independently of the magistrate, to be similarly satisfied.

[26] It is of significance that the distinction drawn in s 456(4) between "the evidence" and providing "evidence" is maintained throughout s 461. As noted, s 461(1) applies when an authorised person enters a place under a warrant. It authorises seizure of "the evidence" for which the warrant was issued. Section 461(3) applies to the same circumstance of entry. However, it authorises seizure of a thing beyond "the evidence" but only if the authorised person has a belief that it is evidence of an offence against the EP Act: paragraph (a). The absence of such a condition from s 461(1) is, in my view, no less significant. It grounds a firm inference that such a belief is not a condition for seizure under that section.

[27] I agree with the appellants' submission that the lawfulness of a seizure of a thing under s 461(1) is dependent upon whether or not it meets the description of what, by the warrant, is authorised to be seized. In doing so, I do not mean to imply that the authorised person need have no state of mind with respect of the thing at all at the time of seizure. In my view, the authorised person need believe that the thing meets the description in the warrant of things that may be seized as "the evidence". The appellants conceded as much during argument of the appeal.[36]

[28] I acknowledge the authorities to which the learned primary judge referred for the principle of general law that both the search and seizure must reasonably be carried out. This principle is directed towards the manner in which execution of the warrant is undertaken. It does not inherently require that a state of mind exist with respect to the evidential quality of the thing to be seized, on the part of the person executing the warrant. The state of mind that may be required will depend upon the statutory context governing the issue and execution of the warrants concerned. I would regard the principle in the present statutory context as requiring the authorised person to believe on reasonable grounds that a document to be seized is within the types of documents stated to be "the evidence" in the warrant. However, no belief on the part of the authorised person as to the document's evidential value for proof of any of the offences referred to in the warrant is also required.

Ground 1(c)

[29] In the course of oral submissions, senior counsel for the appellants stated that Ground 1(c)(i) would not be argued as an independent ground of appeal.[37] Further, no application was made to adduce as evidence on the appeal, the affidavit material which had been filed on behalf of the appellants and which, as noted at footnote 14 of these reasons, was not read before the learned primary judge.[38] In the result, neither

---

36 Tr1-8 ll9-13; Tr1-15 l21 – Tr1-16 l5.

37 Tr1-4 ll36-37.

38 Tr1-2 l1- Tr1-3 l27.

paragraph (ii) nor (iii) in Ground 1(c), both of which relate to factual findings appearing at paragraph [49] of the reasons of the learned primary judge, were pressed.

Ground 1(d)

[30] This ground of appeal is focused upon paragraphs [50] and [51] of his Honour's reasons. I understand him to be stating in paragraph [50] that authorised persons executing the warrant in Brisbane knew, as a matter of fact, that some, but not all, of the information electronically stored within the backup tapes and the QNAP device was factual matter which could have assisted in proof of one or more of the offences nominated in the warrant.[39]

[31] In the following paragraph, his Honour proceeded on the footing that unless all of the information so stored on a particular backup tape or the QNAP device was believed to have that evidential quality, then seizure of that tape or of the QNAP device would not be lawful. His analysis permitted of an exception where the entirety of the backup tape or of the device might assist in evaluating the true evidentiary significance of some of the information stored on it.

[32] In criticising the conduct of the authorised persons his Honour deprecated as an illegitimate exercise of the power of seizure, the taking of an item so that potentially relevant material within it could later be studied and assessed for its value or otherwise. He likened what the authorised persons had done here to seizure "of a whole mass of documents, unexamined in the hope that one of them might reveal some valuable evidential information". Eveleigh LJ, sitting as a member of the Queens Bench Divisional Court, in *Inland Revenue Commissioners v Rossminster Ltd* had characterised such a seizure as "untenable".[40]

[33] His Lordship's characterisation was made within the context of a legislative provision which authorised the executing officer to "seize and remove any things whatsoever found there which he has reasonable cause to believe may be required as evidence for the purpose of proceedings in respect of such an offence".[41] The authority in the warrant in question was worded in a way which conformed with this provision.[42] The United Kingdom provision under consideration differs significantly from s 461(1) in this respect. The EP Act provision does not contain a comparable requirement as to reasonable cause to believe on the part of the authorised person. To my mind, this difference substantially undermines the utility of the decision in *Rossminster* as a platform for argument by analogy in the present circumstances.

[34] The appellant's formulation of this ground of appeal implies a submission to the effect that the decision of this Court *TLC Consulting Services Pty Ltd v White*,[43] if not binding, is powerfully persuasive for the present context. The decision is not referred to by the learned primary judge in his reasons. However, it was referred to in the appellant's written submissions before him and in the course of oral argument.

[35] That case concerned s 89 of the *Fair Trading Act* 1989 (Qld) ("FT Act"). Section 89(3) provides:

> "…

---

39 There is no challenge to this factual premise by any party to the appeal.

40 [1980] AC 952 at 966.

41 *Taxes Management Act* 1970 (UK) s 20C.

42 At 957.

43 [2003] QCA 131.

> (3) A justice who is satisfied upon the complaint of an inspector that there is reasonable cause to suspect that any place has been or is being or is likely to be used in connection with a contravention of this Act or for the keeping of records relating to a contravention of this Act may issue the justice's warrant directed to the inspector to enter the place specified in the warrant for the purpose of the inspector exercising in the premises the powers conferred on an inspector by this Act. …"

Section 89(1)(e)(i) empowers an inspector under a warrant to " … take possession of … records relating to … services supplied or to be supplied or relating to any matter the subject of an investigation under this Act."

[36] The seizure and removal of a server in execution of the warrant issued under s 89(3) was challenged. de Jersey CJ (with whom Davies JA and Atkinson J agreed) rejected an argument that the server was not a record as defined in the FT Act. It was put that the server was not "a record of information … however stored". His Honour concluded that it was.[44] To seek to characterise the server as a "repository of records" of information, but not as a "record of information" was to propose "a distinction without a difference" in his Honour's view. He was not prepared to regard the power to make copies in s 89(1)(e)(i) as an indication that a server was not intended to constitute a record for the purposes of the FT Act.[45]

[37] The Chief Justice then dealt with a circumstance that is closely parallel in fact with what occurred here. His Honour explained the circumstance and analysed its import as follows:

> "It was common ground before her Honour that, 'there are some records on the server which (the appellant) was entitled to seize and that there are some records which (the appellant) was not entitled to seize. There was no consensus as to the extent of the records to which (the appellant) was entitled.'
>
> It was submitted for the respondent that the relevant record, to fall within section 89, must relate solely to the particular service in question or the subject of a particular investigation being undertaken, although there was some retreat from that written submission in the course of oral argument. The statute does not impose such a limitation. There is no reason to conclude that because the contents of the disk drive of the server relate to other matters, in addition to those immediately relevant, the server does not constitute a record 'relating' to those matters immediately relevant. In my view, the learned Judge erred in reaching a contrary conclusion. …"[46]

[38] Before this Court, the respondent contended that neither a backup tape nor a QNAP device could be a particular "thing" within the meaning of s 456(4).[47] Thus, neither could constitute "the evidence" for the purposes of that section. That was so, the argument ran, because it could not, of itself provide evidence of the commission of

---

44 At p 4. The Chief Justice considered that this conclusion was strengthened by the definition of "document" in the *Acts Interpretation Act* 1954 (Qld) which includes "any disc, tape or other article or any material from which … writings … are capable of being produced (with or without the aid of another article or device)".

45 At pp 4-5.

46 At pp 5-6.

47 The word "thing" is not defined for the purposes of the EP Act.

an offence. A distinction was drawn between information stored on a backup tape or the QNAP device and the tape or device itself.

[39] In my view, this distinction is not a valid one. What s 456(4)(a) requires is that the particular thing be something that may **provide** evidence of the commission of a relevant offence. A thing may provide evidence by being a repository from which evidence may be sourced. Thus a thing on which information probative of an offence is stored, is capable of providing evidence of the commission of the offence. Significantly, s 456(4)(a) does not stipulate that the particular thing in itself, constitute, or may constitute, evidence of the same. Had the section be so framed, then the respondent's submission would have force.

[40] The respondent also contended that unless a storage tape or a QNAP device contained exclusively information that might evidence the commission of an offence against the EP Act, it could not be lawfully seized under s 461(1). This argument reframes an argument that this Court rejected in *TLC*. I would reject it for similar reasons. Importantly, there is no limitation expressed in that section which constrains the power given by it in the way contended. Nor do I accept, as the respondent suggested, that the existence of a power to copy from such a tape or device, such as is conferred by s 460(1)(e), gives rise, by implication, to a limitation upon the power in s 461(1) of the kind for which the respondent has contended.

[41] For these reasons, I would uphold this ground of appeal.

Disposition

[42] Success for the appellant on Ground 1(d) has this consequence. It was open to the authorised persons, possessed of the knowledge to which his Honour referred at paragraph [50] of his reasons, lawfully to seize the backup tapes and the QNAP device. It follows, in my view that the declaration made on 1 August 2014 should be set aside.[48]

Order

[43] I would propose the following orders:

1. Allow the appeal.
2. Set aside the declaration (Order 1) made on 1 August 2014.
3. Refuse relief sought in the originating application filed on 21 November 2013 insofar as it relates to the backup tapes and the QNAP device.
4. Respondent to pay the appellant's costs of the appeal on the standard basis.

[44] **PHILIPPIDES JA:** I agree with the orders proposed by Gotterson JA for the reasons set out in his Honour's reasons for judgment. I add the following observations concerning the setting aside of the declaration made at first instance as to the unlawfulness of the seizure. *Entick v Carrington*[49] long ago determined that an act which is an interference with liberty or property is unlawful unless a positive law can be found to authorise it.[50] The present case concerned the power of seizure of an "authorised person"[51] as defined by the *Environmental Protection Act* 1994 (Qld) (the Act). Such a person may only seize things as authorised by the relevant statutory power.[52]

---

48 Order 1. Order 2 has been set aside. Order 3 has been superseded.

49 2 Wils 275.

50 *Clough v Leahy* (1904) 2 CLR 139 at 160 per Griffith CJ (Barton and O'Connor JJ agreeing).

51 See s 445 of the Act as to appointment of an authorised person.

52 See s 447(1) of the Act; see also *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537 at 542 [16].

[45] The power of seizure of "an authorised person" who enters a place under Ch 9 of the Act is outlined in s 461 of the Act. By s 461(1), where entry is with a warrant, "the evidence" for which the warrant was issued may be seized. A warrant may be issued by a magistrate on the application of an authorised person (s 456(1), but only where the magistrate is satisfied that there are reasonable grounds for suspecting there is "a particular thing or activity (the *evidence*) that may provide evidence of the commission of an offence against [the] Act" (s 456(4)(a)). The warrant must state "the evidence" for which it is issued (s 456(5)(b)). The term "the evidence" is to be understood as meaning the particular thing or activity that may provide evidence of the commission of an offence against the Act as stated in the warrant.

[46] Further powers of seizure beyond "the evidence" identified in the warrant are conferred on an authorised person by s 461(2)-(4). Such a person has the power to seize:

- "the particular thing" for which entry was made, where entry is made with the consent of the occupier: s 461(2).
- "another thing", where entry was made with a warrant or consent: s 461(3).
- "a thing", where entry is other than with a warrant or consent: s 461(4).

[47] Unlike the position under s 461(1) concerning the power of seizure of "the evidence" identified in the warrant, the additional powers of seizure conferred by s 461(2)-(4) are qualified by the requirement that the authorised person have a belief "on reasonable grounds that the thing is evidence of an offence against [the] Act" (see s 461(2), s 461(3)(a), s 461(4)(a)). The qualification on the authorised person's additional power of seizure, requiring reasonable grounds for believing in the evidential value of the thing seized, reflects a similar limitation imposed on the common law extension of the power of seizure. The common law extension of the power of seizure did not permit "a wholesale removal of documents to be searched at some other place".[53] As was explained in *Hart v Commissioner of Australian Federal Police*,[54] prior to the enactment of s 3K of the *Crimes Act* 1914 (Cth) allowing pre-seizure removal for examination elsewhere,[55] a similar limitation existed on the power of seizure under the *Crimes Act*, which:

> "… flowed from the conditions by which the statute governed the execution of a warrant … [and] reflected the general principles enunciated by Lord Denning MR in *Ghani v Jones* [1970] 1 QB 693. His Lordship described it (at 706) as 'settled law' that officers entering a house under a warrant or arresting a person with or without warrant for a serious offence were 'entitled to take any goods which they [found] in his possession or in his house which they reasonably [believed] to be material evidence in relation to the crime for which he [was] arrested or for which they [entered]' (at 706). See also *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* at 960 per Eveleigh LJ and at 1013 per Lord Diplock.
>
> It was possible to remove a file, book, bundle or document which was believed on reasonable grounds to contain material of evidentiary value, provided that any necessary sorting process was carried out with reasonable expedition and that those documents not of evidential value

---

53 *Reynolds v Commissioner of Police of the Metropolis* [1985] 1 QB 881 at 902 per Purchas LJ.

54 (2002) 124 FCR 384 at 402-403 [71]-[73].

55 The Act does not contain a provision such as s 3K of the *Crimes Act* which allows pre-seizure removal and examination elsewhere and it is self-evident that such conduct could not constitute seizure: *Hart v Commissioner of Australian Federal Police* (2002) 124 FCR 384 at 402 [69].

> returned reasonably promptly. It was not open to an executing officer to remove materials for later sorting without consideration of whether or not they might contain evidential material: *Reynolds v Metropolitan Police Commissioner* [1985] QB 881 at 896 per Slade LJ; at 889 per Waller LJ; at 902-903 per Purchas LJ; *Allitt v Sullivan* [1988] VR 621 at 641 per Brooking J; *Bartlett v Weir* (1994) 72 A Crim R 511 at 523 per Beazley J.
>
> A warrant could not be used to further a fishing exercise. It could not authorise the seizure of documents for examination in order to determine whether criminal charges should be laid against someone, absent any consideration of how the documents seized were relevant to or could constitute evidence of the commission of a particular offence: *Island Way Pty Ltd v Redmond* [1990] 1 Qd R 431 per Cooper J."

[48] Here, the seizure by the authorised person was not argued to have been made pursuant to the additional powers of seizure in s 461(2)-(4). Nor, in any event, was the seizure made in the "hope" that the things seized might later be revealed to be of evidential value. The seizure was made pursuant to s 461(1). That provision did not condition the power of seizure of "the evidence" upon the authorised person's state of mind as to its evidential value in relation to a relevant offence. The lawfulness of the seizure under that provision did not turn on the authorised officer's consideration of that matter.

[49] Section 461(1) required that the thing seized answered the description of "the evidence" as stated in the warrant. Clearly, the authorised person was required to turn his or her mind to that question. But whether what is seized under the s 461(1) power answers the description of "the evidence" for which the warrant is issued is not determined by the authorised officer's opinion as to that matter (although that may be pertinent to whether the officer abided by the general requirement to act reasonably as mentioned below). Before the primary judge, the respondent conceded that the authorised person had identified that the things seized did contain material which fell within the meaning of the term "the evidence" as described in the warrants, although the things seized also contained other material. There was no dispute before the primary judge that the authorised officer did not have a belief as to that.

[50] A separate issue may arise for consideration in relation to the power of seizure which concerns the conduct of the authorised officer in seizing the thing under the relevant power of seizure in s 461 of the Act. A test of reasonableness applies to such conduct.[56] Thus, the overriding obligation is to do no more than reasonably necessary to answer the terms of the warrant.[57]

[51] It cannot be accepted, as argued by the respondent, that because the QNAP device and the back-up tapes also contained some material not of evidential value, those items could not be seized as things falling within the description of "the evidence" for which the warrant was issued. Nor was the authorised person's power limited to that of making a copy under s 460(1)(e) of selected data on the QNAP device and the back-up tapes. The power to make a copy is distinct from the power of seizure under s 461. The conferral of a power to copy does not operate to limit the power of seizure (see s 460(8)).

[52] **MARTIN J:** I agree with Gotterson JA.

---

56 *Reynolds* at 889 per Waller LJ; at 896-897 per Slade LJ; and at 902-903 per Purchas LJ; *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537 at 542-543 [16].

57 *Crowley v Murphy* (1981) 34 ALR 496 at 525-526 per Lockhart J.