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| CITATION: | *Elvidge v Lush & Ors* [2019] NTSC 9 |
| PARTIES: | ELVIDGE, Stuart<br><br>v<br><br>LUSH, Detective Senior Constable Craig<br><br>and<br><br>COMMISSIONER FOR THE NORTHERN TERRITORY POLICE<br><br>and<br><br>MORRIS, Francis Simon Thomas |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT exercising Territory jurisdiction |
| FILE NO: | 90 of 2018 (21838580) |
| DELIVERED: | 8 February 2019 |
| HEARING DATE: | 30 November 2018 |
| JUDGMENT OF: | Barr J |

**CATCHWORDS:**

CRIMINAL LAW AND PROCEDURE – SEARCH WARRANTS – Validity –
where warrant must include a description of the nature of the things authorised to be seized – where the things authorised to be seized were described by reference to an offence – whether the warrant provides sufficient particulars of the offence for the holder of the warrant to ascertain whether the things to be seized are authorised under the warrant – warrant

did not sufficiently identify class of things authorised to be seized – warrant left discretion to the warrant holder to determine relevance – warrant invalid.

*Police Administration Act 1979* (NT), s 117 (5)(b), s 118A

*Wright v Queensland Police Service* (2002) 2 Qd. R. 667; *Jeremiah v Lawrie* [2016] NTCA 6, 315 FLR 134; *Lawrie v Carey DCM and Anor* [2016] NTSC 23, referred to

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | T Berkley |
| Defendants: | M Littlejohn |

*Solicitors:*

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| Plaintiff: | Darwin Family Law |
| Defendants: | Solicitor for the Northern Territory |

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| Judgment category classification: | B |
| Judgment ID Number: | Bar1903 |
| Number of pages: | 13 |

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Elvidge v Lush & Ors* [2019] NTSC 9
No. 90 of 2018 (21838580)

BETWEEN:

**STUART ELVIDGE**
Plaintiff

AND:

**DETECTIVE SENIOR CONSTABLE CRAIG LUSH**
First Defendant

AND:

**COMMISSIONER FOR THE NORTHERN TERRITORY POLICE**
Second Defendant

AND:

**FRANCIS SIMON THOMAS MORRIS**
Third Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 8 February 2019)

**Introduction**

[1] The plaintiff has commenced proceedings by originating motion filed 11 September 2018 seeking a declaration that a search warrant issued by the third defendant (a Justice of the Peace) is invalid; and an order prohibiting the first defendant, a police investigator, and the second defendant, the

Commissioner of Police, from inspecting or interfering with or copying or otherwise interrogating or making any record of the content of the hard drives of the plaintiff's computers seized by police on 16 August 2018. A consequential order is sought that the first and second defendants immediately surrender to the plaintiff all items seized by police from the plaintiff's premises on 16 August 2018.

[2] The first defendant holds the rank of Detective Senior Constable in the Northern Territory Police. On 15 August 2018, he made application to the third defendant for the issue of a warrant to enter and search the plaintiff's home. A warrant was issued the same day. I set out the content of the warrant below, formal parts omitted:

**SEARCH WARRANT**

**TO SEARCH A PLACE**

**TO**: Detective Senior Constable Craig Lush, a member of the Police Force:-

**WHEREAS I**, Francis Simon Thomas Morris, a Justice within the meaning of the *Police Administration Act*, pursuant to Section 117(2) of that Act, being satisfied by information on oath placed before me on the 15th day of August 2018, that there are reasonable grounds for believing that there is at a place described as:-

Lot 05756, 458 Lowther Road, Virginia, Northern Territory

The following things:

1. Relevant documentation relating to medical leave for Mr Stuart ELVIDGE.

2. Computers, Laptops, Scanners, Data storage devices and associated power sources, containing information associated with the creation, storage, or submission of medical leave for Mr Stuart ELVIDGE.

being things related to or in connection with an offence against a law in force in the Northern Territory, namely an offence of:

Criminal deception as per section 227 of the *Criminal Code Act* (NT).

**AUTHORISE YOU**, with such assistance as you think necessary to enter and search the place described above, if necessary by force, and to seize the things described above, that is found at the place.

This Warrant expires on the **28th of August 2018** unless sooner executed.

DATED THE 15th **DAY OF AUGUST 2018.**

Signed[1] _____
**JUSTICE OF THE PEACE**

[3] The information which the first defendant provided on oath in support of the issue of a warrant was contained in a document, a copy of which is annexed to the first defendant's affidavit sworn 27 September 2018 and marked "CL1". In that document, the first defendant deposed that he had reasonable grounds for believing that the following things were situated at the plaintiff's residence:

1. Relevant documentation relating to medical leave [for the plaintiff].
2. Computers, Laptops, Scanners, Data storage devices and associated power sources, containing information associated

**1** Signature of Justice endorsed

> with the creation, storage or submission of medical leave [for the plaintiff].

[4] From "CL1", it appears that the trigger for the investigation of the plaintiff by police was a complaint made by the Department of the Attorney-General and Justice on 21 December 2017 that the plaintiff, a Northern Territory Corrections Prison Officer, had submitted a false medical leave certificate to claim sick leave in excess of his true entitlement.

[5] The specific allegations described by the first defendant in "CL1" are set out in [6] and [7] below.

[6] The plaintiff attended at the Arafura Medical Clinic on Wednesday 20 July 2016 and obtained a medical certificate for two days: 20 July and 21 July 2016. On 20 July 2016, a forged medical certificate for six days, from 20 July 2016 to 26 July 2016, was uttered on Northern Territory Corrections. The forgery resulted in the plaintiff receiving two additional days of medical leave, for 23 and 24 July 2016.

[7] Approximately one year and five months later, on Wednesday 20 December 2017, the plaintiff again attended at the Arafura Medical Clinic and obtained a medical certificate for three days: 20 December, 21 December and 22 December 2017. On 20 December 2017, a medical certificate for seven days (20 December 2017 to 27 December 2017) was sent to Northern Territory Corrections from a private email address, with the stated subject matter "Elvidge Medical Certificate". When Northern Territory Corrections

made contact with the Arafura Medical Clinic to query the seven-day medical certificate, information was provided that a three-day medical certificate only had been issued, not a seven-day medical certificate.

[8] At the time of the application for the warrant on 15 August 2018, the plaintiff had already been charged on information with offences arising out of his alleged conduct in July 2016 and December 2017 referred to in [6] and [7] above.

[9] Specifically, an information laid on 27 December 2017 alleged offences committed on 20 December 2017: an offence of forgery and an offence of uttering a forged document, contrary to s 258(d) and s 260 *Criminal Code* respectively. A further information laid on 7 August 2018 alleged an offence, also committed on 20 December 2017, of attempting to obtain a benefit by deception, contrary to s 227(1)(b) *Criminal Code*, read with s 277 (2) *Criminal Code*.

[10] In relation to offences alleged to have been committed in July 2016, an information laid on 1 March 2018 alleged an offence committed between 22 and 25 July 2016 of obtaining a benefit by deception, contrary to s 227(1)(b) *Criminal Code*; and offences of forging and uttering committed on 20 July 2016.

[11] There was only one mention in "CL1" of criminal charges against the plaintiff, as follows:

> On 22 December 2017 ELVIDGE was charged with obtaining a benefit by deception and a summons issued to him. The summons was later served on him at his [home] address …

[12] The statement extracted in the previous paragraph might have been intended to refer to the charges the subject of the information laid 27 December 2017. However, that information charged the plaintiff with forging and uttering, not obtaining a benefit by deception. Moreover, in relation to the offending in December 2017, the plaintiff was charged with *attempting* to obtain a benefit by deception, not obtaining a benefit by deception. Further, the charge of attempting to obtain a benefit by deception was the subject of the information laid on 7 August 2018, not the information laid 27 December 2017.

[13] It is unlikely that the statement extracted in [11] above was intended to refer to the charges the subject of the information laid on 1 March 2018, even though that information did allege obtaining a benefit by deception, because of the difference between the date on which the first defendant deposed that the plaintiff had been charged, 22 December 2017, and the date on which he was charged for the July 2016 offending, which was 1 March 2018.

[14] Neither "CL1" nor the warrant itself clearly stated the offence or offences relied on by the first defendant. There is no obvious reason for that omission, given that charges had actually been brought in respect of the alleged offending in July 2016 and December 2017. It was not a situation

where the warrant was being sought at an early stage of an investigation, when it may have been difficult to identify specific offences.

[15] A warrant must sufficiently identify the class of things authorised to be seized, whether by reference to an offence or otherwise. Any document or other physical thing which the warrant authorises to be seized must be objectively ascertainable. If a warrant identifies the object of a search by reference to an offence, the offence must be properly defined.[2]

[16] The identified problem of insufficiency was compounded by the first defendant alleging in "CL1" that the plaintiff attempted to pervert the course of justice by returning to the Arafura Medical Clinic on 5 January 2018 and persuading a medical practitioner, contrary to the true facts, that a seven-day medical certificate had been issued on 20 December 2017. In my opinion, if (1) the first defendant was aware of the alleged attempt to pervert the course of justice at the time of applying for the warrant, and (2) he intended to search for documents relevant to that offence, it was incumbent on him to ensure that the warrant specifically referred to documents relevant to that alleged offence. In the circumstances, it would have been improper to search for documents relevant to an offence which was not referred to in the warrant and then seek to rely on s 118A *Police Administration Act*, which extends the power of seizure beyond the documents or other things described

**2** *Jeremiah v Lawrie* [2016] NTCA 6; 315 FLR 134, per Kelly J at [7], [8], [14] and [16]; per Hiley J at [48]. See also *Lawrie v Carey DCM and Anor* [2016] NTSC 23 at [18], footnote 5.

in the warrant where the police officer executing the warrant unexpectedly finds incriminating evidence "connected with any offence".[3]

[17] In my opinion, it would have been quite simple for the first defendant to have included in "CL1", and for the warrant to have then reflected: (1) the offences alleged to have committed in July 2016; (2) the offences alleged to have been committed in December 2017; and (3), if it were to be relied on, the attempt to pervert the course of justice alleged to have been committed in January 2018. Without a statement of the charge and without even the date of the alleged offending, the warrant was unclear as to the class of documents authorised to be searched for and seized. The question as to whether a warrant meets the relevant legislative requirements must be answered objectively by reference to the contents of the warrant. There is a need for persons affected to be able to understand the bounds of the search to be conducted.[4]

[18] Examination of the warrant discloses a further deficiency. The description of the documents to be searched for and seized was qualified by the word "relevant" in the context "Relevant documentation relating to [the plaintiff's] medical leave".[5] Counsel for the plaintiff contends that the qualifier "relevant" leaves an open-ended discretion to the holder of the

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**3** Unless 'unexpectedly' is necessarily implied in s 118A, the scheme of the Act in relation to issue of warrants, which requires (1) sworn evidence as to reasonable grounds for believing that evidence connected with an offence may be in the possession of a person or is at a particular place and (2) satisfaction on the part of a justice of the peace as to the existence of such reasonable grounds, would be circumvented.

**4** See the observations of Holmes J in *Wright v Queensland Police Service* (2002) 2 Qd. R. 667 at 676.

**5** See [2] above for text of warrant.

warrant to determine what is relevant and what is not. I agree. A police officer executing the warrant would be faced with having to assess relevance as distinct from simply ascertaining whether the document came within or without an appropriate limiting description. The 'relevance' issue assumes greater significance in this case because the offence, in connection with which "things" were authorised to be searched and seized, was mis-described and/or insufficiently particularised. It is of primary importance that the warrant sets out clearly and unambiguously that which the warrant authorises the holder to do. The warrant in the present case did not do so.

[19] I find that the warrant issued by the third defendant on 15 August 2018 is invalid. The necessary bar for the validity of the warrant was not met in relation to identification of the class of things authorised to be seized. The documents and other things seized under the purported authority of the warrant should be returned to the plaintiff.

[20] Given the conclusion set out in the previous paragraph, it has not been necessary for me to consider the deficiency in the *Police Administration Act* identified and discussed by members of the Court of Appeal in *Jeremiah v Laurie and Another*.[6] In brief, there is no power in the *Police Administration Act* for a police officer to remove electronic or hard copy documents from premises being searched for the purpose of examination off-site to see if the documents fall within the class or classes of documents authorised to be

**6** *Jeremiah v Laurie and Another* [2016] NTCA 6; 315 FLR 134 at [32] – [35] per Kelly J, at [105] – [107] per Reeves J.

seized under the warrant. Because a warrant does not authorise removal of documents unless they fall within the description set out in the warrant, the relevant assessment or filtering process must take place at the searched premises, at the time of the search.

[21] The legislative deficiency referred to in [20] appears to have been overlooked by the first defendant in that, in support of the second part of the application, for a warrant for seizure of the plaintiff's computers, laptops and scanners, the first defendant wrote in "CL1":

> It is believed that computers, laptops and scanners as depicted in the video supplied by Defence to DPP and Police will contain relevant information associated with the creation, storage or submission of medical leave [applications] for Mr Stuart ELVIDGE. Seizure of these devices will also allow a verification of the process described by ELVIDGE during the video re-enactment.

[22] This suggests that the intended seizure of the plaintiff's computers and laptops was, in part at least, for the impermissible purpose of later examination of the documents stored on those devices. Even if the warrant holder were lawfully entitled to seize and take away computers, for the purpose of testing the operation of software programs loaded on such computers, documents in the computers could not be 'removed' and examined unless the holder of the warrant assessed at the time of search that the documents fell within the description contained in the warrant.

[23] The observations in the previous paragraph lead to a further issue which I have not had to decide. The following paragraphs and my observations are therefore obiter.

[24] In relation to the alleged offending in December 2017, the plaintiff or his lawyers caused to be produced a video re-enactment of the actions claimed to have been taken by the plaintiff to scan a medical certificate to create a PDF copy in the hard drive of his personal computer.[7] He then transferred the PDF copy onto a USB thumb drive, manually transferred same to his laptop, which then automatically opened the document, not as a PDF but as a Word document, and in a significantly different font to the font appearing in the scanned medical certificate. The plaintiff also obtained a report from an expert in computer technology to explain that no involvement was required on the part of the plaintiff to create the Word document which contained the same information as in the scanned certificate, although not an exact facsimile.

[25] Counsel for the plaintiff made the submission that the certificate provided to the plaintiff must have been for the period 20 December to 27 December because, whatever computer hardware or software interface may have created the inexact facsimile, it did not change the dates or content of the original certificate. It was the result of "the innocent interaction of the hardware used by the plaintiff and his software programs". That submission

**7** It is unclear whether the scanned medical certificate was that obtained on 20 December 2017 – see [7] above.

of course assumes that the medical certificate scanned was the same certificate obtained by the plaintiff on 20 December 2017, and not an altered version.

[26] In his application for the warrant, the first defendant provided information in "CL1" in relation to the video re-enactment, as follows:

> On 1 August 2018 ELVIDGE produced a video re-enactment with the aid of his Lawyer. The video shows ELVIDGE at home placing a medical certificate into a scanner then scanning the document as a PDF file to his desktop computer. ELVIDGE then opens the document in Microsoft Word before copying it onto a USB data storage device and transferring it to a laptop computer. The video then shows ELVIDGE opening it in Microsoft Word and saving it as a .ODT file. This video was then provided to DPP and Police as a reason as to how the original medical certificate came to be saved as a Word document.
>
> This video was purported to be witnessed by Michael FELDBAUERE of Territory Technology Solutions. Who stated in general terms that if a document is opened in Microsoft Word and if the correct font is not present in the system that Word would substitute the font for another similar one.
>
> DPP asked defence to supply the desktop computer and laptop for analysis by DPP Police Digital Forensic Examiners. Defence declined and stated that they would not supply it voluntarily.

[27] It would be rather extraordinary if the plaintiff could have the benefit of the video re-enactment and the derivative expert evidence, without giving the prosecution the opportunity to test the relevant computer programs and processes utilised. My preliminary view is that the use by the plaintiff of the video re-enactment and the calling of expert evidence in relation to the matters depicted in the video should be dealt with by the trial court. The court would be able to deal with all issues relating to both the admissibility and use of evidence proposed. The court could make an advance ruling

pursuant to s 192A *Evidence (National Uniform Legislation) Act 2011* and impose conditions relating to the admission and use of expert evidence to ensure that the trial process were fair to both parties. However, this aspect has not been the subject of argument by counsel and it would not be appropriate for me to make any further observations.

[28] I would propose orders to reflect the finding in [19] above, but I shall hear the parties both in relation to those proposed orders and consequential orders, including costs.

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