QUEENSLAND COURTS AND TRIBUNALS

TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

COPLEY J

No 6201 of 2024

METAROCK GROUP LIMITED **Applicant**

and

ANDREW BROADFOOT and OTHERS **Respondents**

BRISBANE

10.01 AM, THURSDAY, 18 JULY 2024

DAY 1

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HIS HONOUR: All right. If you call the matter, please.

ASSOCIATE: Metarock Group Limited and Broadfoot and others. Number 6201 of '20.

HIS HONOUR: Appearances, please.

MR C.J. MURDOCH KC: Yes. May it please the court. Murdoch, initials C.J., with my learned friend MR FORD, initials J.A.S., for the applicant, Metarock Group Limited, and we're instructed by Mills Oakley.

HIS HONOUR: Thank you, Mr Murdoch.

MR N.L. SCOTT: May the court please. Scott, initials A.D. I appear with MS MORRISON, initials N.L., on behalf of the first and second respondents in the substantive aspect of the matter and the applicant in the application for summary dismissal. We are instructed by the Crown Solicitor.

HIS HONOUR: Thank you, Mr Scott. So there's no appearance from – for the third respondent today.

MR MURDOCH: That's so.

HIS HONOUR: Okay. And for the fourth respondent, I assume there's nobody appearing either.

MR MURDOCH: That's so. They've – they were served with the original application, your Honour.

HIS HONOUR: Okay. Thank you, Mr Murdoch. Is there going to be any need for any oral evidence in this matter?

MR MURDOCH: No, your Honour.

HIS HONOUR: Okay. Is that your view too, Mr Scott?

MR SCOTT: Yes, your Honour.

HIS HONOUR: All right. And so, Mr Murdoch, you've brought an application and I see that Mr Scott has filed an application to have it summarily dismissed, but from reading the outlines that have gone back and forth, I don't know what you gentlemen – if you gentlemen have proposed any order today, but it would seem to me that in determining whether or not the case should be summarily dismissed, I have to have regard to what your case is, and it seemed to me that it might be more efficient, really, to deal with the matter this way – subject to what you two gentlemen have to say – that you, Mr Murdoch, simply advance your case for the application and that

will, one would think, if not impliedly address but certainly – well, sorry, it would impliedly address the application for summary dismissal, and if there's anything you want to say about that, you can deal with that first, and then we would hear from Mr Scott about, perhaps, the merits of the matter as well as why it should be summarily dismissed and then you'd have a reply to that. Would that be an acceptable way of proceeding?

MR MURDOCH: Your Honour, I'm content to propose in whatever way assists the court. My learned friend and I had rather thought that it would follow the way the submissions were filed, but I'm more than happy to take the course of action that your Honour suggests.

HIS HONOUR: Yes. Well, it just seemed to me that it might be the more efficient way because it would give you the opportunity to develop your case on everything - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - fully, and then for Mr Scott to do the same.

MR MURDOCH: Yes, your Honour.

HIS HONOUR: So that was - - -

MR MURDOCH: We're - - -

HIS HONOUR: That was - - -

MR MURDOCH: We're content - - -

HIS HONOUR: - - - the way I - - -

MR MURDOCH: - - - to take that – from our end of the bar table, we're content to take that approach - - -

HIS HONOUR: Okay.

MR MURDOCH: - - - and noting, with respect, that I – we assume your Honour, from what your Honour's said, is across the material.

HIS HONOUR: Well, I've read the outlines that you gentlemen have written - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - on all the issues - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - and I have read all of the affidavits that have been filed by both sides, and I have read or perused some of the exhibits, but it became apparent that some of the exhibits get replicated or seem to be replicated from time to time, and I just turned through those pages.

MR MURDOCH: Yes, your Honour.

HIS HONOUR: Yes.

MR MURDOCH: Well, on that basis, I'm happy to – unless my learned friend's got something different to say, and he doesn't appear to - - -

HIS HONOUR: No, he doesn't seem to. Okay.

MR MURDOCH: I'm happy to commence.

HIS HONOUR: Thank you.

MR MURDOCH: Now, your Honour, could I just – your Honour, as I understand things, has been provided with a court book. Or perhaps not.

HIS HONOUR: Well, I have about 2600 pages of statutory documents - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - and cases here. Is that what you're referring to?

MR MURDOCH: No, your Honour. I – I beg your pardon. I'm sorry. I think my learned friend had a court book he was going to give you. I apologise, your Honour.

MR SCOTT: Your Honour, we have a working bundle, in effect, called the court book, of - - -

HIS HONOUR: All right.

MR SCOTT: - - - all of the non-confidential affidavits. There's two confidential affidavits that relate to the public interest immunity claim.

HIS HONOUR: All right. And are they in there too?

MR SCOTT: They're not in there.

HIS HONOUR: Okay.

MR SCOTT: I have them - - -

HIS HONOUR: I see.

MR SCOTT: - - - in case your Honour needs to inspect them, but, of course, consistent with the principle, it may not be necessary.

HIS HONOUR: That's right. Yes.

MR SCOTT: We also have three volumes of all of the cases that have been referred to in the submissions, and the – within that is also the legislation.

HIS HONOUR: Well, I think I've already got all of that.

MR SCOTT: Okay.

HIS HONOUR: Just not in folders, but - - -

MR SCOTT: Sure.

HIS HONOUR: - - - with a clip in the corner.

MR SCOTT: Okay.

HIS HONOUR: So I don't think I'll need your three – your folders. Thank you all the same.

MR SCOTT: Okay. No trouble.

HIS HONOUR: But I'll take the working copies of the affidavits. The court – this is what you're referring to as the court book.

MR SCOTT: Yes, your Honour.

HIS HONOUR: Okay.

MR SCOTT: Thank you, your Honour.

HIS HONOUR: Thank you, Mr Scott.

MR MURDOCH: And, your Honour, noting that your Honour has the court book, could I hand to your Honour a list of the material that we rely upon.

HIS HONOUR: Okay.

MR MURDOCH: A copy for your Honour. A copy for your Honour's Associate.

HIS HONOUR: Thank you, Mr Murdoch. Right. Thank you, Mr Murdoch.

MR MURDOCH: Yes. Thank you, your Honour. So, your Honour, we thought that because the matter's come before the court in the way that it has, in terms of us

filing an application for review, then the strikeout being filed, it might be useful at the outset just to give your Honour an overview of how we see our application and the strikeout fitting together or sitting together. Now, in terms of the chronology, on 18 April, a magistrate issued a warrant, and that was done, we say purportedly, under section 136 of the Coal Mining Safety legislation, and that was on the application of Mr Broadfoot. And the warrant appears several times in the material, but it's – it – it's at exhibit 1 to Mr Downes first affidavit.

Now, Mr Broadfoot then, on the material, purported to execute that warrant on 23 April, including by doing the various things that are set out in his affidavit of 11 June at paragraphs 10 to 18. That being entering and then, in a – I'll use the generic term – taking certain materials. And that exercise involved him providing a copy of the warrant to certain offices of our client. He – also providing a separate document called a notice to occupier which we don't understand is contended to be part of the warrant, but a separate – a separate document. There was some engagement in preliminary conversation in which he informed Mr Erwin that he had a warrant to enter the building. There was a request of an employee of the applicant to access data. There was copying of emails and then there was – on the material, some 14,000 documents that were then put onto a hard drive and removed. Now, we contend in our application of 15 May that the warrant is invalid and seek that the orders sought in that application be made.

Now, in response to that application, Mr Broadfoot now says through his lawyers that he didn't need a warrant to enter on 23 April and that notwithstanding that he purported to use a warrant to enter, that he otherwise had the power to do what he did on 23 April. And on this basis, Mr Broadfoot and the state moved to strike out Metarock's application for review while having it summarily dismissed. And of course, if they're successful in that application, we accept that naturally, the application for review is dismissed and there's no need for your Honour to determine the interlocutory application for discovery that's made as part of that – that's made as part of that application. Our contention is that the application for summary dismissal ought to be rejected for two reasons.

The first reason being that the court would only dismiss the application for review if it formed the review – I beg your pardon, if it formed the view that the application for review had no utility or had no reasonable basis. And in our submission, that would require the court to find both that having exercised the warrant on the 23rd of April, Mr Broadfoot is now able to rely upon an alternative source of power. And that the alternative source of power that's relied upon gave him the power to remove what he did. And if the court, in our respectful submission, doesn't find for Mr Broadfoot on each of those matters, it would not be appropriate to dismiss the application for review, because it would not be a situation where there was a valid alternate source of power that Mr Broadfoot could rely upon.

So if I can move to deal with that aspect of the application – that being why it is that we say that the alternative powers aren't available. We say that there are two fundamental problems with the argument that's put forward that the warrant was

unnecessary. The first – the first is the – what I – what I might refer to as that – as the factual reality of the situation. Your Honour has seen – your Honour has seen from - - -

HIS HONOUR: Go on.

MR MURDOCH: Your Honour has seen from the material that the warrant was sought. It was given. It was executed and relied upon between 18 April and 23 April. It's our contention that notwithstanding that there are authorities which we can't back away from or ignore, that are – that are to the effect that there is the capacity to rely upon an alternative source of power in some situations. In the circumstances of this case, it would just be a fiction. It would be rewriting the factual history. If Mr Broadfoot now, having obtained from a magistrate and physically entered premises under a warrant, and purported to enter under that warrant and exercise powers as a result of entering under that warrant were now able to – with respect to him, ignore all of that and rely upon an alternate – an alternate source of power. Now, your Honour's been taken to a swathe of cases on this point. Examples including the Kitching decision, the Johns decision, Brown, Rosemont.

And what we say in respect of those is that those cases didn't deal with anything more than a mere legal mistake. That being an administrative decision-maker purporting to decide something under power A, not having it, but having the capacity to decide it under power B. Whereas, what's occurred here, in our submission, is quite tangibly different. It's not a situation of simply making a decision under power A, not having it, being able to do it under power B. As a matter of fact, which can't be erased, the warrant was obtained. As a matter of fact which can't be erased, Mr Broadfoot entered under the warrant, told the people at the – at the – at the – at the premises that that was what he was doing and on the material before the court, based all of his actions in terms of the power to enter that day, on the basis of the warrant, with the effect that the people there at the place that had been entered. That what was what it was – it can be inferred was their understanding as the basis for the entry.

So that's the – that's the factual reality which we say can't simply be ignored as a result of if there is – and we'll come to – come to this in a moment, if there is an alternate source of power. Now, your Honour has before you a large number of cases, but could we prevail upon your Honour to receive one more. It's a decision – we've provided this to our learned friends. It's a decision of Justice Kiefel when her Honour was on the Federal Court in a case called Harris and another v the Great Barrier Reef Marine Park Authority. Now, in this – in the course of giving this decision, her Honour – and this can be seen from the first page where – the very first – the very first page in the footnote, her Honour had occasion to refer to the principle that a mistake in respect of the source of power is not necessarily fatal.

And if your Honour would mind going, please, to page 654, you'll see that the discussion on the matter was introduced at paragraph 8. And then there was a reference to an old decision of – or an older decision, rather, of Abbott v Heidelberg. And her Honour goes on to say that it's attracted little attention, etcetera, and it's had

doubt cast upon it. And we don't cavil with that. Her Honour then refers to the ABT v Saatchi and Saatchi decision. And in respect of that matter – or that decision, rather, her Honour quotes what was said by Chief Justice Bowen, and that can be seen over at the end of paragraph 12. And we just ask your Honour to read the extract there of 765 from Justice Bowen's decision. And the part of the decision that we wish to particularly note is the statement where it says:

> *Particularly where the consequences for the citizen of each exercise of power are different.*

Now, in the present case, in our submission, the consequences of the exercise of power are different, because whether one is entering under a warrant or whether one is seeking to otherwise enter under section 133 – just excuse me, your Honour – under section 133 are matters that can be challenged on different grounds by the occupier. So that's why we say this is perhaps what can be described as an exception to the rule, that a decision-maker can – if he or she has relied upon one power, that does – that they do not have, be entitled to rely upon an alternate power.

In our submission, where the consequences for the citizen in respect of each exercise of power are different, that ought not to be permitted. And here, the consequences are different in that, for example, where a person purports to enter under a warrant, the warrant can be challenged, for example, as we've done here, on the basis of it being a general warrant and being bad for generality. A challenge could also be made on the basis that the pre-requisites that have to be undertaken under the Act before the warrant is exercised haven't been met. Now, that's the situation in respect of a warrant.

But if entry otherwise occurs under section 133, well, those powers of challenge won't be available, but alternate powers of challenge will be available in respect of, for example, the extent to which the powers are able to be exercised in respect of what can be taken – is what's being exercised the power under 139 that comes from entry under 133 absent the warrant or other powers that are being exercised to – and I'm using a general term – take something, the warrant powers, the powers of seizure that are given under the warrant. So the consequences are different. And the bases upon which a challenge can be made are different. So, in our submission, that's a reason why – notwithstanding that there are a range of cases that refer to this capacity to use an alternate source of power – that that principle ought not be taken to be one of – or should not be taken to be one of universal application.

HIS HONOUR: What did the warrant authorise the first respondent to take?

MR MURDOCH: Well, if your Honour – could your Honour go to Mr Downes' first affidavit.

HIS HONOUR: Well, I was just going – looking at the warrant.

MR MURDOCH: I beg your pardon?

HIS HONOUR: I was just looking at the warrant.

MR MURDOCH: I'm taking your Honour – your Honour has got it?

HIS HONOUR: I've got a copy - - -

MR MURDOCH: Yes, yes, yes.

HIS HONOUR: - - - of the warrant here. Yes.

MR MURDOCH: Well - - -

HIS HONOUR: What did it authorise him to take?

MR MURDOCH: Well, that's the problem. Well, that's – I withdraw that. That was – that was too cryptic an answer. One of the problems with the warrant, your Honour, is that it doesn't provide in that respect, because when one goes to the warrant, all it does is refer to there being reasonable grounds for suspecting that there's a particular thing or activity that may provide evidence of an offence, etcetera. So the warrant doesn't – it doesn't provide – as it should, we say – for anything to be taken.

HIS HONOUR: No.

MR MURDOCH: And your Honour will note that, under section 136 of the Act, section 136, subsection (2), the warrant must state, amongst other things, the evidence that may be seized under the warrant.

HIS HONOUR: Yes. But the first thing it must state is the offence for which the warrant is sought.

MR MURDOCH: That's right. And, your Honour, in terms of our compliant in respect of the warrant itself, which is the subject of the - - -

HIS HONOUR: Yes.

MR MURDOCH: - - - JR – of the application for review, we say that it has two defects – two fundamental defects in that it's a general warrant, which we say is impermissible in that it doesn't identify, except by parity, with respect, the words of the legislation. It doesn't identify an offence. And, secondly, nor does it identify the evidence that may be seized under the warrant.

HIS HONOUR: Well, the warrant has to state the offence for which the warrant is sought. So the act requires the warrant to do that.

MR MURDOCH: It does and we – sorry, beg your pardon.

HIS HONOUR: And all it states is, under the heading Offence, it identifies a duty provision.

MR MURDOCH: I beg your pardon, your Honour?

HIS HONOUR: It identifies a duty provision.

MR MURDOCH: That's so. It merely – it - - -

HIS HONOUR: So leaving aside trying to put it into the category of a general warrant at common law, wouldn't you be saying that the problem with this warrant is that it was – according to section 136, subsection (2), paragraph (b), the warrant had to state the offence for which the warrant was sought, and it doesn't do that because it simply refers to a duty provision. It doesn't identify the offence that is said to have been committed because of a failure to observe the duty.

MR MURDOCH: We'd accept – we accept that, your Honour.

HIS HONOUR: And the warrant must state the evidence that might be seized under it.

MR MURDOCH: And it doesn't.

HIS HONOUR: And the warrant must state the hours of the day or night when the place may be entered.

MR MURDOCH: And it doesn't.

HIS HONOUR: And it must state the date, within 14 days after the warrant's issue, that the warrant ends.

MR MURDOCH: And it doesn't.

HIS HONOUR: It's not dated, is it

MR MURDOCH: No, it's not.

HIS HONOUR: No. So you would say, wouldn't you, that the warrant is invalid because it doesn't state those things.

MR MURDOCH: Because it doesn't state those things. That's - - -

HIS HONOUR: And, therefore, you would say that – as I understand it, that you're entitled to some relief under section 43 - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - of the Judicial Review Act.

MR MURDOCH: That's so.

HIS HONOUR: Yes.

MR MURDOCH: That's so. And we - - -

HIS HONOUR: So we'll hear from Mr Scott in due course, but having regard to the way in which he's approached the matter in his written submissions, unless he's going to be asserting that the warrant is to be read with the document that accompanies it, and even if it is so read, it doesn't address all the matters that the warrant should state. It doesn't appear as if Mr Scott is going to defend the warrant on the basis that it complied with section 136.

MR MURDOCH: Well, that's certainly – and I say this with respect to the case that's been brought by the respondents – we haven't seen much, if anything, in their submissions to the effect that the warrant was good. It's all to the effect that he didn't need the warrant and there are these other powers.

HIS HONOUR: Yes. And then he's saying that – it would seem, that the court shouldn't give the applicant the relief which he seeks and which it seeks under section 43 because the first respondent was nevertheless notwithstanding any alleged defects in the warrant, the first respondent was entitled to enter anyway and to copy the documents that he did.

MR MURDOCH: Yes.

HIS HONOUR: So you said to me a few minutes ago that there were two reasons why that alternative power – or alternate power that Mr Scott's relying on is not – are not available and the first reason was the factual reality.

MR MURDOCH: And I've – we've addressed you - - -

HIS HONOUR: Which you've addressed.

MR MURDOCH: We've addressed you on that. But there's - - -

HIS HONOUR: And then the second reason was what?

MR MURDOCH: The second – the second - - -

HIS HONOUR: Or maybe you haven't told me yet.

MR MURDOCH: Well, the second reason is that when one go – and there's just something more I want to say in respect to the first point, but in order to answer directly your Honour's question, the second reason is that in order to – in order – in

order for the court to be of a – of the view that the application to invalidate the warrant ought to be set aside, in our submission, our learned friend has to do two things: has to convince your Honour that it was open in the – in these factual circumstances to exercise an alternate power and (2) that the alternate power in fact gave Mr Broadfoot the capacity to – using the generic term, take the material that he took on the 23rd.

HIS HONOUR: So I'll just note that down. The applicant cannot show that it was open to it or to him – sorry, the respondent cannot show that it was open to him to use another power to enter - - -

MR MURDOCH: That's so.

HIS HONOUR: - - - and cannot show that it was open to him, having entered – what, pursuant to the other power, to do what he did.

MR MURDOCH: Correct.

HIS HONOUR: Okay. And to do what he did, we'll just reduce to, to copy.

MR MURDOCH: Yes, your Honour.

HIS HONOUR: Okay.

MR MURDOCH: Yes.

HIS HONOUR: Yes. I know you don't like that word. You'd prefer to say image, but it's just easier.

MR MURDOCH: I don't - - -

HIS HONOUR: Without prejudging anything to call - - -

MR MURDOCH: Indeed.

HIS HONOUR: - - - it copying.

MR MURDOCH: Indeed. I don't cavil with - - -

HIS HONOUR: Yes.

MR MURDOCH: - - - that, your Honour.

HIS HONOUR: Okay.

MR MURDOCH: So there's just one more point, your Honour, we wanted to make in respect of the – in respect of the – what I might call the rewriting history point.

And it's this: that clearly – now, I know my learned friend says, "Well, if he's got the power, he's got the power and it doesn't – if he's got the alternate power, it doesn't matter". But Mr Broadfoot clearly thought that he needed the warrant, because that was the course of action that he undertook between the 18th and the – and the – and the 23rd. And it appears that it's still part of Mr Broadfoot's case that there's at least some suggestion that the alternate powers to the warrant were insufficient and if your Honour goes to Mr Lonton's affidavit, that of 4 June, and goes to paragraph 18(c) in that affidavit – and this is an affidavit that's been given on the 4th of June – if you go to – if your Honour goes to paragraph 18, in respect of the public interest immunity aspect of the case, he there – he there seeks to – in a – in appropriately sanitised way, summarise what's contained in the confidential affidavit.

And at 18(c), he says that the confidential affidavit includes an assessment of the efficacy of alternate powers held by Inspector Broadfoot to obtain specific classes of documents that he reasonably suspected would be present at the business premises of the applicant. Now, in our submission, it's at least odd that Inspector Broadfoot would be placing into the affidavit that he – it would seem, relied upon to obtain the warrant, an assessment of the efficacy of alternative powers, if in fact, as he now contends, he didn't need the warrant, he had the alternate powers.

HIS HONOUR: Does he contend that or do his lawyers contend that?

MR MURDOCH: Well - - -

HIS HONOUR: In the sense, does Broadfoot depose that in any affidavit, or is that an argument that his lawyers make?

MR MURDOCH: I would need to check that.

HIS HONOUR: Yes.

MR MURDOCH: But it's – in any event, it's being advanced on his behalf.

HIS HONOUR: All right.

MR MURDOCH: And as I read the material – and I could be – I could be wrong – I could be wrong but I don't think I am. There's no explanation at all from Mr Broadfoot as to why he embarked upon this exercise of obtaining the warrant in circumstances where he now says, admittedly through his lawyers, they didn't have to. So that was all we wish to say, your Honour, orally in respect of the first point. But in terms of a – of the – of the second point, that being that in order to make good the strikeout application, it's necessary for the respondents to demonstrate that they had an alternative power that they were able to use to take, copy, etcetera, what they – what they did. This, your Honour, depends, it would seem, upon the extent to which section 139 subsection (3) of the Act could be – could be relied upon.

Now, in our submission, section 139(3), whilst – I beg your – whilst broad, is not without limitation. And it's not – it's not without limitation because of the integers (a) through to (g) but also, it's not without – it's not without limitation because the steps that are set out in (a) through to (g) can only be utilised for a particular purpose or purposes for monitoring and enforcing compliance with this Act, or for conducting an investigation under this Act.

HIS HONOUR: So they're the limitations on doing the things that are set out in subsection (3).

MR MURDOCH: That's right.

HIS HONOUR: The inspector has either got to be monitoring and enforcing compliance with the Act.

MR MURDOCH: Yes.

HIS HONOUR: Or conducting an investigation under the Act.

MR MURDOCH: That's right. Now - - -

HIS HONOUR: Right. I understand. Yes.

MR MURDOCH: And in the present case, as we read the material, what was being purported to be done was an investigation under this Act.

HIS HONOUR: Yes.

MR MURDOCH: And that can be seen from Mr Broadfoot's affidavit of 11 June where he states at paragraph 11 – where – that he recorded the conversation that he had when he entered the premises, and notwithstanding that this was said in the context of a warrant, he says:

> *I've got a warrant to enter the building –*

Etcetera, then he says:

> *Okay, it's obviously in relation to our ongoing investigation in the – into the incident at Crinum on the 14th of September 2021.*

So that's the touchstone, we say, upon which - - -

HIS HONOUR: And does the first respondent say – depose that he was there doing anything other than investigating that incident?

MR MURDOCH: No.

HIS HONOUR: Okay. So it looks like we're proceeding on the basis that if anything was taken, it was taken, purportedly, for the – pursuant to an investigation being conducted under the Act.

MR MURDOCH: In respect of an incident at Crinum - - -

HIS HONOUR: Yes. Yes.

MR MURDOCH: - - - on 14 September 2021.

HIS HONOUR: Yes.

MR MURDOCH: So that's the important limitation, we say, in respect of the exercise of any of these powers.

HIS HONOUR: Yes.

MR MURDOCH: Now, when we go to the evidence of what was taken, that can be seen in Mr Broadfoot's 12 to 19 June affidavit and Mr Erwin's affidavit at paragraphs 21 to 32. Now, in terms of what Mr Broadfoot says in that respect, there's paragraph 12 where he refers to getting the assistance of Mr Goodworth to access data as set out there in paragraphs (a) through to (d). He then, relevantly, refers to, at paragraph 17, arranging for copies to be made of emails dated from 1 July 2021 to 30 September 2021 for inspection. So that's three months' worth of emails that were copied for inspection. And then he says at paragraph 18 that there were some 14,000 documents identified that likely fell within the scope of the warrant. He goes on to talk about it not being practical to inspect each document determined at the time of the execution of the warrant for the various reasons that he's set out there.

HIS HONOUR: So what criteria in the warrant would have assisted him to say, "Hold on. I don't want everything. I just want material between date X and date Y"?

MR MURDOCH: None.

HIS HONOUR: Okay.

MR MURDOCH: And that's the problem.

HIS HONOUR: Maybe.

MR MURDOCH: We say that's the - - -

HIS HONOUR: But can we perhaps notice anything about the correspondence or – between the date of the incident that he claimed he was there investigating and the

ambit of the range of documents he claimed he was after? So the date of the incident was – what did you say? The 14th of September.

MR MURDOCH: Yes.

HIS HONOUR: And the range of emails he was after was - - -

MR MURDOCH: Yeah. Of course. There's at least two weeks' worth – there's at least two works – worth of emails that are after the incident. That's one relevant consideration.

HIS HONOUR: Yes. So the date of the incident was the 14th of September.

MR MURDOCH: Correct.

HIS HONOUR: And the range of emails he said he was only really interested in was – what did you say?

MR MURDOCH: One July 2021 to 30 September 2021.

HIS HONOUR: So emails leading up to the incident, perhaps - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - and some emails after the incident.

MR MURDOCH: That's right.

HIS HONOUR: Right.

MR MURDOCH: But where we're going with this, your Honour – perhaps I'll cut to the chase now. On the material – and just talking to – just referring now just to the emails – on the material, it seems that what was taken in respect of the emails was the entirety of the emails - - -

HIS HONOUR: Yes.

MR MURDOCH: - - - of four individuals - - -

HIS HONOUR: Yes.

MR MURDOCH: - - - between 1 July 2021 to 30 September 2021 - - -

HIS HONOUR: Yes.

MR MURDOCH: - - - and there doesn't appear to have been any attempt to identify before they were taken how, in any way, the entirety of the file was relevant to an incident that occurred at – to an incident that occurred at Crinum - - -

HIS HONOUR: Don't you mean there wasn't any attempt to identify how the entirety of the emails captured within those dates - - -

MR MURDOCH: Correct.

HIS HONOUR: - - - was relevant?

MR MURDOCH: That – that's so, yes.

HIS HONOUR: Because that's different from saying the entirety of the file.

MR MURDOCH: Well, the entirety of the emails captured within those dates could – or any of them could be relevant to that.

HIS HONOUR: Yes.

MR MURDOCH: And what we say – and we'll take you to it in a little while – but on the authorities, taking such a carte blanche approach to the removal of documents goes beyond exercising the power of investigation - - -

HIS HONOUR: I see.

MR MURDOCH: - - - for the purposes of the legislation.

HIS HONOUR: Okay.

MR MURDOCH: So we have – and then we have the situation where – moving on from the emails – that approximately 14,000 documents were identified, and this is in the context, your Honour – if your Honour goes back to paragraph 14 of Mr Broadfoot's email, he says that Mr Goodworth, who, at this stage, has copied data to Mr Goodworth's work station, Mr Broadfoot identified what he describes as potentially-relevant folders. He then required Mr Goodworth to open each folder. Around 10 files within each folder were selected randomly for inspection.

So again, whilst we don't contend that a person, before they can take material, is required to go through every document, there needs to be, in our submission, a more forensic approach when one is acting pursuant to the investigatory powers than randomly selecting things for inspection, and then after randomly selecting things for inspection, taking all of the folders, and that appears to have been what's happened here. So we say that the – on Mr Broadfoot's own evidence, the process that was utilised was inconsistent with the lawful exercise of the power of investigation. And to make that point good, your Honour – or to seek to make that point good – one of the cases that's in the bundle that's before your Honour is the case of JMA

Accounting v Carmody. It's at tab 23 in the bundle. Page 476. If I could just ask your Honour to turn that case up.

HIS HONOUR: Yes.

MR MURDOCH: And it's an interesting analysis of the extent to which the power of search can be undertaken. There was two aspects to the case. One aspect concerned the way in which privileged material ought to be dealt with in respect of a search, but the second aspect, which the court dealt with in paragraph 24 onwards, concerned what was described there as JMA's complaint about the reasonableness of the search and seizure. And unsurprisingly, it's said there the only documents which could be copied were those which had or could reasonably be supposed to have had some relevance to the investigation that was then being undertaken by the taskforce, as well as other documents which might be relevant and which came to light during the search.

There's a reference over on page 545 to some observations of Lord Justice Slade in Reynolds v the Commissioner of Police, and I just ask your Honour to note what's said about the middle of page 545 by reference to page 895, referring to their needs to – that there needs to be a process of preliminary sorting and then – so that's - - -

HIS HONOUR: Sorry, so at paragraph 29, it records that:

> *Lord Justice Slade rejected the contention that the police would not be entitled to take away a bundle which they reasonably believed contained material of evidential value* - - -

MR MURDOCH: But if your Honour then - - -

HIS HONOUR:

> - - - *even for temporary sorting* - - -

MR MURDOCH: Yes.

HIS HONOUR:

> - - - *unless they had first satisfied themselves that each and every document in the bundle might relevant.*

So that – does that mean that Lord Justice Slade said the police could do that?

MR MURDOCH: The police could do that if – providing as – if your Honour goes to paragraph 29, subparagraph (2):

> *They must act reasonably in doing so. They're entitled to remove from the premises files –*

Etcetera –

> *which, at the time of the removal, he reasonably believes contain forged material or (ii) material which might be of evidential value as showing that the owner is implicated in some other crime.*

And if one goes over the page to see how those principles were applied in the case that was before the court, relevantly – I'll just ask your Honour to read the very first paragraph there, paragraph 30.

HIS HONOUR: Yes, I've read it.

MR MURDOCH: Yes. So the point there being:

> *One group of documents was all email store folders. None of the contents were examined before being copied. They simply copied emails in bulk. This is quite impermissible, and the copies must be returned, if that be possible, or destroyed.*

HIS HONOUR: Yes.

MR MURDOCH: Now, on the evidence here, in terms of the emails from 1 July to 2 September, in respect of the four individuals, that's what happened here.

HIS HONOUR: Didn't you just tell me that they looked at a random sample?

MR MURDOCH: Not of the emails.

HIS HONOUR: What did they look at a random sample of?

MR MURDOCH: The random sample – I'll take your Honour back to it. The random sample - - -

HIS HONOUR: So just – which affidavit is this now?

MR MURDOCH: I'm sorry.

HIS HONOUR: Is it Broadfoot of 11 June?

MR MURDOCH: Of 11 June.

HIS HONOUR: Right. Paragraph what?

MR MURDOCH: Paragraph 14. I beg your pardon. It starts at paragraph – the chronology starts at paragraph 12.

HIS HONOUR: Okay.

MR MURDOCH: But - - -

HIS HONOUR: All right.

MR MURDOCH: So we go to paragraph – I beg your pardon. We go to paragraph 12.

HIS HONOUR: I'll just go to that first.

MR MURDOCH: Yes.

HIS HONOUR: Okay.

MR MURDOCH: So there's the mapping of the file server to the workstation. Then there's the selecting relevant mailbox data held within the online email archive, and that's exported.

HIS HONOUR: For certain date ranges.

MR MURDOCH: For certain dates ranges.

HIS HONOUR: Yes.

MR MURDOCH: Then there's this Microsoft Teams searching.

HIS HONOUR: Using key words.

MR MURDOCH: Using key words.

HIS HONOUR: So would that be, perhaps, in an effort to identify if there are any documents relevant to its investigation?

MR MURDOCH: I – we don't cavil with that but only insofar as it relates to whatever was searched on Microsoft Teams. Then (d) "the workstation of Mr Erwin inspected by me" - - -

HIS HONOUR: Yes.

MR MURDOCH: - - - that appears to be a physical search as opposed to a computer search.

HIS HONOUR: Yes.

MR MURDOCH: Then Mr Goodworth - - -

HIS HONOUR: And he did that because Mr Erwin apparently said he was in possession of some - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - material relevant to the mine - - -

MR MURDOCH: Yes, yes, yes.

HIS HONOUR: - - - crinum mine. Yes.

MR MURDOCH: So, your Honour, even if (d) is a computerised search, there appears to be – we accept there's some relevance identified there. But then Mr Goodworth copied data to his workstation.

HIS HONOUR: Right.

MR MURDOCH:

> *Once the data had been copied, I reviewed the file [indistinct] documents that I considered may be relevant having regard to their names.*

That appears to be a review of folders – of computer folders and documents. And then 14, where he's identified potentially relevant folders, he required Mr Goodworth to open each folder and then randomly selected files for inspection.

HIS HONOUR: Yes.

MR MURDOCH: But then if we go down to paragraph 17:

> *I also arranged for copies to be made of emails dated from 1 July 2021 to 30 September 2021 for inspection.*

HIS HONOUR: Right.

MR MURDOCH: There doesn't appear to be any suggestion as I read – as we read the affidavit, that there was any analysis at all in respect of these emails.

HIS HONOUR: Right.

MR MURDOCH: There may have been the random selection for inspection in respect of the computer folders, but that doesn't appear on the affidavit to be the case in respect of the emails.

HIS HONOUR: So you would say all the emails should be given back?

MR MURDOCH: Correct.

HIS HONOUR: Right.

MR MURDOCH: Whether it's – whether they were utilising the warrant or whether they were utilising alternate powers, on the basis of what's said, we say, in JMA, taking that bulk load of emails was, to use the words of the court, quite impermissible.

HIS HONOUR: Okay.

MR MURDOCH: And then in respect of the non-email aspect of it, if one goes on to look at what's – to consider, rather, what's said at paragraph 31 in JMA, the court goes on to describe:

> *The examination of the remainder of the documents can best be described as cursory.*

There's a reference there to the computer technician searching desktop computers and the server, looking for key words, looking for client lists – and then looking for:

> *…client lists and financial transactions and, in particular, any which indicated overseas transactions in Malaysia or Malta.*

Downloaded that information. And that's said to have been brief but sufficient examination in the circumstances. But the court then goes on to say, in respect of the server, the examination:

> *…was limited indeed. Most of the information on the server was contained in a "work file" directory and this was downloaded in full.*

And then you'll see what's said there by the witness. And then the court says:

> *In other words, Mr Chang had no idea whether the information downloaded was relevant or not.*

Now, if we go back to Mr Broadfoot's affidavit – and I'm not – we're not talking about the emails now, we have this situation in respect of the file server where it seems that it's been copied to – I beg your pardon – mapped to Mr Goodworth's work station and, paragraph 13, data – whatever, with respect, that means – was also copied to his work station. Then Mr Goodworth reviewed the folders and documents that he considered may be relevant having regard to their names. He then required Mr Goodworth to open each folder and around 10 files within folder were selected randomly for inspection.

Now, in our submission, when one is dealing with some 14,000 documents, whilst it can be accepted that more was done here than downloading the work file directory in full, as happened in JMA, it still falls short, in our submission, as being an exercise that allowed Mr Broadfoot to have a reasonable idea of whether the information was downloaded was relevant or not, because it seems that, ultimately, what was taken

was based upon what he describes as a random inspection. And there's then been a very, very substantial amount of documents taken.

So, in our submission, again, not just in respect of the emails but also in respect of the entirety, what's happened here has been – to refer to on the evidence – to refer to what's said in paragraph 24 of JMA, an unreasonable search and seizure. And we'd also ask your Honour to note what was said at paragraph 26 of JMA, that one's entitled to copy what was reasonably believed might be of interest but one's not entitled to copy documents in relation to which there was only a remote chance that they were relevant for the purposes of the Act. It's paragraph 26. And we say that on the – on Mr Broadfoot's material, it hasn't been demonstrated that he hasn't taken documents in relation to which there was only a remote chance that they were relevant to this – what we now know to be a very specific inquiry. That being in relation to an incident that occurred at Crinum on 14 September of 2021. Excuse me. And we note, of course, your Honour – and this is consistent with what we said at the outset, that we're not arguing at the moment, the merits of the – of the – of the application for review. We're arguing against Mr Broadfoot's attempt to strike out – strike out the warrant.

HIS HONOUR: I thought you were dealing with everything to the – in your address all at once.

MR MURDOCH: No. I – we are dealing with – we are dealing with it all at once, but we didn't understand – and it's – if – it's my fault if I – if I misunderstood, that the judicial – that the application for review was being heard today.

HIS HONOUR: Well, I'm sorry, I thought that I made it reasonably plain that I thought that the most efficient way to proceed in the case was to hear from each of you in the conventional way of once only, on all the issues, then with you getting a right of reply because you were going first. Because you seek – you seek the court – you ask the court to make a – for example, a declaration that the search was – that the issuing of the warrant was invalid.

MR MURDOCH: Yes.

HIS HONOUR: And the result would then be – you would say, that I would order that the material all be returned and Mr Scott's reply to that was, "No, you shouldn't give him that relief because it would serve no purpose, because even if the warrant – the search warrant was invalid, the first respondent could have done what he did under the Act anyway.

MR MURDOCH: Yes.

HIS HONOUR: And I said to you, really, to consider the utility or the worth of that argument, it would be – it would be helpful to hear from you about why the search warrant was invalid. So what I'd been proposing was that we could deal with all of

these matters through simply two addresses, with you having the right of reply. So I'm sorry if I didn't make that plain enough.

MR MURDOCH: And it's – no, no, your Honour, I - - -

HIS HONOUR: Do you want – do you want to have a bit of time to consider things? If – or what - - -

MR MURDOCH: I'll just take a moment just to take some instructions, your Honour, if that's – if that's okay with your Honour.

HIS HONOUR: Yes, certainly.

MR MURDOCH: Yeah.

HIS HONOUR: Yes.

MR MURDOCH: Yeah.

HIS HONOUR: And if you need a bit of time - - -

MR MURDOCH: And I'm not - - -

HIS HONOUR: - - - just ask - - -

MR MURDOCH: Please, I'm not - - -

HIS HONOUR: I'm sorry if - - -

MR MURDOCH: I'm - - -

HIS HONOUR: - - - I wasn't plain enough.

MR MURDOCH: No, no, and I'm not – I'm not trying to be difficult. I just want to – just get some instructions.

HIS HONOUR: Yes.

MR MURDOCH: Just - - -

HIS HONOUR: Would you like me to adjourn for a couple of minutes?

MR MURDOCH: If that's convenient, your Honour - - -

HIS HONOUR: Okay.

MR MURDOCH: - - - yes.

HIS HONOUR: Yes.

MR MURDOCH: Thank you.

HIS HONOUR: I'll just wait out there.

MR MURDOCH: Thank you, your Honour.

HIS HONOUR: Yes.

ADJOURNED **[11.04 am]**

RESUMED **[11.06 am]**

HIS HONOUR: Yes, Mr - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - Murdoch.

MR MURDOCH: Thank you, your Honour. I've taken some instructions and I've also spoken to my learned friend who of course can speak for – can speak for himself, but the parties had not come today intending to argue the matter of final relief. And it was my misunderstanding of what your Honour said - - -

HIS HONOUR: I see.

MR MURDOCH: - - - when – I apprehended that what your Honour was seeking to do was to outline and to expand to your Honour what the case for final relief was, to assist you to then determine the strikeout, because otherwise, your Honour would be being asked to determine the strikeout in a vacuum.

HIS HONOUR: Right. Is it – is it wrong to – do you say it would be wrong to hear your arguments on the substantive issue at the same time as to hear your arguments as to why that your claim for relief shouldn't be struck out summarily?

MR MURDOCH: There's – no, it would – it would – it would - - -

HIS HONOUR: Wouldn't that - - -

MR MURDOCH: - - - not - - -

HIS HONOUR: - - - be the more efficient way to do the – to do the matter?

MR MURDOCH: As a matter of – as a – as a matter of capacity for the matters to be heard and determined, that would be open. The practical – there's a – there's a couple of practical difficulties.

HIS HONOUR: Yes.

MR MURDOCH: One being either party may wish to say more of or put on further evidence in respect of the application for review, and the second point is – and this is part of why with respect to everybody, that the matter's ended up in the way that it is, because we have an application for discovery.

HIS HONOUR: Yes.

MR MURDOCH: And we would – we would want to have that – if your Honour was - - -

HIS HONOUR: Sorry, when you say for discovery, do you mean that you seek an order that they provide the affidavit - - -

MR MURDOCH: The - - -

HIS HONOUR: - - - that they gave to the justice?

MR MURDOCH: That's so. That's so.

HIS HONOUR: To the magistrate.

MR MURDOCH: And - - -

HIS HONOUR: But isn't – is that – is that application one that does not depend upon the validity or otherwise of the search warrant? In the sense that if the search warrant was held to be invalid and there was an order that you got everything back, would you still be seeking discovery of the affidavit that led to the search warrant?

MR MURDOCH: No, no. No, we wouldn't. It's just that one aspect of our argument in respect of – and one aspect of our argument in respect of the – of the search – of the search warrant is that it – whether or not, given the width of it, it was open to the magistrate on the material to issue it, and that's why we want to see the material. But having said that, if we accept that if the court ultimately was with us in respect of the warrant being bad for the other reasons that we've discussed earlier today, well, the court wouldn't need to – wouldn't need to determine whether or not the material before the magistrate was capable of satisfying the magistrate to issue the warrant. So it's not – we don't necessarily need the material.

HIS HONOUR: No.

MR MURDOCH: But it's – it is an aspect of the argument.

HIS HONOUR: Can I ask Mr Scott something?

MR MURDOCH: Of course. May it please the court.

HIS HONOUR: Mr Scott, do you contend that the warrant was good on its face? That it complied with section 136 of the Act?

MR SCOTT: I haven't come here today with a contention of that kind - - -

HIS HONOUR: No.

MR SCOTT: - - - because I've come here today with an application for summary dismissal under section 48.

HIS HONOUR: Right. So do you concede that the warrant – would you concede that the warrant was bad? Because it was required to specify – to state the things set out in 136 subsection (2) paragraphs (a) to (e)?

MR SCOTT: Well - - -

HIS HONOUR: And that most of those aren't there.

MR SCOTT: Well, your Honour, that does seem to be the case. There may well be an argument about whether or not they're impliedly disclosed and I haven't come here prepared for an argument of that kind. Because our application under section 48 was brought in accordance with section 48 which requires – and that is of the Judicial Review Act, for an application under that section to be brought at the earliest possible time. In other words, before the final hearing. Our point – just to clarify, on the summary dismissal application with respect to the warrant, is that the relief that's sought with respect to the warrant and the application is an order in the nature of certiorari, which can only be granted by the court if the warrant affects rights.

And if – as we submit, there was a power otherwise to enter the premises and do what was done, then the warrant didn't affect rights because there was no right on the part of the applicant to prevent that from happening. So even if your Honour were to take the view that the warrant is bad on its face for the reasons that have been discussed, then there's no power to grant certiorari, and for that reason, that's why the summary dismissal application was brought, at least in respect of that part of the judicial review application. Because section 48, as we've indicated in our reply, permits not just dismissal of a whole application for judicial review, but it may permit dismissal of a claim for relief in an application for judicial review where it discloses on a reasonable basis.

HIS HONOUR: Yes. Because in the alternative, they seek a declaration.

MR SCOTT: Yes.

HIS HONOUR: That the warrant was invalid.

MR SCOTT: Well, actually, the declaration is broader than that, in that it says that what was done in purported authority of the warrant was unlawful, which might comprehend – even if we're right about the warrant being unnecessary, a challenge on the basis of the reasonableness of search, which has been developed and which we would submit doesn't depend at all on the validity of the warrant, because we submit once the premises are entered, on any of the bases identified in section 133, the powers are identical. The only difference being that if there is a warrant that's necessary, what the warrant does is confines the area of search as your Honour will be of course familiar with. But of course the fundamental case against us is the warrant fails to do that, so it's irrelevant in that respect.

HIS HONOUR: Yes.

MR SCOTT: That's our point.

HIS HONOUR: So do you also just wish to deal with the matter today confined to the – basically the application for effectively a summary dismissal of it. That's so.

MR SCOTT: Okay. Yes.

HIS HONOUR: All right.

MR SCOTT: And of course, that – if we win on that, even if we win on the narrow basis that the warrant – there's no basis for granting relied in relation to the warrant for the reasons I've outlined, that then obviates the need for the court to then grant disclosure, because it's – then the sole issue then becomes confined to the reasonableness of the search as opposed to whether or not there was power to issue the warrant.

HIS HONOUR: Yes. Okay. All right.

MR SCOTT: Thank you, your Honour.

HIS HONOUR: Okay. Then proceed as you were intending to - - -

MR MURDOCH: Yes. Thank you - - -

HIS HONOUR: - - - Mr Murdoch.

MR MURDOCH: Thank you, your Honour. I think that your Honour that – that sort of – that's one of the areas where the parties – were the parties to part in respect of the summary dismissal is – as I've said at the outset, that really, in order for summary dismissal to occur, it's necessary for – we say, the respondents to convince or – to convince the court or for the court, on the basis of their submissions to accept, two things: (1) being that the alternate power was capable of being used, and (2) that

it, when used, gave the power to take that which was taken. And if – and the reason why – the reason why we say the latter is, because if the ultimate power that's relied upon didn't give the power to take that which was taken, all they're left with is the warrant. So we – it's difficult, in our submission, to see how your Honour can simply deal with the – what the – what's referred to as the entry aspect of the warrant, when the power to issue a warrant plainly – when one looks at the section, deals with more than entry.

Because the warrant itself provides – and must provide, at section 136, must state the various things which include the evidence that may be seized under the warrant. So the warrant, in our respectful submission, does more than just provide the capacity to enter. It also specifies that which may be seized. And that's – that's in a context where in this legislation, there's section 139 subsection (3) which deals with the powers – the general powers that can be exercised after entering. But there's also section 143 which deals with seizing evidence at a coal mine. And obviously, who enters a coal mine or other place under this part, may seize a thing at the coal mine or other place, if the officer reasonably believes the thing is evidence of an offence against this Act. Now, there's the – we say that this – the power to seize comes – can only come from the warrant. Because that's the – that's the – that in the legislation is what provides for the power to enter and to seize something.

Now, I've dealt with – sorry, we've dealt with the reasonableness of the taking aspect of the case. The other aspect of the case that we say is also problematic for the applicant is whether the applicant – on the material that's been put on, is able to demonstrate that what's occurred here is properly within section 139 subsection (3)(c) or (d) because as your Honour referred to earlier, in terms of how one describes what's happened here, there's these inconsistent – and I say that without criticism – it's just a fact, there's inconsistent references to the actual process that's occurred. There's a reference to mapping a file server. That's at 12(a). There's a reference to copying data to a workstation. And then when one goes to the notice to occupier that was given with the – with the warrant, there's a reference to something called imaging.

The – for Mr Haines to image the following: imaging of the server, imaging of the SharePoint facility, imaging of the Crinum drives, imaging Mr Erwin's work computer, imaging the employee and ex-employee email accounts, including for the three people that are referred to there. And if your Honour goes, please, to Mr Erwin's affidavit of 15 May 2024, he refers there at paragraph 11 to the process of imaging – I'm sorry – at paragraph 11 to:

> *The process of imaging a server or computer drive involves the creation of an identical copy of the server, including the operating structure of the server and all data contained on the server.*

Now, if one then goes back to the legislation, which provides that Mr – under section 139, Mr Broadfoot could take a thing or a sample of or from a thing at the coal mine or other place for analysis or testing. It's not apparent on the material that that was

what was happening. And then they can copy a document at the coal mine or other place. Now, in – accepting that we say it's for the applicant to demonstrate these concepts of imaging and the like, we say it's challenging for the applicant to demonstrate to the court that what was actually happening here was, for the purposes of the legislation, copying a document and that's because when one goes to the definition of document – and that's in your Honour's bundle at page 8 of the bundle of authorities – in terms of a document, that's a record of information - - -

HIS HONOUR: Just a sec.

MR MURDOCH: I'm sorry.

HIS HONOUR: What are you asking? What are you asking me to look at?

MR MURDOCH: The definition of document - - -

HIS HONOUR: To – found where?

MR MURDOCH: - - - in the Acts - - -

HIS HONOUR: In the Acts Interpretation - - -

MR MURDOCH: Yeah.

HIS HONOUR: - - - Act.

MR MURDOCH: And that's extracted at page 8 of your Honour's bundle.

HIS HONOUR: Okay. I think it's at page 100.

MR MURDOCH: Oh, I'm sorry.

HIS HONOUR: No. Oh, no, you – okay. So Acts Interpretation Act. Page 8. Document.

MR MURDOCH: Yes.

HIS HONOUR: Right.

MR MURDOCH: A document means a record of information however recorded. And then electronic – and it includes an electronic document. An electronic document means the things that are set out there. It doesn't appear that imaging or mapping a file server comes within (a) of electronic document. It's difficult, in our submission, to see how mapping a file server or imaging something is a record of information, be it reproduced or in digital form. Whereas what appears to have happened is that there's been a mapping, imaging, and then the taking of the server

itself, as opposed to the actual documents, and that seems to be confirmed by the reference to data.

So we say that there's a real question as to whether what's happened here is within section 139D, and if it's not, that would mean that the power that the inspector would have to arrest on is the power of seizure, which we say inevitably takes him back to having to rely upon the warrant. So unless your Honour had any further questions for us on the strikeout aspect of the case, that was all we intended to address your Honour on orally there.

HIS HONOUR: Okay. Thank you.

MR MURDOCH: Did your Honour wish to hear us now in respect of the public interest immunity aspect? In terms of the discovery application.

HIS HONOUR: Well, if we're only confining it to the strikeout application, doesn't that matter only arise if the matter's not struck out?

MR MURDOCH: Correct.

HIS HONOUR: Then why would I want to hear from you on that given that we're only dealing with the strikeout application now?

MR MURDOCH: Because the – it was proposed that your Honour hear from us in respect of the disclosure application as well because if your Honour was inclined to not strike the matter out, your Honour could then decide the disclosure application. And if your Honour decided the disclosure application in my client's favour, we would then have the benefit of the disclosure for when the substantive matter was heard.

HIS HONOUR: Okay. Can I just see the file for a moment, please?

MR MURDOCH: Yes, your Honour.

HIS HONOUR: Okay.

MR MURDOCH: Your Honour, we've given you reasonably-comprehensive written submissions in respect of this aspect. So I – we certainly won't – will not take as much time as we've taken in respect of the strikeout matter. As we understand the case that's brought against us in respect of the application for disclosure, it's contended that the affidavit that was put before the magistrate ought not be the subject of disclosure because it is the subject of a claim for public interest immunity.

Now, your Honour, in terms of the test for public interest immunity, it was – it's, of course, something that's oft referred to, but if we could just ask your Honour to go to Sankey v Whitlam that is in the – and your Honour will, of course, have looked at

these matters before, but if – we just ask your Honour to go to Sankey v Whitlam, and that's at tab – that's at page 1906 in the material. And when your Honour takes up Sankey v Whitlam, if your Honour could go, please, to page 39.

HIS HONOUR: Yes.

MR MURDOCH: Now, the general principle was set out there by Acting Chief Justice Gibbs. An objection – this is about a third of the way down. The public interest objection, your Honour, can be made on two bases: (1) that the document belongs to a class that ought not be disclosed, whether or not it would be harmful to disclose the contents and (2) the objection can be made because it would be against the public interest to disclose the contents. So can either be in a what one might call a protected class, or (2) it'd be against the public interest to disclose its contents. In terms of a class claim, some examples of that are given towards the end of the page: cabinet minutes, minutes of discussions between heads of department, matters relating to framing of government policy at a high level and the like. Now, we don't apprehend that the claim here is made on the class aspect, rather, we apprehend that it's made on the basis that the affidavit is of a – is of a nature that it would be against the public interest to disclose its contents.

Then what's then required, of course – and this can be seen at page 43, of Sankey v Whitlam is that if one goes to about a third of the way down on page 43, the court must engage in a balancing exercise between the desirability of documents not being disclosed, against the need to produce them in the interests of justice. And of course, in a case such as the present, we would say – we say that the – in terms of balancing the interests of justice, there's the interest that's claimed by the applicants and which we'll come to in a moment. And then of course, there's the interest that our client has in obtaining in the orthodox way, discovery of the material that was relied upon by the magistrate to form the view, whether or not to grant the – to grant the warrant, which is that we – so the – but ordinarily, we'd be entitled to that, in order to test whether or not sufficient material was put before the magistrate to justify the issuing of a warrant, particularly in the – in the wide nature of the warrant that was issued here. So they're – that's what we say is our interest in seeing it.

In terms of the applicant's argument, as we understand, they say that it would be injurious to the public interest for the affidavit to be provided and that's putting it in a nutshell, as we understand it, because it contains references to matters going to the investigations that the inspectors have conducted up to that – up to that point. Now, the points that are relied upon by the applicant in that respect can be seen from Mr Lonton's – I beg your pardon, the respondents in that respect, can be seen in Mr Lonton's affidavit. And if your Honour could go to that, please. Mr Lonton sets out from paragraph 13 why it is he says that the disclosure of the affidavit would be – would be injurious to the public interest. And at paragraph - - -

HIS HONOUR: So which affidavit of Lonton is this?

MR MURDOCH: I'm sorry. That's the 4 June affidavit, your Honour.

HIS HONOUR: Four June. Paragraph 13.

MR MURDOCH: Yes.

HIS HONOUR: Did you say? Yes.

MR MURDOCH: Yes. Now, at paragraph 13, he provides a conclusionary statement at paragraph 13(a) that the – its disclosure would be injurious to the public interest because it contains what he describes as confidential information relating to an ongoing investigation into potential offences by the applicant under the CMHS Act and (b) it discloses what he described as the modus operandi of the first and second respondent. Now, of course, the fact that something is confidential is not of itself a bar to disclosure. It needs to be demonstrated that it would be injurious to the public interest to disclose the material. And in terms of what's said to be confidential, that seems to be dealt with at paragraphs 14 through to 17 of Mr Lonton's affidavit. And if one goes through – if one goes through the affidavit, paragraph 14, he refers to the document outlining – he says in detail, suspicions about acts or omissions that may give rise to contraventions of safety and health obligations.

Now, the first thing we say about that is that noting that the investigation here was in respect of an incident at the Crinum mine on 14 September 2021, we are not dealing here with the situation where a warrant is being sought in respect of ongoing contraventions. Because your Honour will know that there are circumstances where warrants are sought not just in respect of past contravening conduct, but in respect of continuing conduct. And one can understand there why it may be that it's considered injurious to the public interest for the subjects of the investigations to have access to the warrant. But that's not what's happening here. The incident was way back in September of 2021. B: suspicions as to the identity of persons who hold those obligations. Well, the warrant has been issued in respect of section 41 of the Coal Mining Safety and Health Act, which deals with the duties held by a mine operator. So there's no secret as to who the identity of the person who was the subject of the – of the – of the relevant contravention is. It can only be the mine operator at the Crinum mine.

So – then the evidentiary basis upon which the above suspicions are reasonably held by Inspector Broadfoot – well, that rises no higher than what we've already said in respect of (a) and (b) and then (d), identifying classes of documents which are reasonably suspected to be located at the premises and how those documents relate to safety and health obligations held by persons identified in the affidavit. Now, again, the warrant has been issued in respect of an offence against the operator. So it's – with respect, difficult to see how – or perhaps why there was information in the affidavit that related to obligations held by persons, plural. Then if we go to paragraph 15. It's said that there'd be a likely prejudice to the investigation alerting persons of interest as to the progress of the investigation. Again, this is in respect of an offence that's said to have occurred on a particular date many years ago. B: it would disclose the sources of information available to the investigation.

Now, of course, we accept that this is a summary of a confidential affidavit, but 15(b) does not, as we read it, go so far as to say that we're dealing here with informants which we accept that informants are – for the purposes of public interest, in a special case. It simply says it would disclose the sources of information – whatever that means, available to the investigation. And then (c), it would enable those persons of interest – remembering of course that the warrant's against an entity, those persons of in – is in respect of an offence by an entity, those persons of interest to effect the integrity of the investigation, etcetera.

Now, this is, of course, all said in the context of Mr Broadfoot when he attends at the office of our client and records his discussion with them. And this could be – this – and I'm reading, your Honour, what can be heard on the transcript. Amongst other things, Mr Erwin says to Mr Broadfoot in the course of the discussion:

> *I suppose, I hope that you don't think we've been dishonest in not disclosing information at all.*

Mr Broadfoot's response is:

> *Not at all.*

Mr Erwin:

> *It's absolutely not been the case.*

Mr Broadfoot:

> *No, no, definitely not, but it's something we probably need to do as part of our investigation to satisfy ourselves that we do have everything.*

So on the day in question, a denial of any dishonest response to notices. So it's difficult to see how there could be a reasonable concern that there'd be some nefarious conduct would occur along the lines of what's set out there in subparagraph (c). And this is all in the context, your Honour, of, as you will have seen from Mr Downes' affidavit and Mr Erwin's affidavit, that there have been scores of notices to produce that have been issued in this matter. That have been scores of interviews with witnesses, none of which, we say, are confidential. And my client on the affidavit material has – is privy to that information.

So this is not in that line of country of case where one has an investigatory body conducting some sort of covert investigation which, if the subject of the warrant becomes of, that it will somehow affect the integrity of the investigation. It's simply not that scenario at all, regardless of how Mr Broadfoot might wish to portray it. And then in terms of the modus operandi point that he seeks to make in paragraph 18, he says:

The affidavit contains a summary of the evidence provided by persons in interviews.

Well, as I've addressed you on, there's no confidentiality in respect of those interviews. A summary of preliminary conclusions reached by him, well, with respect to him, that's all very interesting, but it doesn't reveal anything that won't become known in due course that could affect the integrity of the investigation. And then as I've already taken your Honour to, an assessment of the efficacy of alternate powers held by Inspector Broadfoot to obtain specific classes of documents. Again, it's difficult to see, particularly the argument that's now being run, how there could be some prejudice to the applicant from that information being made known to the – prejudice to the respondents, rather, from that information being made known to the applicant.

So we have a situation here where the warrant has been issued against a company in respect of an offence that can only be committed by a company – I beg your pardon – an operator, which is a different company. There's no suggestion of any ongoing criminal activity. There's no suggestion that our client is not otherwise law-abiding. There's no suggestion of dishonesty on its part in respect of withholding documents. In fact, that's specifically rejected by Mr Broadfoot when he issues the warrant.

So, in our respectful submission, the matters that are relied upon by Mr Broadfoot are insufficient in the circumstances of this case to demonstrate there being a public interest in the material not being provided. And your Honour wouldn't even have to go, with respect, to undertaking the balancing exercise that is required under the Sankey v Whitlam test. And if your Honour did, the public interest aspect is so weak that the balancing exercise would be, in our submission, decided in our client's favour. So unless your Honour has any further questions for us in respect of the public interest immunity aspect of the case, they're our oral submissions on that.

HIS HONOUR: Did you address me in relation to paragraph 18(d) of Lonton's affidavit where he refers to the fact that Broadfoot includes information about the details of future investigative steps to be undertaken?

MR MURDOCH: I beg your pardon. I did – I did not. Your Honour, the difficulty, in our submission, in respect of that point in terms of the public interest is that it's not expanded upon as to how – if those future investigative steps were to be revealed, how that would prejudice anything. It's simply a statement that it details future investigative steps. And particularly where this is a case in which, prior to this argument being raised, the investigations haven't been conducted in some secret way. It's difficult to see how this case falls into the situation of the investigators wanting to keep their cards properly – keep their cards close to their chest in terms of not tipping somebody off, because there has already been scores of notices to produce, scores of interviews, that have been conducted.

And I'm reminded that, in the second affidavit of Mr Broadfoot – I withdraw that. Just excuse me, your Honour. I just want to turn up one further note, if I may. Yes.

As I say, there's already been scores of interviews, scores of notices to produce, so it's difficult to see how obtaining this affidavit would, in a prejudicial way, provide details of further investigative steps. But we can't take that any further, your Honour, given that there's really no particulars given as to what those steps are.

HIS HONOUR: Okay. Thank you, Mr Murdoch.

MR MURDOCH: Thank you, your Honour.

MR SCOTT: Your Honour, if I could start with the application for summary dismissal. And as I said briefly earlier, the power to summarily dismiss an application for judicial review is granted to the court by section 48 of the Judicial Review Act. That power is expressly granted to either dismiss the whole application or a particular claim for relief. And that might, for example, be, as in this case, where the claim – one of the claims for relief in the application is for an order in the nature of certiorari.

Your Honour, it is firmly established as a proposition of law that certiorari can only be granted by a court in respect of a decision of order or some other legal instrument where that affect rights. The authority for that proposition is Ainsworth v Criminal Justice Commission [1992] 175 CLR 580 to 581. And that's at tab 11, volume 1,of the bundle. I don't need to take your Honour to it. But the fundamental explanation why that proposition is so is that an order in the nature of certiorari quashes a legal effect on rights; effectively, reverses that effect. If what's been – in issue doesn't affect rights, then there's nothing to quash. And the fundamental proposition, as we deal with the warrant, is concerned is that the warrant granted no greater powers than inspectors otherwise had to enter the workplace and do what they did.

That's clear, we submit, if your Honour goes, please, to the Coal Mining Safety and Health Act, which is behind tab 3 of the authorities bundle, volume 1, section 133 grants a series of separate and distinct powers. Two officers, which are defined to include – defined by section 132A to include inspectors. And your Honour will see from subsection (1) there's a number of bases that entry may be authorised. One is by warrant. The other is if the place is, or reasonably is – reasonably suspected to be a workplace. There is no dispute at all that the place in question here was a workplace.

What follows from that in respect of how the entry is concerned is this. Firstly, the occupier – here, the applicant in the substantive proceeding – had no right to refuse the inspector's entry to the workplace. They had no right because it was a workplace and the inspectors had that power under 133(1)(e). So the warrant, insofar as it purported to authorise that entry, had no effect on rights because of the absence of a right on the part of the occupier to refuse entry. There is also the practical issue, which is let's assume certiorari is granted here in respect of the warrant, that order will have no effect because all that would do would be to take away the warrant and the authority to enter will still have existed.

The same follows, we submit, in respect of the powers that were exercised here, which was a power to copy documents. Electronic documents. That, of course, appears in section 139 of the Act, which your Honour's been taken to. Our fundamental point is when your Honour goes to section 139, subsection (1), what's clear is that the section applies to an officer, who might be an inspector, who enters a coal mine or other place. That must be pursuant to a grant of power under section 133. The section doesn't distinguish as to what power to enter is exercised. Provided there is a power to enter, then those powers that appear in section 139 are enlivened and, again, therefore the warrant didn't affect rights because those powers that appear there were available to the inspectors regardless of whether or not the warrant existed.

All that the warrant can do is limit the powers of the officers by the – what's required to be stated in section 136. That is, for example, the offence for which the warrant is sought , the evidence that may be seized and so forth, but of course, the fundamental point that's against us in the substantive proceeding is that there was no limit granted by the warrant. So there is no utility or relevance in the warrant insofar as the ambit of the officer's powers is concerned.

Something has been said about section 143. Your Honour will see that it does not distinguish either between what powers are exercised when an entry occurs and so it – that provision is engaged regardless of what power is exercised [indistinct] the place, but it is a separate and distinct power from the powers that are granted by section 139, subsection (3), and the reason why that's clear is section 143 deals with seizure. Section 139 does not provide for seizure. It provides for other things. Although, arguably, subsection (3)(c) might, in a broad sense, be within the ambit of seizure, but to read the provisions as a whole would be to read seizure referred to on 143 as referring to something different. There is no express reference in 139, subsection (3) to the word "seizure". What we're dealing with here is, instead, an exercise of the power in section 139, subsection (3)(d): copy a document.

Now, effectively, there are two points about the lawfulness of what was done put against us. One is a point about the reasonableness of the search by reference to JMA Accounting. The other point is whether or not what was being done was an exercise of the power under section 139, subsection (3)(d). That is, copy a document. But the answer to whether or not either of those grounds are made up – made out are not affected in any respect by the validity of the warrant because even if an entry is under a warrant, then the powers that may be exercised are only those powers that are granted to inspectors when they enter a place, such as the powers granted by section 139.

Accordingly, even if the warrant were valid, the issue would still be whether or not the officers, for example, acted within the introductory words of subsection (3) of section 139. That is, whether or not they were exercising the power for conducting an investigation, and, your Honour, there is no dispute – there can be no dispute that what they were doing was conducting an investigation. The question is whether what they were doing was for an investigation and, perhaps, whether or not there's

an implied limit on that power to confine what's been done by reference to a concept of reasonableness as per JMA Accounting.

As to that question, there may well be a trial issue as to the construction of the word "for" conducting an investigation. Our primary position, or the position we put in written submissions, is there's – they're not. It's not. But it may well be, after having heard what I've heard today, that there is a trial issue about that by reference to the word "for". The way we've comprehended that word "for" is that that is a – that introduces a purpose, if required. It doesn't introduce a requirement that the documents taken must all satisfy requirements of relevance at the moment of taking them. Provided that they are taken bona fide for the purpose of the investigation, then they are taken for conducting an investigation, our ultimate case is, and the reason for that is the reasons of practicality that Mr Broadfoot identifies in his affidavit. Tab 7. The affidavit, I think, 11th of June 2024. Those matters of practicality appear at paragraph 18.

In terms of the legitimacy of that being a purpose for taking things – that is, undertaking a preliminary analysis of what's there and then taking it away for more definitive examination offsite – that's recognised by the authorities; accepting that there's a contention about whether or not they – the officers in this case were reasonably within the confines of that object. At the very least, that process is recognised, and it's recognised in JMA Accounting, to which your Honour was taken, and I'll take your Honour back to that case, if it pleases. Your Honour, that was at tab 23, volume 1 of the authorities, and if I could ask your Honour, please, to read paragraph 13 on page 542.

HIS HONOUR: Yes.

MR SCOTT: And that, of course, is consistent with what you were earlier taken to, in JMA Accounting. For example, paragraph 29, where there was a reference to a rejection of a submission that the police would not be entitled to take away a file or bundle which they reasonably believe contain material of evidential value, even for the temporary sorting at the police station. Now, this, of course, is framed in JMA Accounting in the oral submissions on behalf of my learned friend, by reference to what was described as JMA's complaint at paragraph 24 about reasonableness. Now, reasonableness is, of course, a fundamental concept in administrative law. And what has been clarified by the High Court relatively recently, in recent years, is that reasonableness does not exist in a vacuum.

Reasonableness is gauged by reference to principles of statutory interpretation of the subject matter scope and purpose of the particular power being exercised, and that was identified by – in the High Court's decision of Minister for Immigration and Citizenship v Li, L-i (2013) volume 249 CLR 332 and the relevant paragraph reference is paragraph 67 of the judgment in Li. I apologise if we don't have a copy of that for you. I didn't apprehend we'd be getting into - - -

HIS HONOUR: That's all right. I've made a – I've made a note of the reference.

MR SCOTT: Thank you, your Honour. But the point is, that – if this case does resolve into a question of reasonableness of the search and what was taken, and whether there was an overly indiscriminate approach, two things follow: one is, there is a question of construction as to which – as to how reasonableness is to be judged in the – this statutory context, whether power in section 139 is a power expressly – a power to do things for a particular purpose. Here, conducting an investigation. And if, for whatever reason, the inspectors assess that it is impractical to definitively resolve all questions of relevance and privilege as at the moment of the search, and it's of necessity, required that the material needs to be taken away offsite whilst confidentiality of anything that might be privilege is maintained, then the question of interpretation is whether or not that is unreasonable in that statutory context.

The second thing that follows is, that's potentially a trial issue that would be addressed by potentially further evidence as to why it was thought necessary to take away the material for later assessment. But the fundamental point is, your Honour, that in no respect does the answer to that question depend upon the validity of the warrant, because the powers that are granted by section 139 may be exercised, regardless of whether or not there is a warrant. And in the end, it's a question of interpretation of section 139. A point was raised by our learned friends about, well, there is difference between how things are done under a warrant and when the more general powers are exercised, and this difference was said to arise from section 136. In particular, the requirement that the things be stated.

Can I just refer your Honour to a decision of the High Court in Smethurst which is at tab 32 volume 2 of the bundle, [2020] volume 272 CLR 172 paragraph 28, where the point is made in relation to a different statutory warrant power, but it's a familiar proposition that the purpose of requirements such as those that appear in section 136 is to define the areas of search. That is, not to grant a power, to take anything in particular, but to confine the ambit of the powers of entry that may be exercised under 139 and elsewhere. Finally, the other point that's taken relates to whether what was done was copying a document, and great significance was placed upon this concept of imaging. We differ with our learned friends about whether or not there's any mystery in what was done. It's quite plain, we submit, from Mr Broadfoot's first affidavit at paragraphs 12 to 9, tab 7 of the court documents folder and Mr Erwin's affidavit, tab 4 of the court documents folder paragraphs 10 to 11 and 30 that documents were copied – electronic documents were copied.

And if your Honour goes back to the definition of electronic documents in the Acts Interpretation Act, subparagraph (c) would seem to clearly comprehend the concept of imaging a server. That is, making a copy of the record in digital form, capable of being reproduced, transmitted, stored, or duplicated by electronic means. But in any event, if your Honour's in any doubt about that at all, it ultimately just goes to the trial issue that does not depend upon the validity of the warrant. And indeed, whether the warrant is valid or not, it did not affect rights in the sense that it granted any greater right to do what was done than what was done under – that was available to be done under the more general powers. Could I have some water, please. Thank

you. Can I then please deal with the public interest immunity question that relates to the disclosure application, your Honour?

HIS HONOUR: Could I just ask you, Mr Scott - - -

MR SCOTT: Sure.

HIS HONOUR: - - - the – just so that I have it precisely here, the applicant seeks order in the – orders in the nature of a writ of certiorari.

MR SCOTT: Yes.

HIS HONOUR: And you've dealt with that. Then further, in the – in the alternative, it seeks a declaration that the warrant is invalid, and as I – am I to understand that your application for summary dismissal relates to that aspect of the orders sought too?

MR SCOTT: Yes, your Honour. I beg your pardon. I should address that as well. Yeah, so 2(a). That – what I was saying about the other aspects that might involve the trial issue, really deal with 2(b) and (c). If I could deal with the question of declaration that the warrant was invalid, that too goes to the court's power and again, in Ainsworth's case to which I referred earlier, but this time, the relevant passage in Ainsworth commences on page 581, and it might be convenient if I take your Honour to it. And while we're here, perhaps I could also identify the passage that [indistinct] certiorari. So starting at page 580.

HIS HONOUR: Just a second.

MR SCOTT: Yes, your Honour.

HIS HONOUR: I've just got to find it – where it is in the bundle.

MR SCOTT: I apologies. I think it's - - -

HIS HONOUR: Yes.

MR SCOTT: - - - page 161, perhaps, of the bundle.

HIS HONOUR: Okay. Right. Page 5 what?

MR SCOTT: Five-eighty of the Commonwealth Law Report.

HIS HONOUR: Five – yes.

MR SCOTT: And your – hopefully you've got - - -

HIS HONOUR: I've got that, yes. Page 580. Yes.

MR SCOTT: Thank you, your Honour. You go to the last paragraph on 580 of the report, the opening of the paragraph is:

> *The function of certiorari is to quash the legal effect or the legal consequences of the decision or order under review.*

HIS HONOUR: Yes.

MR SCOTT: And then there's a discussion about all of that, continuing over to the end of the first paragraph on page 581, with the statement:

> *There being no legal effect or consequence attaching to the report, certiorari does not lie.*

HIS HONOUR: Yes.

MR SCOTT: And that's our point. There is no legal consequence here of the warrant. Then in terms of declaration, that is dealt with at the bottom of page 581, commencing with the words, "It is now accepted", again, going over to the end of that paragraph that starts at the top of – or ends at the top of page 582. And the relevant passage is that:

> *The relief –*

That is, declaration –

> *will not be granted if the court's declaration will produce no foreseeable consequences for the parties.*

That, we submit, is perfectly apposite with respect to the warrant.

HIS HONOUR: If the warrant was invalid - - -

MR SCOTT: Yes.

HIS HONOUR: - - - and a declaration issued, then in some cases – let's pretend we're just speaking more in the abstract – the applicant who succeeds in getting the declaration might try to rely upon that somewhere in the future for an argument in a criminal proceeding, it seeking to invoke the Bunning v Cross discretion, for example.

MR SCOTT: Yes.

HIS HONOUR: So in that situation, a declaration for that applicant would have utility, wouldn't it, in that abstract example I've given you?

MR SCOTT: Yeah, potentially.

HIS HONOUR: Yes.

MR SCOTT: But, your Honour, perhaps if you read from the sentence commencing at the top of that page, "However, it is confined", not directed to a determination – it is directed to the determination of legal controversies and not answering abstract or hypothetical questions.

HIS HONOUR: Yes.

MR SCOTT: And, here, it's still a hypothetical question.

HIS HONOUR: So you're saying, in the context of – what are you saying? Are you saying, in the context of this particular litigation, it would be hypothetical?

MR SCOTT: I'm sorry. I'm saying in respect of the particular example that you're putting to me, but if what your Honour has in mind that it might be of utility some time in the future to the applicant to have a declaration that the warrant is invalid - - -

HIS HONOUR: Yes.

MR SCOTT: - - - that it might be used to support exclusion of evidence, for example - - -

HIS HONOUR: Yes.

MR SCOTT: - - - in a subsequent criminal proceeding, that, effectively, raises a hypothetical question because there isn't a criminal proceeding yet. It's hypothetical whether there will be.

HIS HONOUR: I see. But aren't you rejecting the – aren't you saying there should be no – you should summarily dismiss the application for a declaration because even declaring that the conduct – the search warrant was invalid doesn't matter because the inspectors were authorised under the Act anyway to enter and copy?

MR SCOTT: Yes.

HIS HONOUR: So that's the basis upon which you say that the application for the declaration should be summarily dismissed.

MR SCOTT: Absolutely. And it – to deal with the - - -

HIS HONOUR: And all I was – I guess, all I was really positing to you was that in a case where that argument wasn't available - - -

MR SCOTT: Yes.

HIS HONOUR: - - - to the respondent, presumably the government - - -

MR SCOTT: Yes.

HIS HONOUR: - - - might there not be, in that other type of situation, some utility to a declaration.

MR SCOTT: Yes.

HIS HONOUR: But your answer was, "No, no, because" – you took me back to this case and said, "Well, there's no criminal proceeding on foot".

MR SCOTT: Yes. Yes.

HIS HONOUR: Which is true in the context of this case.

MR SCOTT: Yes.

HIS HONOUR: But I suppose I didn't make that plain in my abstract example.

MR SCOTT: My apologies for jumping at shadows, your Honour.

HIS HONOUR: But that's okay. I understand better now why you're saying there should be no – I should summarily dismiss the application for a declaration. Not because – not really because it's hypothetical because there's no criminal matter on foot, but because you're saying it wouldn't matter whether the warrant was valid or not because they were authorised under the law to do as they did.

MR SCOTT: Yes, your Honour.

HIS HONOUR: Okay.

MR SCOTT: And to the extent that there is any debate about whether or not they were authorised under the law, that does not depend on the validity of the warrant. It depends upon - - -

HIS HONOUR: No. You're saying it depends upon the ambit of the – of 133 read with 139.

MR SCOTT: Indeed.

HIS HONOUR: Yes.

MR SCOTT: Yes, your Honour. Thank you. So, your Honour, that's what I had to say about the summary dismissal application.

HIS HONOUR: Well, they also seek to have a declaration that the seizure by the first and second and, they assert, the fourth respondent – and we'll assume that he – the man from Vincents sees something too – under the warrant was unlawful. Would

you be saying there that – what are you saying there about the summary dismissal of that part of their relief – claim for relief?

MR SCOTT: Well, having heard what I've heard today from my learned friends, whilst I don't withdraw what we've said about summary dismissal of that part of the application, we acknowledge that there may well be a triable issue about the construction of the powers that may be exercised on the bases that have been identified.

HIS HONOUR: So, therefore, if there's – if – well, if there's – if there might be a triable issue about order 2(b), then why would I summarily dismiss their application for an order under 2(b)?

MR SCOTT: You wouldn't.

HIS HONOUR: Right.

MR SCOTT: You wouldn't. But what it would mean is that the – it would still obviate the need for disclosure because there's no issue then – that remaining issue does not depend upon the validity of the warrant. It depends upon the construction of the powers.

HIS HONOUR: I see. And then paragraph 2(c), does that flow with 2(b), does it?

MR SCOTT: It does, your Honour.

HIS HONOUR: If there's a triable issue about 2(b), then there's a triable issue about 2(c).

MR SCOTT: That's so.

HIS HONOUR: But you're saying that if there's a triable issue about either of those things, let's focus on 2(b).

MR SCOTT: Yes.

HIS HONOUR: And the applicant succeeds in showing that the seizure was unlawful, not under the warrant, but under the Act, then there'd be no need for the applicant to have disclosure of the affidavit of Broadfoot - - -

MR SCOTT: Yes, your Honour.

HIS HONOUR: To get the warrant from the magistrate.

MR SCOTT: Yes.

HIS HONOUR: I see. Okay.

MR SCOTT: Thank you, your Honour. If there's nothing further your Honour wishes to hear from me on that – on the summary dismissal application, if I could go then to the public interest immunity issue - - -

HIS HONOUR: Okay. Thank you.

MR SCOTT: - - - which relates to the disclosure point. And, of course, this is all in the context where the – depending on how your Honour deals with summary dismissal application, it may be your Honour does not need to weigh the public interest.

HIS HONOUR: Now, just explain that to me a little further. Expand on that, what you just said.

MR SCOTT: Well, there's two – there's three possibilities, the third being that summary dismissal application fails and your Honour needs to engage in the public interest immunity consideration. The other two possibilities are that the summary dismissal application succeeds entirely. There's no longer a proceeding on foot. There's no longer a question for disclosure. If the summary dismissal application only succeeds in part – that is, the part of the application that seeks relief in relation to the warrant and, therefore, that is gone and there's simply a question of construction of the powers granted to inspectors who entered the premises – then there is no relevance to the application for the warrant for which disclosure is sought. And, of course, disclosure can't be granted for anything that's not relevant. And that's the fundamental point.

HIS HONOUR: Right.

MR SCOTT: So then if I could deal with principles relating to public interest immunity. And at the outset, can I accept these things: that, of course, the principles identified in Sankey v Whitlam are not in dispute. They're well-established. And that we're not dealing with a class claim. We're dealing with a contents claim. But it's a contents claim in respect of a clearly identified public interest in the authorities. And in respect of that, could I ask your Honour please to take up – I think it's volume 2 of the authorities bundle, tab 41, decision of the New South Wales Court of Criminal Appeal, Attorney-General for New South Wales v Stuart. Might be page - - -

HIS HONOUR: It - - -

MR SCOTT: - - - twelve hundred and - - -

HIS HONOUR: - - - might - - -

MR SCOTT: - - - ninety-three.

HIS HONOUR: These – I think you must have these arranged differently from me. What – these many volumes that I've got of cases - - -

MR SCOTT: Yes.

HIS HONOUR: - - - they've got a number in the bottom right-hand corner.

MR SCOTT: They do. And the number I've got for Stuart is 1293.

HIS HONOUR: Righto.

MR SCOTT: And if I've got that wrong, I might clarify, because - - -

HIS HONOUR: No. No, you've got that right. But that's in what's called volume 4 of 6 for me. I think you - - -

MR SCOTT: Right.

HIS HONOUR: - - - said 2.

MR SCOTT: Yes.

HIS HONOUR: Yes.

MR SCOTT: Apologise.

HIS HONOUR: Okay. All right. So – well, I found it.

MR SCOTT: Yes. So this – the citation is [1994] volume 34 NSWLR page 667.

HIS HONOUR: Yes.

MR SCOTT: And if your Honour goes to page 674 of the report itself, there should be a heading, The Claim of Public Interest - - -

HIS HONOUR: Yes.

MR SCOTT: - - - Immunity. Now, part of what I'm about to say is for context, and I'll explain why shortly, your Honour. But the opening words of the second paragraph under that heading is:

> *The identity of a police informer has a matter – as a matter of public policy been against protected – been protected against disclosure since at least certain cases are decided.*

Does your Honour have that?

HIS HONOUR: I have it.

MR SCOTT: Thank you. Now, of course, as Mr Murdoch indicated earlier, we're not dealing with police informers here. We're not dealing with informers at all. But the relevance - - -

HIS HONOUR: We're not dealing with what? Someone coughed.

MR SCOTT: I beg your pardon, your Honour?

HIS HONOUR: You said we're not dealing with police informers.

MR SCOTT: And we're not dealing with informers at all.

HIS HONOUR: Right. That's what I didn't hear. Thank you.

MR SCOTT: Thank you. But the reason for that is it – me identifying that is it contextualises what appears later on the next page, page 675, starting at point (b), where it's said that the particular public interest in protecting the identity of police informers appears to be in part – sorry, appears to be part of a broader public interest in the maintenance of social peace and order. And there's a reference to a case of D v National Society for Prevention of Cruelty to Children.

HIS HONOUR: Yes.

MR SCOTT: And the point is that – of me identifying this is to identify the public interest that we're dealing with here. We're not dealing with just – and we're not dealing at all with a particular category or class or aspect of this broader public interest, but what we're dealing with is this public interest in the maintenance of social peace and order. That's the public interest that we're dealing with.

HIS HONOUR: Right.

MR SCOTT: And then your Honour will see in the next sentence:

> *As another part of that broader public interest, it is essential that nothing used by police in their pursuit of criminals should be disclosed which may give any useful information concerning continuing inquiries.*

Those words, continuing inquiries, to those who organise criminal activities.

HIS HONOUR: Yes.

MR SCOTT: And that's what we're dealing with here. We're dealing with an investigation into potential criminal activity that is not yet complete and which details of the direction and the – where those investigations are up to, appear in the material that's sought by the application for disclosure. And the reason, logically,

your Honour, why this is a relevant public interest is, if anyone that might be effectively the suspect or the target of an investigation gets wind of the direction that inquiries are going, then of course, they may take steps to close off those inquiries by whatever means. So it's usually taken that prima facie, that material is withheld. Now, it's put against us in the written submissions – and your Honour might ask, well, does that apply to these types of investigations. They're not by police. We're not dealing with a grand criminal conspiracy or some kind of criminal gain.

Our point is that these principles aren't confined to those kinds of cases, because the public interest – it's the broader public interest that we're dealing with. And here, the Parliament has enacted legislation that imposes safety and health obligations on persons involved in coal mining and has created criminal offences in the event that those obligations are breached. So we are dealing with criminal – potentially criminal conduct in that sense. And it – the ambit of the types of offences – or the types of offences we're dealing with might well – as is put against us in written submissions, be offences of strict liability. But they are still serious offences and offences that carry with them potential imprisonment. One offence that isn't a strict liability offence that's expressly referred to in this legislation is the offence of industrial manslaughter. And on no sense could that be described as a strict liability offence. So we are dealing with a serious matter, your Honour.

The other thing that we've said in our written submissions is that even to the extent we're not dealing with criminal – something that might be potentially criminal, we are dealing with a workplace death. Someone died in this incident, and the legislation provides for and requires the investigation of those deaths in order to – even if criminal investigations – sorry, criminal proceedings are commenced, hopefully prevent these sorts of deaths occurring in the future. And so there is a public interest in maintaining the integrity of those investigations. But could I take your Honour to a couple more authorities to develop this point. The first is case of Beneficial Finance Corporation which will be at page 1409 of – I think, your Honour's bundles.

HIS HONOUR: Yes.

MR SCOTT: And I'll just, for the record, identify the full title of the case: Beneficial Financial Corporation v the Commissioner of Australian Federal Police [1991] 31 FCR 523 and the relevant passage appears towards the top of page 551.

HIS HONOUR: Yes, 551.

MR SCOTT: Yes, your Honour. And your Honour will see a sentence commencing on the – at the end of the third line, at the stage when a search warrant is issued. And then just going to the end of the quote from the Quartermaine v Netto case.

HIS HONOUR: Yes.

MR SCOTT: And that, we say, expresses the usual approach to the public interest with respect to material that's sought in support of an application for a search warrant, for the reasons of general public interest that I identified earlier. Then, insofar as whether we're confined to police investigations or criminal investigations of a particular kind, can I take your Honour, please, to a case that should appear at page 2018 of your authorities bundle.

HIS HONOUR: Is this Spargos Mining?

MR SCOTT: Yes, your Honour. And for the record, I'll identify it. It's Spargos Mining No Liability v Standard Chartered Australia Limited [1989] 1 ACSR 311. The relevant passage is on page 312 and goes to towards the middle of that page. That is, the quote ending just before the words:

It is of course.

HIS HONOUR: Well, what you're seeking to show is that claims for public interest immunity can commonly arise and have been recognised in relation to investigations of criminal offences when those investigations are generally carried out by people who are not police but are government officers.

MR SCOTT: Yes, your Honour.

HIS HONOUR: Well, that would seem to be pretty uncontroversial.

MR SCOTT: Yes.

HIS HONOUR: So - - -

MR SCOTT: But - - -

HIS HONOUR: - - - you probably don't need to take me to any more than what you've shown me thus far about that.

MR SCOTT: Well, can I just – there is one aspect to it that I want to identify - - -

HIS HONOUR: Okay.

MR SCOTT: - - - and there was a point that's made in writing made orally that we're not dealing with really, really serious things. So this - - -

HIS HONOUR: But we're dealing with offences where a company could get fined tens of thousands of dollars.

MR SCOTT: Yes.

HIS HONOUR: And it could have a conviction recorded against it.

MR SCOTT: Yes.

HIS HONOUR: So we're not dealing with a trivial matter where a person get a ticket from a regulator.

MR SCOTT: No, we're not.

HIS HONOUR: No.

MR SCOTT: Yes.

HIS HONOUR: So - - -

MR SCOTT: Thank you, your Honour.

HIS HONOUR: - - - if we're dealing with a matter that's an offence against a statute where a legal person – a company – can be fined thousands of dollars, then that's a serious matter.

MR SCOTT: Yes.

HIS HONOUR: Even if the – of course, the company can't suffer a range of penalties that the natural person can.

MR SCOTT: Yes, your Honour. Then the only other point I wish to deal with in respect of the public interest immunity issue is that, effectively, the point that's put is there's no secret as to what's going on from the point of view of the applicant. So it's not going to reveal anything new.

HIS HONOUR: Well, one difficulty with that submission is that the application doesn't know what the regulator knows, thinks he knows, believes he knows, suspects he knows, or suspects he might be able to discover.

MR SCOTT: Yes, your Honour. That's our point.

HIS HONOUR: Right.

MR SCOTT: Yes. Now, finally, I identified at the outset that we haven't handed up the confidential affidavits: one of which attaches the search warrant application. The other is another affidavit by Mr Lonton which gives some more explanation as to what it is that is not known by the applicant. Of course, whether or not your Honour needs to inspect that depends on whether or not your Honour's in sufficient doubt about the claim of public interest immunity. Your Honour might not, and therefore not call for inspection of it.

HIS HONOUR: So I was wondering about that, and you and Mr Murdoch can consider this. Perhaps the better course at this stage is for me not to receive either of

those affidavits unless and until I indicate a desire to receive them, which could be communicated to your solicitors by my Associate in writing and then you would have liberty to, obviously, indicate whether you were happy for them to be provided by delivery or whether you wish to make further submissions about whether I should get them or not.

MR SCOTT: Your Honour - - -

HIS HONOUR: What do you think – what do you say about that proposition?

MR SCOTT: We are content with what is clearly an eminently sensible proposition.

HIS HONOUR: Okay. Mr Murdoch?

MR MURDOCH: We don't cavil with that, your Honour.

HIS HONOUR: Okay. All right. So I'm not going to – therefore, the upshot is I'm not going to – you're not going to hand them up now and I won't take them now. Thank you.

MR SCOTT: Thank you, your Honour. That's all I had to say, unless there's anything else I can assist your Honour with.

HIS HONOUR: No, thank you, Mr Scott.

MR SCOTT: Thank you.

MR MURDOCH: I just have two matters - - -

HIS HONOUR: Yes.

MR MURDOCH: - - - in reply, your Honour. One deals with the disclosure point. Could I ask your Honour to go back to the Stuart decision? And - - -

HIS HONOUR: Yes, but you'll just have to tell me where it is again.

MR MURDOCH: Well, that's - - -

HIS HONOUR: Which volume is this in or - - -

MR MURDOCH: That is – helpfully, I can – the - - -

HIS HONOUR: Just tell me the page, I think.

MR MURDOCH: The page is 1293. I just - - -

HIS HONOUR: One-two-nine-three.

MR MURDOCH: I'll just – I'll just ascertain the volume, I'm sorry.

HIS HONOUR: That's okay. I can probably get it.

MR MURDOCH: I think your Honour might have a different volume system.

HIS HONOUR: Yes. So that would appear to be in what's called volume 4 of six for me.

MR MURDOCH: Yes, your Honour.

HIS HONOUR: One-two-nine-three. Anyway, I've got the case - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - Mr Murdoch.

MR MURDOCH: And if you could – if your Honour could please go back to page 675. Now, your Honour, we don't cavil with the proposition that the application of the public interest immunity and principles ought to not be confined to investigations of offences under the Criminal Code. That's not our - - -

HIS HONOUR: No. In other - - -

MR MURDOCH: That's - - -

HIS HONOUR: In other words, you're - - -

MR MURDOCH: It's not our proposition.

HIS HONOUR: In other words, you're saying, "Look, in a – in an appropriate case, an inspector – a public service inspector under a statute could be obtaining information or gathering it up which might attract public interest immunity."

MR MURDOCH: That's so.

HIS HONOUR: But you're saying - - -

MR MURDOCH: And this is - - -

HIS HONOUR: - - - in this case - - -

MR MURDOCH: Correct. That's so.

HIS HONOUR: - - - the following is the position.

MR MURDOCH: That's so.

HIS HONOUR: Okay.

MR MURDOCH: And we - - -

HIS HONOUR: That's what I understood you to be saying this morning.

MR MURDOCH: That – and we say that when one looks at the matters of principle – when one takes it back to principle, regardless of the particular type of investigator that's involved or the particular piece of legislation – when one takes it back to matters of principle, as are set out and marshalled up well, we say, in the paragraph that our learned friends took you to at page 675 in Stuart where it begins that:

> *This particular public interest in protecting the identity of police informants appears to be part of a broader public interest.*

If one accepts that they're the points of principle, the facts of this case don't come within those principles. That's our argument.

HIS HONOUR: Okay.

MR MURDOCH: Yes.

HIS HONOUR: I mean, maybe he took me to that because you made the observation that, look, these are not criminal offences, and by that, I took you to mean that they were offences in a statute that pertain to the conduct of an industry.

MR MURDOCH: But the types of - - -

HIS HONOUR: And – but maybe that's why he went down this path.

MR MURDOCH: It may well have been, but the apprehensions that give rise to the need for public interest immunity as set out as a matter of principle in that paragraph we say don't arise on the facts here. That's our point.

HIS HONOUR: Yes, because you say there's no – as far as you know, there's no informers that are informing.

MR MURDOCH: There's no informers.

HIS HONOUR: That – but that's only as far as you know, isn't it?

MR MURDOCH: Well, it's – Mr Scott said that this is not an informer case.

HIS HONOUR: Okay. All right. Okay.

MR MURDOCH: And no informers – we're not dealing with, as we understand it on the material, investigation of ongoing criminal activities. It's a investigation in respect of something that's fixed and closed - - -

HIS HONOUR: Yes.

MR MURDOCH: - - - as I've said several times, whilst I accept your Honour's observation that – I don't want to get into unknown unknowns, but - - -

HIS HONOUR: No.

MR MURDOCH: - - - whilst we don't know what we don't know in respect of what they're investigating, differently to many investigations, we have a very significant amount of knowledge as to the focus of the investigation, as a result of the multitude of notices that have been issued.

HIS HONOUR: Yes. Well, you know a lot of things through - - -

MR MURDOCH: So it's not - - -

HIS HONOUR: - - - one – through some means or another.

MR MURDOCH: Correct. So - - -

HIS HONOUR: But you don't know whether that represents all that they know or think they know.

MR MURDOCH: We accept that.

HIS HONOUR: Yes.

MR MURDOCH: Because we can never know that.

HIS HONOUR: No.

MR MURDOCH: But it's not in that – in that line of country of cases where the apprehension is that this can't be disclosed because it would mean that we'd be looking over their shoulder. In terms of what's in front of on – to a very large extent, we don't need to look over their shoulder.

HIS HONOUR: Yes. I saw you use that expression in your written submission.

MR MURDOCH: Yes.

HIS HONOUR: Yes. I remember that phrase.

MR MURDOCH: So that's all we wished to say in respect of that aspect. Unless your Honour has any further questions for us on the public interest immunity.

HIS HONOUR: No.

MR MURDOCH: Now, in respect of the other aspect of the case, that being the strikeout, it seems that one particular matter that our learned friends place quite a degree of reliance upon in their strikeout application is – and I'm paraphrasing, and I hope I'm doing it – I seek to do it fairly, the argument that, look, from their perspective, at the end of the day, it doesn't matter. Because the inspectors – whether they were doing it within power, outside of power, could do everything that they purported to do, without the need for a warrant. We say that there's one aspect of the argument that would call – that ought to cause pause in respect to that argument being accepted and that is that section 139 deals with the powers that it deals with, particularly in 139 sub (3). And sets out a limited array of power – a range of powers. But then in subdivision (5), there's the reference to power to seize evidence.

It's – we say it's interesting in terms of a statutory construction point that seizure is only otherwise, as we read the legislation, referred to in the context of what one can do under a warrant. Now, your Honour would know that the cases say that in terms of legislation which provides power to a regulator to coercively do that which they would not otherwise be entitled to do, such as to enter premises, such as to remove materials. This type of legislation – because it infringes on the rights that a citizen otherwise has or a corporation otherwise has to say, "No, you can't enter. No, you can't take that", needs to be read strictly. So in our submission, it's – it is not clear as the applicant – as the respondents contend, that absent the warrant, that the – that seizure could occur. And as we understand their argument, they are now seeking to say, "Well, we have powers under 139 and we've got powers under 143 so we didn't need the warrant". It may well be that in order to exercise seizure, if they need to go there, that they did need the warrant. So we say that the – it's the – the argument is not as – is not as – is not as clear cut in terms of the strikeout as they seek to make it.

HIS HONOUR: All right.

MR MURDOCH: In terms of the exercise of power. So that was the only additional point we had by way of reply, your Honour, unless you had - - -

HIS HONOUR: Right.

MR MURDOCH: - - - any questions otherwise for us.

HIS HONOUR: Well, I do just want to raise one - - -

MR MURDOCH: Yes.

HIS HONOUR: - - - matter otherwise with you.

MR MURDOCH: Yes.

HIS HONOUR: To state the obvious, you don't seek a declaration that the premises of Metarock in Mackay is not a workplace, do you?

MR MURDOCH: No, no, we accept it was a workplace.

HIS HONOUR: Right.

MR MURDOCH: Yes.

HIS HONOUR: Okay. Okay.

MR MURDOCH: Yes.

HIS HONOUR: All right. Well, all I can say is that – thank you both for your submissions and for giving me the authorities. And I'll reserve the matter and obviously prepare a judgment as speedily as I can. Thank you.

MR MURDOCH: Thank you, your Honour.

HIS HONOUR: Good morning.

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