IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-044-517
[2014] NZHC 3175

UNDER	the New Zealand Bill of Rights Act 1990
IN THE MATTER	of the Summary Proceedings Act 1957
AND	
IN THE MATTER	of the International Covenant on Civil and Political Rights
BETWEEN	V.R. SIEMER and J.D. SIEMER First Plaintiffs
AND	SPARTAN NEWS LIMITED Second Plaintiff

Continued over page …

Hearing:	14-18, 21, 22 October 2013; 29 November 2013; 13, 19 and 22 March 2014
Appearances:	CS Henry for the Plaintiffs (on all days exept 18 October 2013) AM Powell and E Devine for the First to Fourteenth Defendants V Casey for the Fifteenth Defendant VR Siemer in person (on 18 October 2013 only)
Judgment:	11 December 2014

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 11 December 2014 at 3 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

AND	S SIEMER Third Plaintiff
AND	K.S. BROWN First Defendant
AND	M PALMA Second Defendant
AND	A LOVELOCK Third Defendant
AND	JANE THEW Fourth Defendant
AND	REECE SIRL Fifth Defendant
AND	JULIE FOSTER Sixth Defendant
AND	JOHN MILLER Seventh Defendant
AND	DAVID THOMAS Eighth Defendant
AND	BRETT OTTO Ninth Defendant
AND	TREVOR FRANKLIN Tenth Defendant
AND	JOHN TAYLOR Eleventh Defendant
AND	JUERGEN ARNDT Twelfth Defendant
AND	KERWIN STEWART Thirteenth Defendant
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND Fourteenth Defendant
AND	B J REID Fifteenth Defendant

Introduction

[1] At 7:00 am on 21 February 2008, Kevin Siemer left his family's home in Clansman Terrace, Gulf Harbour on Auckland's North Shore and headed off to school. As he went, a number of Police officers arrived. They had a search warrant. Three Police officers led by Detective Senior Sergeant Stan Brown entered the dwelling by the closed but unlocked front door. The Detective Senior Sergeant loudly announced their presence. There was no response initially but as the Police officer continued to call out and began to walk upstairs, Mr Vincent Siemer appeared from the main bedroom in his pyjamas. Mrs Jane Siemer and a then 13-year-old daughter, Stephanie, also awoke.

[2] A short time later, six other Police personnel (including two digital forensic analysts from the Police Electronic Crime Laboratory) also entered the dwelling. They began to search the house and to seize property. Later in the morning three more Police officers arrived to assist. The search occupied a total of more than seven hours, although not all Police personnel were present throughout. The last of the Police officers departed at around 1:30 pm.

[3] During the search, the Police prevented the members of the Siemer family present from moving about the house freely. Mr Siemer complains that he was forced to remain in his pyjamas for several hours and that he was prevented from making personal phone calls. Mrs Siemer alleges that she was told that if she left the house to take Stephanie to school she was not to talk to anybody and must return home immediately.

[4] The Police seized a large number of items of personal property belonging to members of the Siemer family, including cell phones, CDR and DVD discs, memory sticks, printers, fax/scan machines, computers and keyboards, computer hard drives, pieces of paper containing handwritten notes, a library card, and items of male clothing. Many of the items were returned within a few days; some of them weeks later; and others in September 2012, well over four years after the seizure. Two USB memory sticks have been retained in Police custody.

[5] None of the members of the Siemer family was subsequently charged with any offence. Mr and Mrs Siemer and Stephanie, and a company which has its registered office at the Clansman Terrace address, have claimed damages from the senior Police officer who applied for the search warrant; all of the Police officers who have been identified as being at the house during the search; the deputy registrar of the Auckland District Court who issued the warrant; and the Attorney-General.

Summary of the plaintiffs' claims

[6] The plaintiffs' claims are founded on three broad propositions:

(a) The warrant should not have been issued because the application did not contain sufficient relevant information; did not adequately disclose allegations of offending; and did not justify a search of the premises for evidence.

(b) The warrant was invalid because –

(i) it did not disclose the date on which it was issued (it is alleged the day and month were stated but not the year) so it was not possible to determine by when the warrant was required to be executed;

(ii) it was a general warrant in that it did not contain a sufficient description of alleged offending; the description of the items of which seizure was authorised was not sufficiently specific to provide reasonable limitations on the search of the premises and the seizure of private property; and it purported to authorise the seizure of items not reasonably connected to the alleged offence or offences referred to; and

(iii) it was obtained in bad faith as a pretext for searching Mr Siemer's home and seizing his property for some ulterior purpose.

(c) The search of the premises and the seizure of property were conducted in an unlawful and unreasonable manner.

[7] The allegation that the date of issue was not disclosed on the face of the warrant is founded on an assertion that the warrant which was produced in evidence as the original was not in fact the warrant issued and executed. This allegation is based on discrepancies between the claimed original and the purported copy of the warrant handed to Mr Siemer at the time of the search.

[8] The plaintiffs allege that because the search warrant was invalid, the presence of the Police officers on their property and in their home amounted to trespass. They say that their privacy was invaded; that they were subjected to false imprisonment and intimidation; and that the seizure and retention of their personal property amounted to trespass to goods and conversion. Overall, the plaintiffs allege that the entry, search and seizure by the Police personnel breached the plaintiffs' rights under the New Zealand Bill of Rights Act 1990 ("NZBoRA") to be secure against unreasonable search or seizure,[1] not to be arbitrarily detained,[2] and, as detained persons, to be properly treated.[3] They seek damages or compensation, including aggravated and punitive damages.

[9] The defendants deny that the application was inadequate, that the warrant was invalid, and that any aspect of the search or seizure was unreasonable. They also plead, in any event, statutory immunity from some of the plaintiffs' claims for damages.

Recusal

[10] After learning that I had been assigned to hear this case, Mr Henry filed a memorandum asking the Chief High Court Judge to intervene by ensuring that another judge was assigned instead. The grounds were that, in another case, I had concluded without any pleading or prior notice to Mr Siemer that he had defamed me on a website which he managed. Mr Henry suggested that that action constituted

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1 New Zealand Bill of Rights Act 1990, s 21.
2 Section 22.
3 Section 23.

"the gravamen of very serious judicial misconduct" and said that it would be "grossly inappropriate" for the interests of Mr Siemer and his family to come before me for determination. He argued that it would undermine public confidence in the impartiality of the Court, thereby inviting opprobrium and disrepute on the judicial system. Mr Henry suggested that at the least it was necessary to guard against unconscious prejudice. Relying on the judgment of the Supreme Court in the *Saxmere* case,[4] Mr Henry submitted that it was well established that the want of impartiality at issue is not so much the presence of actual bias on the part of an adjudicator as the reasonable apprehension, by the fair-minded lay observer, that a judge might not bring an impartial mind to the resolution of a question the judge has to decide.[5] The Chief Judge declined to intervene.

[11] When the case was called before me, Mr Henry invited me to recuse myself on the same grounds. After hearing from Mr Henry, I declined to stand aside from the hearing and said I would give my reasons in due course on delivering the judgment in the case. These are my reasons.

[12] In a case involving Mr Siemer which I heard in May 2013,[6] where Mr Siemer represented himself, Mr Siemer requested that I disqualify myself on the ground that I had demonstrated bias against him in the handling of cases in which he had previously appeared before me. He alleged then that I was the subject of seven active complaints by him to the Judicial Conduct Commissioner, that my rulings in cases in which he was involved were the subject of four then-current appeals to the Court of Appeal, and that he had included on a website managed by him "data" of my past which included "very questionable legal behaviour". Mr Siemer alleged that I had failed in my duty to assist him as an unrepresented litigant and that I had placed myself in a position where the natural tendency for me as a judge would be to "seek vengeance" against him for requesting that I disqualify myself.

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4 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

5 At [4].

6 *Siemer v Attorney-General* [2013] NZHC 1111.

[13] In explaining my refusal to recuse myself on that occasion, I referred to and relied upon the principles set out by the Supreme Court in *Saxmere*.[7] The principles of that case, to which I referred at paragraphs [5] to [8] of the judgment delivered in May 2013,[8] apply here also. I observed in that judgment, at [9], that in making his application for recusal, Mr Siemer was not assisted by reference to "self-generated, defamatory allegations about my conduct made on a website managed by him, or by numerous complaints made by him to the Judicial Conduct Commissioner about decisions made in the exercise of my judicial duties in relation to any legal proceedings". I said that judges who have sworn to uphold the rule of law are not intimidated or otherwise influenced by such matters and that to take them into account on a recusal application would be to place into the hands of an aggrieved litigant the power to force the disqualification of any judge, no matter how outrageous or unreasoned the allegations or complaints. I then referred to observations of the Court of Appeal in *Muir v Commissioner of Inland Revenue.*[9]

[14] In the earlier judgment I used the word "defamatory" to indicate that the statements had a tendency to lower my reputation "in the estimation of right-thinking members of society generally".[10] It was an appropriate use of the term to describe statements having the effect, if not the intention, of calling into question my suitability for appointment to the High Court and of undermining my credibility as a judge. In a subsequent appeal related to that decision not to recuse myself, in which a judge of the Court of Appeal was required to review a decision of the Registrar of the Court of Appeal refusing to dispense with the payment of security for costs by Mr Siemer, Harrison J endorsed as correct the statements I made at [9].[11]

[15] I concluded in this case that those considerations continued to apply and that a principled approach to the issue in terms of the Supreme Court's judgment in *Saxmere* did not make it appropriate that I should recuse myself. I declined to do so.

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7 Above n 4.
8 Above n 6.
9 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [101].
10 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240.
11 *Siemer v Attorney-General* [2013] NZCA 391 at [6]-[7].

The issues to be determined

[16] I am required to determine the following issues:

(a) Was the warrant to search the property at 27 Clansman Terrace and to seize the items listed invalidly obtained because the application provided insufficient relevant information to justify it? Specifically:

(i) Did the application adequately disclose allegations of particular offending?

(ii) Did the application justify a search of the subject premises for evidence?

(b) Did the warrant disclose the date on which it was issued and, if not, does that render the warrant invalid despite s 204 of the Summary Proceedings Act 1957 ("SPA")?

(c) Was the warrant a general warrant and, therefore, invalid? More specifically:

(i) Did it contain a sufficient description of the alleged offending?

(ii) Was the description of the items of which seizure was authorised sufficiently specific to provide reasonable limitations on the search of the premises and the seizure of private property?

(iii) Did the warrant purport to authorise the seizure of items not reasonably connected to the alleged offence or offences referred to?

(d) Was the warrant obtained in bad faith as a pretext for searching Mr Siemer's home and seizing his property for some ulterior purpose?

(e) Does the second plaintiff, Spartan News Limited, have standing to bring any claims independently of the plaintiff members of the Siemer family?

(f) Does Stephanie Siemer have standing to bring a claim for trespass to land?

(g) Are the Police officers who executed the search warrant entitled to immunity from suit by virtue of s 39 of the Police Act 1958 or ss 26 or 27 of the Crimes Act 1961?

(h) Can the Attorney-General be held vicariously liable in tort for the actions of the Police officers who executed the search warrant, or does he have immunity by virtue of s 6(5) of the Crown Proceedings Act 1950?

(i) Can Detective Superintendent Lovelock and Deputy Registrar Reid be held vicariously liable for the actions of the Police officers who executed the search warrant?

(j) Can the Deputy Registrar be held liable for breaches of NZBoRA or does he have judicial immunity?

(k) Can the Attorney-General be held liable for damages under the NZBoRA?

(l) Were the search of the premises and the seizure of property conducted in an unlawful or unreasonable manner?

(m) If the warrant was invalid and/or any aspect of the search and seizure unlawful and unreasonable, are the plaintiffs or any of them entitled to remedies and, if so, what?

Background facts

[17] During 2006 and 2007, the New Zealand Police conducted a major operation in the Uruwera region gathering information about the conduct of a number of people believed to support the establishment of overall Māori sovereignty in New Zealand allegedly by coercive means. It was given the title "Operation Eight". The arrests of 18 people in mid-October 2007 attracted a considerable amount of news media and public interest, particularly when the Solicitor-General announced the following month that, notwithstanding allegations that the defendants had engaged in training for terrorist activities, the charges under the Terrorism Suppression Act 2002 would not be pursued. Four of the arrested persons were subsequently tried on charges under the Arms Act 1983 but, by the time of the trial, much of the evidence which had been obtained by the Police had been held to be inadmissible against them on those charges.[12]

[18] On 11 November 2007, Detective Superintendent Andrew Lovelock was directed to lead an investigation into what was said to be the unauthorised disclosure of sensitive information gathered by Police during Operation Eight. In particular, Detective Superintendent Lovelock was concerned to investigate who had been responsible for posting on a website, www.nzclu.org, a copy of an affidavit sworn by Detective Sergeant Aaron Pascoe ("the Pascoe affidavit") filed in support of search warrants that the Police had sought in the course of the investigation. The Pascoe affidavit contained a detailed account of the evidence obtained by the Police against the Operation Eight defendants, including by covert surveillance and the interception of private communications purportedly under warrants issued by the courts.

[19] Detective Superintendent Lovelock's assignment was to establish who had been responsible for disclosing the information on the website and drawing to it the attention of a number of news media agencies; to confirm or negate the source of the information being within the New Zealand Police; to assess the criminal culpability relating to any such disclosure; and to determine whether there had been any breach of Police regulations by a member of the New Zealand Police.

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12 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

[20] Initially, the concern was whether there had been any contempt of court and/or any breach of s 312K of the Crimes Act 1961, which then prohibited the disclosure of private communications lawfully intercepted pursuant to an interception warrant issued by a court. Detective Superintendent Lovelock's subsequent inquiries led him to believe that on 19 and 22 November 2007, an email had been sent to a number of recipients, including the Solicitor-General, which directed the recipients to the "nzclu" website and which enabled a document intituled "NZPOLICEaffidavit.pdf" to be read and downloaded.

The application for the Clansman Terrace search warrant

[21] On 19 February 2008, Detective Superintendent Lovelock applied under s 198 of the SPA for a search warrant in respect of "any building, carriage, box, vehicle, receptacle, premises or place situated at 27 Clansman Terrace, Gulf Harbour, Whangaparäoa", the Siemer home. In the sworn application, the Detective Superintendent indicated that the document posted on the website was a copy of the 156-page Pascoe affidavit from which page 144 was missing.

[22] The application indicated that contempt of court and an alleged breach of s 312K of the Crimes Act could not be relied upon as alleged offences supporting an application for a search warrant under the SPA, because they were not offences punishable by imprisonment as required by s 198(1)(a) of the Act. However, Detective Superintendent Lovelock deposed that a warrant could be sought on the grounds of belief that there was evidence of a conspiracy to obstruct, prevent, pervert or defeat the course of justice under s 116 of the Crimes Act or of a wilful attempt to obstruct, prevent, pervert or otherwise defeat the course of justice under s 117(e) of the Act, both of which are punishable by imprisonment for a term not exceeding seven years.

[23] Much of the detailed and highly prejudicial information in the Pascoe affidavit about the activities of the remaining Operation Eight defendants had become irrelevant due to the decision to drop the charges under the Terrorism Suppression Act. Thus, the pre-trial publication of that information carried a risk

that the rights to a fair trial of the defendants facing the Arms Act charges would be infringed, with the result that the course of justice would be adversely affected.

[24] Copies of the Pascoe affidavit with certain portions deleted had been provided to counsel representing the defendants in the Operation Eight case as part of the prosecution's obligation to disclose relevant documents, but they were not publicly available. In his application, Detective Superintendent Lovelock said that Police inquiries had established that a person using the name Michael Ross had distributed from the address civil.liberties@yahoo.com emails drawing attention to the website containing the Pascoe affidavit on 19 November 2007 and on three other occasions on 22 November 2007, at times which were precisely recorded. Subsequent inquiries indicated that the four emails had been sent from a computer terminal situated in the Whangaparāoa Library and that, at the relevant times, the emails were sent by a person using a library user identification number attributed to Mr Siemer. Detective Superintendent Lovelock said that the Police had obtained from a member of the library staff and from a Detective Henshaw, who had previously dealt with Mr Siemer on unrelated matters, evidence that tended to identify Mr Siemer as the person using the computer at the relevant times. Having viewed the CCTV footage, Detective Henshaw said that the person shown in the video recording "could well be" Mr Siemer as there was "a very good likeness to him" and that he was "fairly sure" that it was Mr Siemer in the recording.

[25] At paragraphs 49 and 55 of his affidavit, Detective Superintendent Lovelock said:

> 49. I have viewed the CCTV footage on a number of occasions and in my opinion the male person captured entering and leaving the Whangaparäoa Library on 19 November 2007 is identical to the man that is captured entering and leaving the library on 22 November 2007. Further that a male person seen undertaking a transaction with a Library staff member on 20 December 2007, is identical to the male seen on 19 and 22 November 2007.
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> …
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> 55. I believe that a search of 27 Clansman Terrace, Gulf Harbour, Whangaparäoa will provide evidence against Vincent Ross SIEMER and/or person or persons as yet unknown for wilfully attempting to

obstruct, prevent, pervert or defeat the course of justice and/or conspiring to obstruct, prevent, pervert or defeat the course of justice thereby placing in jeopardy the opportunity of Jamie Beattie LOCKETT and others (Referred to in APPENDIX 'A' and in Appendix 'A' of that document) (& later in this paragraph) of having a fair trial in respect of charges brought under the Arms Act 1983, and seek a warrant to search for and seize:

1. *Any documents and correspondence linking Vincent Ross SIEMER to the Whangapäraoa Library including subscriber document number 21728001856252;*

2. *Any documents and correspondence relating to the website www.nzclu.org;*

3. *Any documents and correspondence relating to "Michael ROSS" and the e-mail address of civil.liberties@yahoo.com;*

4. *Any documents and correspondence relating to any business relationship between Vincent Ross SEIMER* [sic] *and <yahoo.com>;*

5. *Any billing accounts or banking records relating to the Whangaparäoa Library; <yahoo.com.> or any Internet Service Providers (ISP's) linked to <yahoo.com>;*

6. *Any documents and correspondence between Vincent Ross SIEMER and the Operation Eight accused persons and their legal advisors including in particular: Whiri Andrew KEMARA (aka Te Rangikaiwhiria KEMARA); Tame Wairere ITI, Omar HAMED, Tuhoe Francis LAMBERT, Jamie Beattie LOCKETT; Rongomai Simon BAILEY, Emily Felicity BAILEY, Riwiri ITI, Valerie MORSE; Watene Paul McCLUTCHIE; Ira BAILEY, Marama MAYRICK, Moana Hemi WINITANA; Charl Hirschfeld; Annette Sykes, Anthony Rogers, Kahu Barron-Afeaki, Jeremy Bioletti, Mary Kennedy; Val Nisbet; Thomas Sutcliffe; Jo Wickcliffe; Mark Lillico; Michael Bott; Miharo Armstrong; Jason Pou; Sandy Baigent; Moana Dorset; Murray McKechnie; and Moana Tuwhare.*

7. *Any documents and correspondence relating to document entitled 'NZPOLICEaffidavit.pdf' available via www.nzclu.org;*

8. *Any document entitled 'NZPOLICEaffidavit.pdf';*

9. *Any computers, central processing units, external and internal drives and external storage equipment or media, terminals or video display units, together with peripheral equipment such as keyboards, printers, scanners and modems used to create or store any material specified in numbered paragraphs 1-8 above.*

10. *Any and all computer or data processing software or data including, but not limited to, hard disks, floppy discs, cassette tapes, video cassette tapes, magnetic tapes, integral RAM or DOM units and any other permanent or transient storage devices used to create or store any material specified in numbered paragraphs 1-8 above.*

11. *Records or documents, whether contained on paper in handwritten, typed, photocopied or printed form or stored on computer printouts, magnetic tape, cassettes, discs, diskettes, photo optical devices or any other medium; access number(s), password(s), pass-phrase(s), personal identification numbers (PINS) devices used to assist in the creation or storage of any material specified in numbered paragraphs 1-8 above.*

12. *Any computing or data processing literature and software including, but not limited to, printed copy, instruction books, notes, papers or computer programs in whole or in part used to assist in the creation or storage of any material specified in numbered paragraphs 1-8 above.*

13. *Samples of computer, printer and copier paper used to assist in the creation or storage of any material specified in numbered paragraphs 1-8 above.*

14. *Any clothing worn on 19 November 2007 by Vincent Ross SIEMER at the Whangaparäoa Library namely a blue coloured jumper and grey coloured trousers;* as per CCTV footage.

15. *Any clothing worn on 22 November 2007 by Vincent Ross SIEMER at the Whangaparäoa Library namely an island style patterned shirt and khaki shorts;* as per CCTV footage para 49.

16. *Any clothing worn on 20 December 2007 by Vincent Ross SIEMER at the Whangaparäoa Library namely a white short sleeved 'v' necked buttoned shirt; grey coloured shorts with a black stripe at the side, and a red and white coloured bag.* as per CCTV footage para 49.

[Underlining added.]

[26] The words which I have underlined in the description of the items numbered 14, 15 and 16 were added by Detective Superintendent Lovelock by hand at the time he swore the affidavit before Mr BJ Reid, a deputy registrar of the Auckland District Court, who is the fifteenth defendant.

[27] At the time of preparing the warrant application, Detective Superintendent Lovelock also prepared and printed off a search warrant to be signed by the Deputy Registrar, in anticipation of the application being successful. He also printed off what was intended to be a copy of the search warrant which would be handed to the occupiers of 27 Clansman Terrace, Gulf Harbour, at the time the warrant was executed. An issue about how the warrant and the occupiers' copy were prepared and the form they were in when the warrant was signed by Mr Reid and subsequently executed is discussed more fully below.

The applicable principles of law

[28] My consideration of the plaintiffs' claims and my conclusions about them are necessarily informed by the judgment of the Court of Appeal in *Attorney-General v Dotcom* (the *Dotcom Search Warrants* judgment),[13] in which the Court considered the judgments of Winkelmann J holding to be invalid search warrants issued under s 44 of the Mutual Assistance in Criminal Matters Act 1992 ("the MACMA") at the request of the Department of Justice of the United States of America.[14]

[29] In the *Dotcom Search Warrants* judgment, the Court of Appeal noted that issues relating to the validity of search warrants arise in the context of the exercise of statutory powers designed to achieve a balance between well-established rights of privacy, personal integrity, private property, the rule of law and law enforcement values.[15] The Court observed that the rights of the individual are protected from unreasonable search or seizure not only by the need for law enforcement agencies to comply with the requirements of the relevant statutory powers, but also by the involvement of the courts in considering issues relating to the validity of search warrants in challenges to the admissibility of evidence obtained under them and, on occasion, in judicial review proceedings.[16]

[30] Considering the relevant statutes which were in effect prior to the enactment of the Search and Surveillance Act 2012, including the SPA and the MACMA, the Court noted that most of them required search warrants to be obtained on application to an independent officer acting judicially. The Court said:[17]

> The officer had to be satisfied that there were reasonable grounds for authorising the issue of the warrant. Warrants were to be issued in a prescribed form which had to identify what might be searched and seized and the relevant offences. At the same time, in terms of s 204 of the Summary Proceedings Act, courts were precluded from quashing, setting aside or holding invalid warrants "by reason only of any defect, irregularity,

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13 *Attorney-General v Dotcom* [2014] NZCA 19, [2014] 2 NZLR 629. Although this judgment was issued after the principal hearing of this case, I received helpful written submissions about the decision from counsel.

14 *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115; and *Dotcom v Attorney-General* [2013] NZHC 1269.

15 *Attorney-General v Dotcom*, above n 13, at [24], citing Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at ch 2.

16 At [26].

17 At [27].

omission, or want of form" unless satisfied that there had been a miscarriage of justice.

[31] The Court then summarised the applicable principles, which have relevant application in this case, in the following terms (footnotes omitted):

> [28] Appellate decisions interpreting and applying these statutory provisions have established that:
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> (a) an application for a search warrant should make proper disclosure;
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> (b) a warrant must be issued in respect of a particular offence and should be as specific as the circumstances allow and may be invalid for lack of specificity;
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> (c) a warrant containing a misdescription of the offence, but which is not otherwise misleading, may be saved by s 204 of the Summary Proceedings Act;
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> (d) a warrant that is in such general terms that it fails to identify with sufficient particularity the offence to which the search relates will be a nullity and not able to be saved by s 204;
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> (e) a warrant with defects that cannot be regarded as so radical as to require the warrant to be treated as a nullity may, in the absence of a miscarriage of justice, be saved by s 204;
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> (f) the court's approach should not be overly technical or "nit-picking"; and
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> (g) a question of degree is involved, "answerable only by trying to apply a commonsense judgment" against the statutory background and with reference to the particular facts.
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> [29] The question whether a warrant is saved by s 204 requires a careful examination of the terms of the particular warrant in the context of the facts of the particular case….

[32] The Court of Appeal then discussed a number of relevant authorities, emphasising that the focus of a court's inquiry in a challenge to the validity of a warrant is on the circumstances of the particular case.[18] The Court observed, however, that the decision in *Rural Timber Ltd v Hughes*[19] confirms that an inadequate description of the target offending may be adequately explained by the content of the remainder of the search warrant assessed in a commonsense way in the particular factual circumstances of the case.

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18 At [30]-[33].

19 *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 (CA).

[33] *Rural Timber* concerned a warrant which described the suspected offence as "conspiring to defraud the Commissioner of Works (Crimes Act 1961, s 257)" and authorised the search for and seizure of 15 items listed in a schedule, namely: hubodometers, waybills, consignment notes/manifests, instructions for delivery, driver's logbooks or time-sheets, financial records, road-user charges, application forms, distance licences, driver hours records, vehicle running receipts, vehicle mileage records, tools/implements for tampering with hubodometers, sales records, contracts for cartage, and hire-purchase agreements.

[34] In that case, the Court of Appeal held that the suspected offence was described "somewhat inadequately in the warrant", in that the precise nature of the alleged conspiracy was not specified and no dates were given. Nevertheless, the Court held that reading the warrant together with the schedule, a reasonable reader would gather that hubodometers, instruments for tampering therewith, road-user charges and distances were involved. A reasonable reader would have little difficulty, the Court concluded, in gathering that the alleged conspiracy must involve misrepresentation of the distances travelled by the company's vehicles. The Court noted also that there was evidence, relevant to the question of miscarriage of justice in the context of applying s 204 SPA, that the nature of the alleged conspiracy and the general object of the searches was explained both in the briefing of the Police and traffic officers who participated in the searches and at the commencement of the searches to the company personnel then present.

[35] Adopting a similar approach, the Court of Appeal noted in the *Dotcom Search Warrants* case that it was not disputed that the application for the search warrants provided the District Court Judge with reasonable grounds to be satisfied that the warrants should be issued. It was not suggested on appeal that the Judge had been given inadequate or misleading information. Among other things, the Court held that the Judge was entitled to rely on the Police to execute the warrants lawfully and not to seize anything that was clearly irrelevant.[20] The Court held that the Judge was also entitled to rely on the Police to comply with the provisions in the MACMA requiring a notice to be given to the owner or occupier of the place or thing searched

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[20] At [49].

identifying anything seized under the warrant and requiring everything seized to be delivered into the custody of the Commissioner of Police.

[36] Bearing in mind the principles just summarised, I deal next with the specific issues related to the validity of the warrant.

Was the warrant invalidly obtained because the application provided insufficient relevant information to justify it?

Did the application adequately disclose allegations of particular offending?

[37] As the Court of Appeal held in the *Dotcom Search Warrants* judgment,[21] an application for a search warrant should make proper disclosure and a warrant must be issued in respect of a particular offence. It is first necessary to decide here whether there were adequate grounds on which the Deputy Registrar could be satisfied that it should be issued.

[38] The warrant which was executed at 27 Clansman Terrace was authorised on the basis that there were reasonable grounds for believing a search would yield evidence in relation to the offences of wilfully attempting to obstruct, prevent, pervert or defeat the course of justice in New Zealand (s 117(e) Crimes Act 1961) and/or conspiring to obstruct, prevent, pervert or defeat the course of justice in New Zealand (s 116 Crimes Act). There are any number of ways to commit an offence under either s 116 or s 117 of the Crimes Act, as the use of the expression to "obstruct, prevent, pervert or defeat the course of justice" in those sections makes clear. They are broadly described crimes intended to cover a broad range of conduct.

[39] The warrant application, which takes the form of an affidavit sworn by Detective Superintendent Lovelock, contains detailed background evidence setting out the Detective Superintendent's investigation into what he described in the application as "the unauthorised disclosure of sensitive information, including lawfully intercepted communications (pursuant to interception warrants), gathered by Police during 2006 & 2007 into the conduct of a group of individuals who generally supported the establishment of overall Maori Sovereignty in New Zealand

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[21] *Attorney-General v Dotcom*, above n 13, at [28].

by coercive means". It explains the steps taken to identify the source of the information related to Operation Eight and the Pascoe affidavit in particular which could be accessed on nzclu.org. The application explains the implications of the availability of the Pascoe affidavit in terms of the adverse impact on the fair trial rights of the Operation Eight defendants, and identifies the offences which Detective Superintendent Lovelock considered may have been committed.

[40] The affidavit then explains the basis upon which the Detective Superintendent concluded that a copy of the Pascoe affidavit was uploaded onto nzclu.org by Mr Siemer using a computer at the Whangaparāoa Library. The evidence described includes Detective Henshaw's belief that Mr Siemer was the man whose image was captured in the surveillance footage obtained from the library at the relevant times, and the description provided by a witness of a man fitting Mr Siemer's description. Although Detective Superintendent Lovelock's affidavit did not allege that Mr Siemer was seen on 19 and 22 November 2007, or 20 December 2007, wearing particular items of clothing, the handwritten additions to the warrant application in respect of items 14, 15 and 16 refer back to the CCTV footage which is described in paragraph 49 of the application as having been seen by Detective Superintendent Lovelock. The inference to be drawn from, and the obvious intention of, the additions is to identify that Detective Superintendent Lovelock saw that the person in the CCTV footage recorded on the relevant dates was wearing the clothing described in the numbered items.

[41] There was ample evidence, in my view, on which the Deputy Registrar could form a reasonable belief that Mr Siemer had committed either or both of the particular offences referred to in the application, and about the manner in which the offending occurred.

Did the application justify a search of the subject premises for evidence?

[42] It took little more than plain logic for the Deputy Registrar to accept that there were reasonable grounds for believing that evidence of the offending would be found at Mr Siemer's home.

Conclusion as to sufficiency of information

[43] Accordingly, I am satisfied that the warrant application contained sufficient relevant information to justify the Deputy Registrar's decision to issue a warrant for the search of 27 Clansman Terrace for evidence of the offences described.

Did the warrant disclose the date on which it was issued and, if not, does that render the warrant invalid despite s 204 of the SPA?

[44] The omission of an identifiable date from a search warrant is significant in view of the requirement in s 198(3) SPA that a search warrant must authorise a search "within one month from the date thereof". The plaintiffs submit that the presence of a date on a search warrant is a matter of "critical substance", and that its absence would render a subsequent search invalid.

[45] It is not disputed that the warrant produced in evidence as Exhibit C contains on its face a date of the "19th day of February, 2008". The underlying question of fact on this issue, therefore, is whether Exhibit C is the warrant that was actually issued by the Deputy Registrar. The plaintiffs allege that it is not because, they say, the way in which the Police produce search warrants and occupier copies of search warrants means the documents should be identical, and there are discrepancies between Exhibit C and the supposed copy warrant presented to Mr Siemer on the day of the search.

[46] Detective Superintendent Lovelock explained that, in addition to preparing the application for the warrant, he prepared what he intended would become two documents: first, the search warrant itself, to be signed by the Deputy Registrar, comprising a one-page search warrant in the prescribed form with a two-page schedule describing the items which would be sought and, if located, seized in the course of the search. The second document would be a copy of the warrant and schedule to be handed to the occupier of the subject property. The second document comprised four pages, the fourth being a notice to the occupier of the subject premises.

[47] Detective Superintendent Lovelock said that he prepared the warrant and the occupier's copy of the warrant, Police form SP50, using a template available from an application within the Police computer system. The application was constructed to produce a single document comprising a first page, which would be the original search warrant; a second blank page; a third page being an exact copy of the search warrant on the first page but with a "COPY" watermark imprinted diagonally across it; and a fourth page containing the Notice to Occupier.

[48] The schedule listing the items sought was prepared by Detective Superintendent Lovelock as a separate Word document, two copies of which were printed out. He said one copy of the two-page schedule was then attached to the first page produced by the template to form the original search warrant. The copy of the search warrant produced by the template then had the second copy of the schedule attached to it, together with the notice to the occupier.

[49] The template contained standard text and a number of blank fields which were required to be completed as necessary using the relevant data which was unique to the intended warrant, such as the nature of the suspected or alleged offence and the date of the warrant. The template was set up so that data inserted into fields on page 1 of the template (the search warrant) would be automatically reproduced in the corresponding fields on page 3 of the template (the occupier copy of the warrant). Apart from the watermark on the copy, therefore, the warrant and the copy would be identical.

[50] Detective Superintendent Lovelock produced Exhibit C on the basis that it is the search warrant which he had prepared using the method just described and which was issued by the deputy registrar, Mr Reid. The operative parts of the first page of Exhibit C read:

> **To** every constable:
>
> (or to , constable:)
>
> **I am satisfied** on an application
>
> (in writing made on oath/affirmation)
>
> ~~(made on oath/affirmation orally, the grounds for which I have noted in writing)~~

THAT there is reasonable ground for believing that there is (are) in any building, ~~aircraft, ship~~, carriage, vehicle, box, receptacle, premises or place situated at 27 Clansman Terrace, Gulf Harbour, Whangaparaoa, the following thing(s), namely:
Refer Schedule "A" attached

(upon or in respect of which an offence of Wilfully attempting to obstruct, prevent, pervert or defeat the course of justice in New Zealand (per Sec 117(e) Crimes Act 1961); and / or Conspired to obstruct, prevent, pervert or defeat the course of justice in New Zealand (per Sec 116 Crimes Act 1961) has been or is suspected of having been committed)

(*or* which there is reasonable ground to believe will be evidence as to the commission of an offence of Wilfully attempting to obstruct, prevent, pervert or defeat the course of justice in New Zealand (per Sec 117(e) Crimes Act 1961); and / or Conspired to obstruct, prevent, pervert or defeat the course of justice in New Zealand (per Sec 116 Crimes Act 1961))

~~(or which there is reasonable ground to believe is intended to be used for the purpose of committed an offence …..)~~

THIS IS TO AUTHORISE YOU at any time or times within one month from the date of this warrant to enter and search the said building, ~~aircraft, ship~~, carriage, vehicle, box, receptacle, premises or place situated at 27 Clansman Terrace, Gulf Harbour, Whangaparaoa, with such assistants as may be necessary, and if necessary to use force for making entry, whether by breaking open doors or otherwise, and also to break open the box (receptacle) (any box or receptacle therein or thereon) by force if necessary; and also to seize

(any thing upon or in respect of which the offence has been or is suspected of having been committed)
(or any thing which there is reasonable ground to believe will be evidence as to the commission of the offence)
~~(or any thing which there is reasonable ground to believe is intended to be used for the purpose of committing the offence)~~

DATED at AUCKLAND this 19th day of February, **2008**

[51] Below this text there is what Detective Superintendent Lovelock identified as Mr Reid's original signature and the handwritten word "Deputy" immediately preceding the printed word "Registrar" under the signature. The exhibit also bears, between two parallel hand-drawn diagonal lines, an original handwritten inscription which Detective Palma identified in evidence had been added by him, with his signature, shortly after he entered 27 Clansman Terrace on 21 February 2008. It reads:

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[52] The second and third pages of Exhibit C comprise the schedule describing the things believed to be located at the subject address. Beneath the heading "SCHEDULE 'A'" there is a subheading "ITEMS SOUGHT" followed by a numbered list identical to that appearing in paragraph 55 of the warrant application, reprinted at [25] above, except for the omission of the handwritten additions to items numbered 14, 15 and 16.

[53] It is not suggested that the three-page document produced as Exhibit C does not conform to the requirements for the form of a valid search warrant under s 198 SPA. But the plaintiffs challenge Detective Superintendent Lovelock's assertion that Exhibit C was the actual warrant issued by the Deputy Registrar and Detective Palma's evidence that the exhibit bearing his handwriting and signature is the search warrant executed by the Police on 21 February 2008.

[54] It is clear that there are discrepancies between Exhibit C and the four-page version of the warrant handed to Mr Siemer at the time of the search. On Mr Siemer's copy, the statement of the alleged offences under the words "Refer Schedule 'A' attached" reads:

> (upon or in respect of which an offence of has been or is suspected of having been committed).
>
> (*or* which there is reasonable ground to believe will be evidence as to the commission of an offence of Wilfully attempting to obstruct, prevent, pervert or defeat the course of justice in New Zealand (per Sec 117(e) Crimes Act 1961); and / or Conspired to obstruct, prevent, pervert or defeat the course of justice in New Zealand (per Sec 116 Crimes Act 1961))

[55] It can be seen that the first bracketed paragraph contains blank fields, whereas the corresponding paragraph of Exhibit C has been completed, as shown at [50] above. Further, Mr Siemer's copy of the warrant contains a typewritten date of "19th day of February" but it does not show the year. The year appears in bold type in Exhibit C.

[56] It is not disputed by the plaintiffs that the first page of the copy warrant handed to Mr Siemer includes the Deputy Registrar's signature and the handwritten addition of the word "Deputy" before "Registrar". It is also accepted that each of the two pages of Schedule "A" bear the Registrar's initials at the bottom; the fourth page

of the copy warrant, headed "NOTICE TO OCCUPIER", does not have the initials. In the notice, the fields intended for manual completion at the time the warrant is executed include the date and time of execution; the name, Police Station and telephone number of the officer in charge of the search; and the signature of that officer. In Mr Siemer's document, they are blank.

[57] Assuming from the application of the computer template that the warrant and the copy would be identical in all material respects, and pointing to the discrepancies in the exhibits produced in this case, the plaintiffs argue that Exhibit C cannot be the search warrant that was issued by Mr Reid and executed at the Siemer home. In the context of the case, that proposition amounts to an assertion that the document produced to the Court is a forgery prepared by Detective Superintendent Lovelock, Detective Palma and Mr Reid. I am wholly satisfied that that is not so.

[58] The explanation for the discrepancy between the two documents lies in the way in which the copy warrant was produced. Detective Superintendent Lovelock said he has now learned, but did not appreciate when he prepared the Siemer search warrant, that a proper use of the computer application requires the user to move from one field to the next using the keyboard Tab key after the unique information is entered in a particular field. It is also possible to move the cursor from one field to another using a computer mouse. When the cursor is moved by mouse from a field into which unique data has been placed to another field, the unique data remains in the field into which it was typed but does not automatically transfer to the corresponding field in the copy warrant. The reproduction of the unique data in the corresponding field in the copy warrant occurs only when the cursor is moved by use of the Tab key.

[59] It appears that, in respect of some but not all of the unique data in the original warrant, Detective Superintendent Lovelock used the mouse to shift the cursor to the next field, rather than the Tab key, with the result that not all of the fields for unique data in the copy warrant were completed.

[60] Mr Henry challenged the credibility of this explanation by suggesting that it was likely to be a common mistake and one which would have become well known

to the Police (and particularly to a senior officer such as Detective Superintendent Lovelock) over the many years during which the template was used. I accept Detective Superintendent Lovelock's evidence, however, that he could recall only one other occasion where he had noticed a similar problem occurring, notwithstanding that other Police officers are likely to have had similar experiences.

[61] Mr Henry suggested also that it was suspicious that, although Mr Reid had initialled the two pages of Schedule "A" in Mr Siemer's copy of the warrant, the initials do not appear on the Schedule in Exhibit C. Detective Superintendent Lovelock's evidence was that he would normally check that amendments to the warrant (such as deletions of references to places which might be searched) were initialled by the issuing registrar together with any attached schedule but that he appeared not to have done so in this case.

Conclusions on disclosure of date of issue on warrant

[62] I have concluded that the very experienced Police officer and Deputy Registrar who produced the search warrant in this case fell below the standards of care they would usually expect of themselves and their colleagues in similar circumstances, and that neither of them noticed the deficiencies in the occupier copy. I find Detective Superintendent Lovelock's explanation for the discrepancies to be credible and note it is supported by evidence from a computer security consultant contracted to the Police, Mr Brett Dale, who replicated the errors using the template used by the Detective Superintendent.

[63] I reject as completely unfounded, therefore, the proposition that Detective Superintendent Lovelock, Detective Palma and Mr Reid conspired to fabricate a false warrant for the purposes of misleading the Court. It is established beyond doubt that Exhibit C is the warrant which was issued by Mr Reid on the basis of Detective Superintendent Lovelock's application and which subsequently came into the possession of Detective Palma, who had it with him at the time the Siemer home was entered on 21 February 2008. It is plain that the warrant contained the necessary information to meet the requirements of s 198 SPA and that it is in valid form, including as to the date. That finding means it is unnecessary to consider

whether the document should be saved under s 204 SPA on account of the omission of a completed date.

[64] It is evident, however, that the occupier copy of the warrant handed to Mr Siemer did not provide him with all of the relevant information to which he was entitled. Among other things, that document contains a typewritten date of "19th day of February" but it does not show the year. That omission and other gaps in the occupier copy, although regrettable, cannot affect the validity of the warrant itself. They may be relevant, however, to the issue of whether the search was conducted in an unlawful and unreasonable manner. I deal with that issue below.

Was the warrant a general warrant and, therefore, invalid?

General warrants invalid – the plaintiffs' argument and the law

[65] The plaintiffs challenge the warrant for being insufficiently specific as to the nature of the alleged offending. They say that it was overly broad as to the categories of items authorised to be seized and insufficiently specific as to the nature of those items, with the result that the warrant purported to authorise the seizure of items not reasonably connected to the alleged offence or offences referred to. Overall, the plaintiffs submit that the warrant's lack of specificity rendered it a general warrant and therefore invalid.

[66] In *Tranz Rail Ltd v District Court at Wellington*, the Court of Appeal said:[22]

> For centuries the law has set its face against general warrants and held them to be invalid. Entry onto or into premises pursuant to an invalid warrant is unlawful and a trespass… A general warrant in this context is a warrant which does not describe the parameters of the warrant, either as to subject matter or location, with enough specificity.

[67] The requirement that search warrants be "as specific as the circumstances allow" is designed to ensure that both the searchers and those whose premises are being searched understand, "with the same reasonable specificity", the proper scope of the authorised search.[23]

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22 *Tranz Rail Ltd v District Court at Wellington* [2002] 3 NZLR 780 (CA) at [38] per Tipping J.

23 At [41] per Tipping J.

[68] To that end, the warrant must contain sufficient detail both as to the alleged offending underlying its issuance and the items authorised to be searched and seized.[24] It must also, of course, authorise the search and seizure only of relevant, and not irrelevant, material.[25]

Did the warrant contain a sufficient description of the alleged offending?

[69] I have already observed that the warrant which was executed at 27 Clansman Terrace was authorised on the basis that there was reasonable grounds for believing a search would yield evidence in relation to broadly described offences. The particulars provided in the application are not replicated in the warrant itself; it does not provide any indication that the alleged offence relates to the unauthorised disclosure of a sensitive Police document.

[70] Warrants must be construed as a whole, however, so it is necessary to consider what other material there is which might assist in defining the offence.[26]

[71] Context for the allegations on the face of the warrant is provided by the list of items sought as set out in Schedule A, the terms of which are identical to the list replicated above at [25], except for the handwritten insertions at items 14, 15 and 16, which do not appear in the warrant itself.

[72] The references, in items 1 to 8, to the Whangaparāoa Library; the website www.nzclu.org; the email address civil.liberties@yahoo.com; and the document entitled "NZPOLICEaffidavit.pdf" being available via the www.nzclu.org website, are indicative of an offence or offences relating to making a Police affidavit available on the internet. Further context is given to the particular nature of the inquiry by paragraph 6 of the schedule which refers to an allegation that Mr Siemer had some kind of contact, if not a relationship, with the Operation Eight accused and their legal advisers. It is clear also from the items numbered 9 to 13 that the Police considered that the offending might be established by reference to information stored

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24 See *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) at 736-737 per McCarthy P.
25 See *Dotcom v Attorney-General*, above n 14, at [51]-[77].
26 *Rural Timber Ltd*, above n 19; *R v Sanders* [1994] 3 NZLR 450 (CA) at 454; and *Attorney-General v Dotcom*, above n 13, at [34].

electronically on one or more of the types of device or data storage facility referred to. The date or dates of the alleged offending may be inferred from the description of items 14, 15 and 16.

[73] I am also satisfied from the evidence that the Police officers who were instructed to conduct the search were sufficiently briefed to understand the nature of the offending so as to narrow the range of items which might legitimately be seized pursuant to the warrant.

[74] I accept that it may have been desirable in the present case for the warrant itself to have identified that the suspected offences related to the uploading of the Pascoe affidavit onto nzclu.org so as to make it available to members of the public. Given Detective Superintendent Lovelock's knowledge of Mr Siemer's attendances at the Whangaparāoa Library, the warrant should also have identified the probable date or dates of the alleged offending. Taking the search warrant and the list of items sought as a whole, however, I consider that the document contains sufficient information to enable a reasonable reader to understand the allegations about the offending and when it occurred.

Was the description of the items of which seizure was authorised sufficiently specific to provide reasonable limitations on the search of the premises and the seizure of private property?

Did the warrant purport to authorise the seizure of items not reasonably connected to the alleged offence or offences referred to?

[75] The next two subsets of the third issue are so closely related that it is convenient to deal with them together.

[76] In *R v Sanders*, Fisher J said this of the legal requirements for the content of a search warrant:[27]

> …the things alleged to be present at the stated location may be defined in generic terms… but the exercise must be more than a fishing expedition with nothing in particular in mind… a thing will constitute evidence of the commission of an offence if its form or existence would directly or indirectly make one or more of the factual elements of the offence itself more likely.

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[27] *R v Sanders*, above n 26, at 461.

[77] A warrant must be sufficiently specific about what may be searched for and seized so the occupier of the premises may understand, and if necessary obtain legal advice about, the permissible limits of the search.[28] In the end, the question must be whether, looking at the document as a whole, it is likely that anyone would be misled as to its scope and purpose.[29] Obviously, the purpose for the search must be related to the offence or offences in respect of which evidence is sought.

[78] The plaintiffs in this case allege that the warrant was invalid because it authorised the search for and seizure of items which were not related to, or could not have had any probative value in respect of, the listed offences. Mr Henry submits that there can be no plausible connection between all of the items set out in the warrant and the specified offences. On that basis, it is said the warrant was oppressive because the categories of items sought were defined so broadly as to make it inevitable that it would capture both relevant and irrelevant material.[30]

[79] Mr Henry also argues that the warrant is invalid because it is not framed in a way which enabled the Siemers to understand specifically what material the Police were authorised to search and seize. For example, counsel submits that the first category of items – any documents and correspondence linking Mr Siemer to the Whangaparāoa Library – is too broad because it would enable the Police to search for and seize a letter to Mr Siemer from the library reminding him to return an overdue book.

[80] For the first to fourteenth defendants, however, Mr Powell submits that it is difficult to see what further detail could have been provided and that a reading of the warrant makes it clear why the Police arrived at 27 Clansman Terrace.

Discussion

[81] I agree that the evidential connection between the items sought and the suspected offences is obvious. Mr Henry's example of the library letters does not

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28 *Auckland Medical Aid Trust v Taylor*, above n 24, at 733 per McCarthy P, at 742 per Richmond J and at 749 per McMullin J.

29 *R v Sanders*, above n 26, at 467.

30 *Dotcom v Attorney-General*, above n 14, at [77].

demonstrate that the items were described too broadly or with insufficient specificity. The Police sought to link Mr Siemer to the place where the offending allegedly occurred. Evidence of his frequenting the library was the type of evidence which they were entitled to seek.

[82] While the description of some of the items sought is wide and might possibly have given rise to the search and seizure of irrelevant material, the courts should take a realistic and commonsense approach to attacks upon search warrants. It is the broad picture, rather than individual factors, which is important.[31]

[83] I am satisfied that each of the items listed was sufficiently relevant to the suspected offending to be considered as potentially providing evidence of the commission of the suspected offences. Items 1, 5, 14, 15 and 16, if located, provide evidence linking Mr Siemer to the use of the library's computer on the relevant date or dates. Particular items of clothing, rather than all clothing, were identified.

[84] Items 2, 3 and 4 were relevant to establishing that Mr Siemer was the person who had created or had access to nzclu.org with sufficient authority to upload the Pascoe affidavit. The existence of any items listed at 6, 7 and 8 would tend to prove a link between Mr Siemer, the Operation Eight defendants, the Pascoe affidavit and the website.

[85] While I acknowledge that the items numbered 9 to 13 inclusive in the list are very broadly described, they are items capable of providing evidence of the creation of the website and, particularly, of the downloading and subsequent uploading of a copy of the Pascoe affidavit in a portable document format (".pdf"). It is significant, in my view, that the listed items are confined to equipment capable of producing and storing material of the kind more specifically identified in items numbered 1 to 8 inclusive. The limitations on the face of the document are sufficient to meet Mr Henry's criticism that the warrant necessarily authorised the seizure of irrelevant material, possibly of a highly personal, confidential or sensitive nature, belonging to members of the Siemer family, which would have had nothing to do with the suspected offending.

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[31] *Collett v R* [2013] NZCA 158 at [21]. See also *R v Fox* (2002) 19 CRNZ 652 (CA) at [16].

Conclusion that warrant was not invalid for generality

[86] For these reasons, I am satisfied that the warrant was not a general warrant but one directed towards locating evidence that would directly or indirectly make one or more of the factual elements of the alleged offences more likely. I decline to hold the warrant invalid on the grounds of generality.

Was the warrant obtained in bad faith as a pretext for searching Mr Siemer's home and seizing his property for some ulterior purpose?

[87] The plaintiffs allege that the warrant was obtained in bad faith. They invite the Court to draw this conclusion on the basis of their allegations that:

(a) the application sworn by Detective Superintendent Lovelock contained insufficient material to link the Siemer home to the commission of any of the alleged offences listed in the warrant;

(b) the general nature of the warrant and the items listed as those to be searched and seized clearly indicated that the defendants were engaged in a "fishing expedition"; and

(c) the search of the Siemer home was "designed to be a tool to harass and intimidate" Mr Siemer.

[88] I have addressed and rejected the first two of these submissions in the preceding discussion. There is simply no evidence that the purpose of the search was to harass and intimidate Mr Siemer. Detective Superintendent Lovelock explained why the public dissemination of the Pascoe affidavit was a matter of concern to the Police, even after the possibility that a Police officer had been involved in improper conduct had been largely discounted. The potential link between Mr Siemer and the uploading of the affidavit onto the internet, using a computer at the Whangaparāoa library, was obvious and the Police were bound to investigate it further.

[89] The plaintiffs adduced no evidence of an ulterior motive on the part of any of the Police officers and the allegation was never put to them in cross-examination. Applying for and executing this warrant required a significant consumption of Police time and resources, and I am more than satisfied that the Police have many far more important things to do with their time than send 12 officers to Mr Siemer's house to spend seven hours searching it just to annoy him.

[90] I am satisfied there is no merit in the allegation of bad faith.

Overall conclusion on allegation that the search warrant was invalid

[91] I find for the defendants on all of the issues related to the allegations that the search warrant was either obtained invalidly or was invalid on its face.

The plaintiffs' tort and NZBoRA claims

[92] It remains to consider whether the search was conducted unlawfully and unreasonably, and to determine whether the causes of action in tort and for NZBoRA damages are made out. As I have mentioned, the plaintiffs allege that various of the defendants are liable for the torts of trespass to land and goods, breach of privacy, conversion, false imprisonment and intimidation. They allege further that their rights under ss 21, 22 and 23 of NZBoRA were breached. They seek damages or compensation, including aggravated and punitive damages. Before addressing these issues, it is necessary to set out in more detail the plaintiffs' evidence about what took place on the morning of the search and to make findings of fact.

The evidence about what happened during the search

[93] Mr and Mrs Siemer were still in bed when the Police made their way into their house to execute the search warrant. Their daughter Stephanie was asleep in her bedroom. Mr and Mrs Siemer say that they heard the Police come through the unlocked front door and shout that they were now "in control" of the house. Mrs Siemer says she was very frightened. Mr and Mrs Siemer went downstairs to find several officers present. Mr Siemer was handed a copy of a search warrant.

There was then some pushing between Detective Sergeant Brown and Detective Palma as Mr Siemer tried to get into his office. The officers did not want him to go into that room because it had not yet been searched.

[94] Mr Siemer says he retreated from the two officers, who were "crowding" him, by going through the living room to the back deck. The officers followed him. Mrs Siemer took this opportunity to enter the office and retrieve two memory sticks. She says she did this because she "thought that the police were coming to confiscate Vince's computer and his work". She then went to Stephanie's room to wake her daughter up.

[95] Detective Jane Thew saw what was going on and followed Mrs Siemer into the bedroom. She demanded that Mrs Siemer give her the memory sticks and Mrs Siemer handed them over. Detective Thew then told Mrs Siemer and Stephanie they had to go to the living room. All of the Siemers were still in their night clothes. Stephanie says by this time she was crying and feeling very scared.

[96] Mr Siemer was on the deck with the male officers. He says that Detective Sergeant Brown was taking notes. After about five minutes, Mr Siemer, who was getting cold, said he wanted to phone his lawyer. The officers let him go inside but Mrs Siemer and Stephanie were moved out of the living room so that Mr Siemer could not see them or talk to them from the kitchen. Mr Siemer says there was then a minor tussle between him and Detective Sergeant Brown over the phone handset, as the Police officer wanted to dial the number. The Detective Sergeant relinquished the handset. Mr Siemer managed to speak to a community advocate and explain his situation. He alleges, however, that a couple of minutes after this conversation the telephone rang but he was not allowed to answer it. He says one of the officers then "incapacitated" the phone so that no calls could come in or out.

[97] I am satisfied that there was a minor physical tussle between Mr Siemer and Detective Sergeant Brown over the use of the telephone and that Mr Siemer was instructed that he was not permitted to telephone anyone except a lawyer. The Detective Sergeant said he believed the Police were entitled to restrict calls in and out of the house during the search so that they would remain in control of the search.

That is not correct and the Police were over-zealous in taking those steps. Although the Police were entitled to take reasonable measures to ensure the search was not hindered or obstructed, and to control the movement of the occupants around the property to that end, no member of the Siemer family was under arrest. The plaintiffs were entitled to speak to whomever they wished, and were free to leave and return to the property at any time.

[98] Normally, at this time, Stephanie would have been getting ready for school. She says, however, that she was not allowed into her bedroom to get changed unless Detective Thew accompanied her. She chose to stay with her mother in the living room until the Police said it was alright for her to get changed. Mrs Siemer then took Stephanie to school, but she was late. Stephanie had not had any breakfast and did not have any lunch to take with her. Mrs Siemer said she did not have any breakfast either because, she alleges, she was not allowed to go into the kitchen.

[99] Mrs Siemer said that Detective Thew told her that she could take Stephanie to school but that she should not talk to anyone and she should come straight back to the house. When Mrs Siemer returned from the school run she returned to the living room. She essentially remained there for the whole morning until the Police left sometime around 1:30 pm.

[100] I find it unlikely that Detective Thew would have instructed Mrs Siemer to return to the property immediately after dropping Stephanie at school. The Police were entitled to search the premises whether or not the occupants were present, and Mr Siemer was permitted to leave the property without any similar instruction being issued. Given Detective Thew's experience of Mrs Siemer's early attempt to obstruct the search by seizing the memory sticks, I doubt that the Detective would have had any interest in ensuring Mrs Siemer's return to Clansman Terrace.

[101] The officers had Mr Siemer sit down in the kitchen and answer questions about his visits to the Whangaparāoa Library and his connections to the Urewera 18. He says that for about four hours he was kept more or less at the kitchen table. He alleges that several times he asked if he could change out of his pyjamas and the officers refused because the house was being searched. Mr Siemer alleges that at

one point he asked if he could make a cup of coffee, and the officer said he could if he answered one more question, to which he agreed.

[102] About four hours into the search, Mr Siemer was informed that a visitor had come to the house and wanted to speak with him. He went to the gate of his property in his pyjamas.

[103] Shortly after this, Mr Siemer was permitted to get dressed. Then he and his visitor, Grace Haden, made to leave in his car, but Constable Thomas stopped him because the Police had not finished searching it. Mr Siemer alleges that the officer conducted a pat-down search of him and took, and kept, a note from Mr Siemer's trouser pocket. Mr Siemer and his friend left in her car. He returned to the house at about 2pm to find that the Police had left not long before, taking with them a substantial number of his personal belongings.

[104] It is alleged that, until they were permitted to leave the premises, Mr and Mrs Siemer and Stephanie were detained against their will by Detective Sergeant Brown, Detective Palma and Detective Sirl. Mr Henry argues that evidence of their confinement is provided by the manner in which Mr Siemer was kept apart from his wife and Stephanie during the search; by the requirement that the occupants should remain in their night clothes for unreasonably long periods; by an instruction that Mr Siemer would be permitted to get himself a cup of coffee only after providing Detective Sergeant Brown with information; and by the giving of an unlawful instruction to Mrs Siemer, when she was eventually permitted to take Stephanie to school, not to speak to anyone and to return to the house immediately after Stephanie was delivered. I accept, however, that separating Mr Siemer from his wife and daughter was a reasonable response, in the circumstances, to Mrs Siemer's attempt to conceal evidence at the beginning of the search, in that it assisted the Police to minimise the risk of obstruction or hindrance. I accept also that it was reasonable of the Police to keep Mr and Mrs Siemer and Stephanie from returning to their bedrooms until the search of those rooms was completed; the Police made offers to escort the occupants to their rooms to obtain clothing. I find also that Mr Siemer has exaggerated both the intent and effect of Detective Sergeant Brown's comment about the coffee and that it was mere banter taking place some hours into the search.

The standing of the second and third plaintiffs

[105] It is appropriate next to address preliminary arguments raised on behalf of the defendants. The first of these concerns the standing of the second and third plaintiffs.

[106] It is submitted that the claims by the second defendant ("Spartan News") should be dismissed because no evidence was led by the plaintiffs about the company's purported occupation of the property or its connection to any of the causes of action advanced. The defendants also argue that the mere fact that a company has its registered office at an address does not make it an occupier of that address or the owner of any property in it. It is further submitted that Stephanie Siemer does not have standing to sue in trespass to land because she does not have a proprietary interest in the Clansman Terrace property.

Claims by Spartan News Limited

[107] I accept the defendants' submission that the plaintiffs have not established any basis upon which Spartan News could found claims that are independent of the members of the Siemer family. A company may sue for interference with its land or goods.[32] However, it must have been in possession of the land or the goods at the time of the trespass.[33] Actual possession consists of two elements – the intention to possess the land or thing and the exercise of control over it to the exclusion of others.[34] In these proceedings, the plaintiffs proved the company's incorporation and the fact that it has its registered office at Clansman Terrace, but they did not present any evidence to show that the company had actual possession of any of the items taken, nor to show that it in fact operated in any way out of the address.

[108] The claims by the second plaintiff must be dismissed for these reasons.

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32 See the discussion in Stephen Todd and others *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [23.4].

33 *Cousins v Wilson* [1994] 1 NZLR 463 (HC) at 466; *Trustbank Canterbury Ltd v Lockwood Buildings Ltd* [1994] 1 NZLR 666 (HC) at 677.

34 *Moore v MacMillan* [1977] 2 NZLR 81 (SC) at 88.

Claim by Stephanie Siemer for trespass to land

[109] As for Stephanie, I agree with the defendants that she does not have standing to sue in trespass to land as she does not have any right to exclusive possession of her parents' property. She merely lives there. Being a child living in her parents' home, her position is more like that of a boarder, who has a right of residence but who does not have sufficient legal interest in the room she inhabits to bring an action for trespass.[35] Nor has it been shown that Stephanie had ownership of the chattels in the house generally. I am satisfied on the balance of probabilities, however, that she did have ownership of the things in her bedroom at the time of the search. She has standing to bring a trespass claim in respect of interference with those items and to sue for false imprisonment, but the other claims brought in her name must be dismissed.

Statutory immunities

[110] It is also necessary to consider, on a preliminary basis, various immunities against suit that are claimed by the defendants by virtue of their role as servants of the Crown, exercising functions that are in the public interest.

Immunities claimed by the Police officers

[111] In respect of the remaining claims, the defendant Police officers submit that they are protected by the statutory immunities set out at s 39(1) of the Police Act 1958 and ss 26 and 27 of the Crimes Act 1961.[36]

[112] Section 39 of the Police Act operates to protect any "member of the Police doing anything in obedience" to a process issued by a court or judicial officer from responsibility for any irregularity, or want of jurisdiction, in the issuing of the process. Section 27 of the Crimes Act is to similar effect. The defendants submit that the effect of these sections is that, if there is a problem with the warrant itself, the constable can claim immunity.

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35 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC) at 429.

36 The Policing Act 2008 did not come into force until 1 October 2008.

[113] Section 26 of the Crimes Act justifies every act done by a constable in obedience to a lawful warrant issued by a judicial officer. If the warrant is valid, then the constable is protected by s 26 from liability for actions he takes in obedience to it.

[114] Because I have found that the search warrant was valid, the Police officers executing it may claim immunity by virtue of s 26(3) of the Crimes Act 1961, which says:

> **Execution of sentence, process, or warrant**
>
> …
>
> (3) Every one duly authorised to execute a lawful warrant issued by any Court or Justice or Community Magistrate or other person having jurisdiction to issue the warrant, and every person lawfully assisting him, is justified in executing the warrant; and every prison manager required under the warrant to receive and detain any person is justified in receiving and detaining him.

[115] "Justified" is defined in s 2 of the Crimes Act as meaning "not guilty of an offence and not liable to any civil proceeding". That is, the officers are protected from both criminal and civil liability in respect of their conduct while executing a lawful search warrant. Of course, this immunity does not extend to every action taken by a Police officer brandishing a valid search warrant. The protection will be lost if the officer does things that are outside the scope of the warrant, or are unreasonable, or are done in bad faith.[37]

[116] In summary, the defendant Police officers are entitled to the benefit of the immunities in respect of all tortious causes of action unless, and to the extent, they acted in bad faith or outside the authority of the warrant or otherwise unreasonably in its execution.

Immunity claimed by the Attorney-General

[117] Mr Powell submitted, and I accept, that the Attorney-General has immunity from actions in tort by virtue of s 6(5) of the Crown Proceedings Act 1950, and that

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[37] *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*] at 673 per Cooke J, at 694 per Hardie Boys J, at 688-689 per Casey J, at 714 per Gault J, and at 716 per McKay J.

he does not lose this immunity even if the officers acted unreasonably – only if they acted in bad faith. The allegations of bad faith in this case are denied. The Attorney-General acknowledges, however, that the Crown immunity in s 6(5) is available only against tortious causes of action and not the claims to public law compensation for infringements of rights guaranteed by NZBoRA.

[118] I will return to the pleaded immunities after considering the various causes of action.

Vicarious liability of Detective Superintendent Lovelock, the Deputy Registrar and the Attorney-General

[119] Liability in tort is personal and based on fault. The sole exception to this is vicarious liability under which, for policy reasons, the law holds one person liable for torts committed by another, even though the former is himself without fault. The plaintiffs claim that Detective Superintendent Lovelock (as the officer who procured the search warrant), the Attorney-General (as the government official with overall responsibility for the defendants' actions), and the Deputy Registrar (as the officer who issued the warrant) are vicariously liable for the trespasses of the officers who carried out the search of the Siemer property.

[120] For vicarious liability to apply, the relationship between the person who committed the tort and the person who is said to be vicariously liable for it must be that of employer and employee, or akin to the employment relationship.[38]

Detective Superintendent Lovelock

[121] Detective Superintendent Lovelock applied for the search warrant but was not involved in its execution. There is no principled basis for holding the Detective Superintendent liable for any wrong committed during the execution of the search warrant by others; not even the Commissioner of Police can be made vicariously

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[38] See the discussion in Cherie Booth and Dan Squires *The Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at [5.56]-[5.61]; also Stephen Todd and others, above n 32, at [22.1].

liable for the conduct of other police officers.[39] The claims in tort alleged against Detective Superintendent Lovelock must be dismissed.

Deputy Registrar – tort claims

[122] The causes of action alleged against the Deputy Registrar, Mr Reid, are trespass to land, invasion of privacy, and (it would appear, although the pleadings are not clear) NZBoRA breaches. Mr Henry submits that the Deputy Registrar cannot "don the armour of judicial immunity", as he is an administrative, not a judicial, officer. Alternatively, it is submitted that any immunity that might have been available to him as someone exercising a judicial function does not apply as he acted outside his jurisdiction, and was "grossly negligent", in issuing the warrant.

[123] The Deputy Registrar was not in any way involved in the execution of the search warrant, and there is no basis on which he could be held liable for the conduct of the officers who did. There is no support for the argument that a deputy registrar issuing a warrant assumes liability for any tort committed by the Police in either applying for it or in its execution.

[124] It has been said many times in the authorities that senior Crown servants are not vicariously liable for the torts of their subordinates. For example, in *Crispin v Registrar of the District Court*, Cooke P in the Court of Appeal said:[40]

> Claims in tort based on actions or omissions of Crown servants can be put forward in three ways. First, there can be an action against the Crown, commonly represented by the Attorney-General, under the Crown Proceedings Act 1950, alleging vicarious liability on the part of the Crown. Secondly, there can be an action against the individual employee or employees alleged to have committed the tort: this would be against them personally, named as individuals, although it would often be the case that the Crown as a good employer would stand behind them financially. Thirdly, where a statute or subordinate legislation so permits, there may be an action against the holder of an office named simply as such holder: a class of case in which the legislation authorises the holder of the office for the time being to be sued eo nomine. What cannot be done, however, is to sue a senior Crown servant on the footing that at common law he is vicariously liable for the torts of his subordinates. For this well-settled principle, see for instance *Bainbridge v Postmaster-General* [1906] 1 KB 178.

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[39] *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA) at 723 and 726-727.

[40] *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 (CA) at 255.

[125] More recently, in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, the Court of Appeal said:[41]

> We agree with the submission of counsel for the appellants that senior Crown servants are not vicariously liable for the wrongful acts of their subordinates. There is no relationship of principal and agent between senior Crown officials and their subordinates.

[126] This argument has even more force, of course, when the Crown servant sued and those who actually carried out the wrongful act are not even in a relationship of responsible authority – the Deputy Registrar is not the superior of the officers who executed the search warrant. The claims in tort against the Deputy Registrar must be dismissed.

Deputy Registrar – NZBoRA claims

[127] I have found that the Deputy Registrar was justified in authorising the search warrant. It is by no means clear, therefore, what public law claims could be brought against him. In any event, there is a strong argument to be made that the Deputy Registrar enjoys judicial immunity in respect of his actions.

[128] The issuing of a search warrant under s 198 of the SPA is the exercise of a judicial function, even if it is carried out by a Deputy Registrar.[42] In our legal system, judges have immunity from civil liability for anything said or done by them in their judicial capacity.[43] This immunity is based on public policy grounds such as promoting the effective functioning of the rule of law and maintaining public confidence in the fair and effective administration of justice.[44]

[129] Support for the proposition that deputy registrars authorising a search warrant are protected by the same immunity can be found in the case law. For example, McGechan J said at first instance in *Crispin v Registrar of the District Court*:[45]

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41 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [49].
42 *Baigent's Case*, above n 37, at 695 per Hardie Boys J and at 674 per Cooke P.
43 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.
44 At [166]-[167].
45 *Crispin*, above n 40, at 252.

> Assuming as I prefer that the Registrar's acts were judicial, it would be surprising if immunity did not apply. It is elementary that the immunity applies both to judges and to persons presiding over quasi judicial bodies: *Thompson v Turbott* [1962] NZLR 298 and *Atkins v Mays* [1974] 2 NZLR 459. There seems no reason or logic or common sense, and no authority, that would put Registrars exercising judicial functions in a different category. If the law gives a Registrar a judicial function, all policy considerations which dictate immunity for a Judge or quasi judicial adjudicator apply with equal force to protect that Registrar.

[130] On appeal in *Crispin*, it was found that there were more fundamental difficulties with the claim, resulting in the appeal being dismissed without consideration of the issue of immunity. Cooke P, however, noted that the scope of the immunity was one of the difficulties faced by the plaintiff.[46]

Conclusion – claims against Deputy Registrar dismissed

[131] It may be that the public law immunity conferred on a deputy registrar in issuing a search warrant applies only when he or she has acted within jurisdiction, as used to be the common law position for the immunity of all judicial officers below superior court level.[47] In this case, I have no doubt that the Deputy Registrar was acting within jurisdiction so there is no need to discuss this point further. I am satisfied that the public law claims against the Deputy Registrar must be dismissed.

The Attorney-General

[132] It is not disputed that, subject to any statutory immunities, the Attorney-General can be made vicariously liable for the torts committed by servants of the Crown.[48] Mr Powell submitted, however, that statutory immunities operate in this case to protect the Attorney-General from vicarious liability for the actions of the Police officers.

[133] Section 6(5) of the Crown Proceedings Act 1950 says:

> No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial

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46 At 256.
47 *Chapman*, above n 43, at [163].
48 Crown Proceedings Act 1950, s 6.

> nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

[134] This immunity extends to Police officers executing a search warrant.[49] The Crown loses the protection of this immunity only if the officers act in bad faith or outside the scope and purpose of the process.[50] I have held above that there was no bad faith on the part of Detective Superintendent Lovelock in obtaining the warrant.[51] The Police officers who attended at 27 Clansman Terrace went there only because they had been directed by Detective Superintendent Lovelock to do so; no element of bad faith has been established. I address below, in connection with the specific allegations under the various heads of claim, whether any of them acted outside the scope and purpose of the process.

[135] It is accepted, however, that the immunity afforded the Attorney-General by s 6(5) is available only in respect of tortious causes of action and not claims to public law compensation for NZBoRA breaches. That is because the state's liability for NZBoRA breaches is not vicarious but direct.[52] The Court of Appeal in *Baigent's Case* cited with approval a Privy Council case which discussed state compensation for breaches of human rights by its servants in the following terms:[53]

> ... no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6(1) and (2) of the Constitution.

[136] Therefore, the Attorney-General will be directly liable for any NZBoRA breaches committed by the Police officers in executing the search warrant, and will not have the benefit of any statutory immunity.

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49 *Baigent's Case*, above n 37, at 674 per Cooke J and at 696 per Hardie Boys J.
50 At 696-697 per Hardie Boys J and at 716 per McKay J.
51 At [87]-[90].
52 *Baigent's Case*, above n 37, at 718 per McKay J.
53 *Maharaj v A-G of Trinidad and Tobago (No 2)* [1979] AC 385 at 399 per Lord Diplock, cited in *Baigent's Case*, above n 37, at 677 per Cooke P.

[137] I turn now to consider the claims in tort against the Police officers involved in the search, and then the question of the Attorney-General's public law liability for alleged breaches of the NZBoRA. In determining these issues, it will be necessary to make findings as to the overall reasonableness of the manner in which the premises were searched and items seized.

First cause of action – trespass to land

[138] The first cause of action is in trespass to land, alleging that because of the invalidity of the warrant the defendants who entered the property without the consent of the plaintiffs had no lawful authority to do so. It is said further that the search was without lawful authority because the plaintiffs did not consent to the defendants' remaining in the home. For the alleged trespass the plaintiffs claim $10,000 in damages; an additional $40,000 for aggravated and/or exemplary and/or punitive damages; interest; and costs.

The claims against the defendants in the house during the search

[139] The plaintiffs make this claim against the defendants who were present at the search and entered their home; that is, all of them except the seventh defendant, Constable John Miller, who remained outside the dwelling. The tort of trespass to land arises when there is an unauthorised entry onto the land of another.[54] The defendants do not dispute that a constable entering a private property without specific legal authorisation can be a trespasser.[55]

Conclusion on claim for trespass to land

[140] I have found, however, that the search warrant was valid. It authorised the Police officers' entry onto the land and into the residence at 27 Clansman Terrace. I dismiss this cause of action accordingly.

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54 *Mayfair Ltd v Pears* [1987] 1 NZLR 459 (CA) at 465 per Somers J.
55 *Tranz Rail Ltd*, above n 22, at [38] per Tipping J.

Second cause of action – trespass *ab initio*

[141] The plaintiffs allege as a second cause of action that the defendants are liable for trespass *ab initio*. Mr Henry argues, relying on an old common law doctrine, that an entry onto land that began lawfully can become unlawful through the wrongful actions of those who enter.[56] Under the doctrine, if a person with legal authorisation enters onto another's land but, while there, abuses the authority by doing an act which amounts to a trespass, he or she may be sued as if his or her original entry were unlawful.[57]

[142] Mr Siemer alleges that a trespass occurred when he had the argument with Detective Sergeant Brown over the use of the telephone. He also says that he was stopped and subjected to an unlawful search in the presence of one or more onlookers, causing him to suffer degradation, humiliation and shame, before he was finally permitted to leave the home with Ms Haden. The plaintiffs also submit that a further trespass occurred when the defendants searched and/or seized various items which, it is alleged, fall outside the ambit of the warrant, notably Mr Siemer's bank account balance information and the business card for Spartan News Ltd. It is also alleged that Mr and Mrs Siemer and Stephanie were detained against their will and, therefore, falsely imprisoned by Detective Sergeant Brown, Detective Palma and Detective Sirl.

[143] The plaintiffs say that as a result of the trespass to the person and to the goods of Mr Siemer, and the false imprisonment of Mr Siemer and the other family members, the defendants committed a trespass *ab initio* for which damages of $5,000, interest and costs are claimed.

Does the doctrine of trespass ab initio *apply?*

[144] It is by no means clearly established, however, that the principle of trespass *ab initio* by relation back forms part of New Zealand law. The principle was

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[56] Stephen Todd and others, above n 32, at [9.2.06(2)].
[57] *Cinnamond v British Airports Authority* [1980] 1 WLR 582 (CA).

established in the *Six Carpenters' Case* in 1610,[58] but in *Chic Fashions (West Wales) Ltd v Jones*, Lord Denning MR said:[59]

> I know that at one time a man could be made a trespasser *ab initio* by the doctrine of relation back; but that is no longer true. The *Six Carpenters' Case* was a by-product of the old forms of action. Now that they are buried, it can be interred with their bones.

[145] Lord Denning explained why the doctrine was no longer good law:[60]

> At one time the courts held that the constable could seize only those goods which answered the description given in the warrant. He had to make sure, at his peril, that the goods were the very goods in the warrant. If he seized other goods, not mentioned in the warrant, he was a trespasser in respect of those goods: and not only so, but he was a trespasser on the land itself, a trespasser ab initio, in accordance with the doctrine of the *Six Carpenters' Case*, which held that, if a man abuse an authority given by the law, he becomes a trespasser ab initio.
>
> If such had remained the law, no constable would be safe in executing a search warrant. The law as it then stood was a boon to receivers of stolen property and an impediment to the forces of law and order.

[146] In *Baigent's Case*, Hardie Boys J said:[61]

> During argument, a question arose as to whether the doctrine of trespass ab initio would apply. I doubt it; see *Elias v Pasmore* [1934] 2 KB 164, 168, and *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299; [1968] 1 All ER 229 at p 313; p 235 per Lord Denning MR and p 320; p 241 per Salmon LJ.

Conclusion on claim for trespass ab initio

[147] I am prepared to hold, therefore, that the principle advanced by Mr Henry is not applicable in New Zealand. I dismiss the claim based on trespass *ab initio* accordingly.

[148] Even if I am wrong in that view, I am not persuaded anything occurred during the search to render the lawful entry pursuant to the warrant unlawful. I have held that the Siemer family members were not detained or unreasonably confined. I find also that the search of Mr Siemer when he attempted to leave the property with

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58 *Six Carpenters' Case* (1610) 8 Co Rep 146A, 77 ER 695 (KB).
59 *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 (CA) at 313.
60 *Chic Fashions*, above n 58, at 309.
61 *Baigent's Case*, above n 37, at 694.

Ms Haden was lawful. Both Mr and Mrs Siemer had been uncooperative in the initial stages of the search, and Mrs Siemer had actually seized and attempted to hide the memory sticks which were later found to contain copies of the Pascoe affidavit. The Police were entitled to be suspicious of their actions. Mr Siemer had entered his car before the vehicle had been searched and the Police had reasonable grounds to believe that he may have removed items covered by the search warrant.

[149] The plaintiffs submit, however, that even if the warrant was valid, a trespass occurred when the defendants seized various items which fell outside its ambit, notably Mr Siemer's bank account balance information and the business card for Spartan News Ltd. I accept that those two items did not come within the terms of the warrant as items listed for possible seizure. I accept also that Mr Siemer was entitled to regard information about his bank balance as private and to feel aggrieved that it had been taken. But the seizure of those items was an error of judgment in the course of a lengthy and detailed search, not a conscious violation of the occupants' rights. I am not prepared, in the circumstances, to hold that it renders a lawful entry unreasonable so as to justify an award of damages.

Third cause of action – breach of privacy

[150] The third cause of action alleges that the manner in which the search was conducted breached the plaintiffs' privacy when Police officers entered, searched and photographed what were said to be "the most private and intimate areas" of the Siemer home, seizing "a vast array of material from those areas" and items including the plaintiffs' cell phones and records, and cloning their personal records. The plaintiffs also allege that the personal search of Mr Siemer in the presence of a visitor was in breach of his right to privacy. It is said that the defendants' actions constituted an intentional intrusion upon the plaintiffs' seclusion and/or privacy as a result of which they experienced distress, anxiety, shock, humiliation and loss of dignity for which damages in the sum of $70,000 plus interest and costs are sought.

[151] The tort of privacy recognised by the Court of Appeal in *Hosking v Runting* involves publication of private facts.[62] There was no publication here. The

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62 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

plaintiffs' claim might be more properly argued as a claim for intrusion upon seclusion as formulated by the High Court in *C v Holland*.[63] That tort involves an intentional and unauthorised intrusion into seclusion (being an intimate personal activity, space or affairs), which amounts to an infringement of a reasonable expectation of privacy and which is highly offensive to a reasonable person.[64] However, the tort of intrusion is still in its infancy – the decision in *Holland* was not appealed to a higher court – and it originated in a case with quite different facts; the defendant made covert recordings of his female flatmate while she was in the shower.

Conclusion on claim for breach of privacy

[152] The claim for breach of privacy is misconceived. To find that the tort of intrusion may be applied in a situation where Police are executing a lawful search warrant, simply by virtue of their searching "private and intimate areas", would compromise effective policing and render search warrants of only limited utility.

[153] I dismiss this cause of action.

Fourth cause of action – trespass to goods

[154] In the fourth cause of action it is alleged that the plaintiffs suffered loss through the unlawful seizure of property which included cell phones, computer equipment, computer memory sticks, printers and other items. The plaintiffs allege that, because the defendants had no lawful authority for their actions and because the plaintiffs did not give their consent to this interference with their belongings, all the defendants (excluding the seventh and fifteenth defendants) are liable for the tort of trespass to goods. Special damages of $487.94 are claimed for the cost of acquiring substitute items and equipment and damages of $30,000 plus interest and costs are also sought.

[155] The tort of trespass to goods involves committing, without lawful justification, any act of direct physical interference with goods in the possession of

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63 *C v Holland* [2012] 3 NZLR 672 (HC).
64 At [94].

another person.[65] As with their claim for trespass to land, however, the plaintiffs' claim in this respect relies on the defendants having no lawful authority to search and seize their goods because the search warrant was said to be invalid.

Conclusion on claim for trespass to goods

[156] I have already found that the warrant was valid so it follows that the defendants' interference with the plaintiffs' goods was justified to the extent that the warrant authorised the seizure. And for the reasons given earlier about the seizure of Mr Siemer's bank account balance information and the business card for Spartan News Ltd, I am not prepared in the circumstances to hold that the taking of those items justifies an award of damages.

[157] No tort has been made out and I dismiss this cause of action.

Fifth cause of action – conversion by taking and/or detention

[158] The fifth cause of action alleges conversion by taking and/or detention, this allegation relating to the items taken from the plaintiffs and not immediately returned. Special damages of $37,970 are sought together with general damages of $5,000, plus interest and costs.

[159] The elements of the tort of conversion were set out in *Cuff v Broadlands Finance Ltd*:[66]

> The tort of conversion is constituted by the interference with the use and possession of a chattel of another, wilfully and without lawful justification. It requires a dealing with the chattel in a manner inconsistent with the plaintiff's right and with an intention in so doing to deny that right, or to assert an inconsistent right.

[160] The tort can be committed both by taking possession of goods or by detaining them.[67] In this case, the defendants' taking of the plaintiffs' goods cannot constitute conversion as it was done pursuant to a valid search warrant; the plaintiffs do not

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65 *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74 (HC) at 76 per Tipping J.
66 *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 (CA) at 346.
67 At 346.

base their claim in this regard on an argument that any items seized were outside the scope of the search warrant. Rather, the plaintiffs' claims rest on the allegedly unreasonable detention of their goods in that some items were seized and then detained for more than four years.

Conclusion on conversion claim

[161] The Police returned most of the electronic equipment and other items promptly once they had carried out their examination of them, but they may fairly be criticised for having detained some of the plaintiffs' goods for what was an unduly long time. I am satisfied the undue delay in returning some of the items resulted from administrative inattention once the items had been determined to be irrelevant to any ongoing inquiry, not from an intention to deny the members of the Siemer family their rights to possession of their property. I am not persuaded that conversion by detention is established so as to justify an award of damages. I dismiss the claim in conversion.

Sixth cause of action – false imprisonment

[162] The sixth cause of action alleges false imprisonment of the plaintiffs on the basis of allegations which include separating the plaintiffs and confining them to certain areas of the home; preventing the plaintiffs from communicating with neighbours; requiring Mr Siemer to remain in his pyjamas for over four-and-a-half hours and to appear in public so dressed; preventing Mr Siemer from making coffee for himself until he answered Detective Sergeant Brown's questions; and requiring him to speak to a friend outside the house while still in his pyjamas and "obviously under the control and direction of the Police". They also allege that Mrs Siemer was not permitted to assist Stephanie to get ready to attend school. It is said that these actions as a whole were arbitrary, excessive, uncalled for and outrageous, entitling the plaintiffs to general damages of $50,000 and aggravated, exemplary or punitive damages of $30,000, interest and costs.

[163] These claims are directed at the first, second, fourth, fifth and seventh defendants. The seventh defendant is said to have committed false imprisonment by

virtue of his remaining at the Siemers' front gate throughout the search and preventing visitors from having access to the house and the plaintiffs.

[164] For false imprisonment to be made out, the defendant must have asserted a total restraint upon the plaintiff; "total in the sense that it prevented all movement, and not merely in some directions".[68] There does not need to have been actual physical contact – it is enough that there is the threat of force or the exercise of pressure.[69]

Conclusion on false imprisonment claim

[165] In this case, the Siemers were prevented from entering the areas of the house that were yet to be searched, but there is no evidence that they were subjected to a total restraint. I have said already that the Police were justified in taking reasonable steps to prevent the obstruction or hindrance of a lawful search. I dismiss the false imprisonment claim.

Seventh cause of action – intimidation

[166] The seventh cause of action alleges intimidation of Mr Siemer by Detective Sergeant Brown who is said to have informed Mr Siemer that he would be permitted to make coffee for himself only if he continued to answer Detective Sergeant Brown's questions, thereby threatening Mr Siemer with continued imprisonment if he did not answer them. It is alleged also that Mrs Siemer was intimidated by a command by Detective Thew that she was not to talk to anyone while delivering Stephanie to school and was required to return immediately to the home. Damages for intimidation of $10,000 plus interest and costs are sought against Detective Sergeant Brown and Detective Thew.

[167] The tort of intimidation is an economic tort. It has been described as "procuring economic harm to another by the use of unlawful threats to curtail that other's freedom of action".[70] Mr Henry argues, however, that the tort should not be

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68 *Blundell v Attorney-General* [1968] NZLR 341 (CA) at 357 per McCarthy J.
69 At 357.
70 *Pete's Towing Services Ltd v Northern Industrial Union of Workers* [1970] NZLR 32 (SC) at 41.

confined to the context of interference with business relations and invites a significant expansion of the tort so that it stands as a broadly based cause of action that could apply in any situation where a plaintiff perceives the exertion of some emotional pressure. I decline to accept Mr Henry's invitation to be so creative. Detective Sergeant Brown admits the comment about the coffee but says it was understood by all present to be tongue-in-cheek; I am wholly satisfied that the direction was mere banter and given in jest. Putting aside the definition of the tort, the claim that Mr Siemer was in any way intimidated or placed under emotional pressure by Detective Sergeant Brown is fanciful. I have held above that I am not satisfied that Detective Thew ordered Mrs Siemer to return immediately from dropping Stephanie at school. Mr and Mrs Siemer's allegations that they were intimidated have nothing to do with procuring economic harm to another through unlawful threats and there is no basis for the intimidation claim in this proceeding.

[168] I dismiss this cause of action.

Attorney-General not vicariously liable in tort

[169] The rejection of the claims in tort against the Police officers who executed the search warrant means that the claims against the Attorney-General based on alleged vicarious liability must also be dismissed.

Eighth cause of action – breaches of ss 21, 22 and 23 NZBoRA

[170] The eighth cause of action alleges breaches of ss 21, 22 and 23 of the NZBoRA and seeks compensation in the sum of $40,000, plus interests and costs. This claim is made against all defendants including Detective Superintendent Lovelock (due to his alleged bad faith in procuring the warrant), the Attorney-General and the Deputy Registrar. The latter is alleged to have been grossly negligent in signing the search warrant and the occupier copy when there were discrepancies between them. I have already dismissed the claims against Detective Superintendent Lovelock and Mr Reid in relation to the warrant and do not need to discuss their actions further in this context.

[171] Section 21 protects against unreasonable search and seizure. I have already found that the search warrant was lawful and I have not accepted the plaintiffs' specific claims in tort based on allegations that the Police acted unreasonably or in bad faith. I have held that the Police seized two items, the bank balance information and the business card, which were outside the scope of the items listed in the warrant, but I have held that resulted from minor errors of judgment.

Was the search, considered as a whole, unreasonable?

[172] The plaintiffs argue nevertheless that the search, taken as a whole, was unreasonable. They bring together all their objections to the search in support of this submission: the issuing of the warrant on "tenuous" grounds; the number of Police officers involved; the duration of the search; the incident involving Mr Siemer's request for coffee; the defendants' actions in respect of the telephone; the search and seizure of items that they say are not within the purview of the warrant; subjecting Mr Siemer to a pat-down search outside his car; detaining Mr and Mrs Siemer and Stephanie in various areas of the house; searching and photographing various private or sensitive areas such as inside Stephanie's closet and inside toilet bowls; detaining a number of the Siemers' items beyond any period that could have been required under the warrant; intimidating Mr and Mrs Siemer; and so on.

[173] I do not doubt that Mr and Mrs Siemer and Stephanie were alarmed by the noisy entry of Police officers into their home while they were asleep. And I do not doubt that they were distressed by the whole experience of having a substantial number of uninvited Police officers in their home, searching through their belongings over several hours. But those are the inevitable consequences of the necessarily robust process of the execution of a warrant authorising a search for evidence of a crime.

[174] I am satisfied that the search was conducted reasonably. The timing of the search was unexceptional, beginning during daylight hours at 7am. It was reasonable for the Police not to forewarn the Siemer family of the search, since the premise for it was a reasonable belief (well-founded, as it turned out) that it would produce evidence linking Mr Siemer to the publication of the Pascoe affidavit on the

website. As with the execution of any search warrant, prior notice would have been likely to result in the destruction or concealment of evidence, a possibility which is heightened when the target of the search is electronically stored information.

[175] The mode of entry into the property was reasonable. Force was not used and only three officers entered initially. They included one female officer, Detective Thew, because it was anticipated there would be female occupants of the residential address. I am not persuaded that the manner of entry was anything other than routine. A copy of the search warrant was brought to Mr Siemer's attention at the earliest opportunity.

[176] I have considered whether providing Mr Siemer with an incomplete copy of the warrant rendered the search unreasonable, particularly in that the omission of the year of issue may have resulted in his being unable to know whether it was being executed within the one-month time limit. The evidence established, however, that Mr Siemer showed no interest in the contents of the document he was given and it appears to have been used by him, at the time of the search, simply as convenient paper on which to record events which occurred during the search and which he considered noteworthy. Further, it is obvious from the references in the copy warrant to events which were alleged to have occurred in November 2007 that the warrant must have been issued after that; the "19th day of February" shown can only have been in 2008.

[177] I am satisfied also that the total number of officers used in the search was reasonable. The rest of the initial search team entered sometime after the first trio, and having a total number of 12 officers involved was not an unreasonably large group to undertake a search of this nature in a large house where the occupiers were present and the items being searched for were potentially small and highly moveable. It was reasonable to have sufficient officers in the house to restrict the movements of the occupants so that they could not go into areas that were yet to be searched. Having a greater numbers of officers involved also meant the search could be completed more speedily and efficiently, as indicated by the arrival later in the morning of three more officers to bolster the initial complement.

[178] The duration of the search, from 7:03 am to approximately 1:30 pm, and its thoroughness were also dictated by the nature of the search and of the items sought. I accept as reasonable the defendants' explanation that some aspects of the manner in which the search was conducted were justified by the initial actions of Mr and Mrs Siemer, including Mr Siemer's attempts to get into the office immediately after he was given the search warrant, and Mrs Siemer's subsequent attempts to conceal the memory sticks she took from the office. Those actions amounted to attempts to interfere with the execution of the search warrant, and in those circumstances it was entirely reasonable for the Police to take extra precautions to secure the scene from interference. Such measures include preventing Mr and Mrs Siemer and Stephanie from going into any part of the house that the Police had not searched, including the bedrooms. I accept that the Police offered opportunities to the family members to retrieve clothes under supervision, and to get dressed.

Conclusion on NZBoRA claims

[179] I repeat my finding that the restrictions placed on Mr Siemer's phone calls during the search were unnecessary for the purpose of preventing the possible destruction of evidence, but I am not persuaded that the limitations were such as to render the search as a whole unreasonable. I dismiss the claim for a breach of s 21 NZBoRA.

[180] The claims under ss 22 and 23 NZBoRA can be disposed of summarily. Section 22 protects against arbitrary arrest or detention, and s 23 provides for the rights of persons who are so arrested or detained. The Siemers were neither arrested nor detained. Clearly, the Siemers were free to leave their house, as demonstrated by the fact that Mrs Siemer left to take Stephanie to school and that Mr Siemer also departed with Ms Haden. Mr Siemer perhaps felt that he could not leave the house until he was out of his pyjamas, but I accept the Police evidence that, had Mr Siemer allowed the Police to retrieve his clothes from the bedroom, he would have been able to get changed and leave.

[181] I conclude, therefore, that the claims based on alleged NZBoRA breaches must fail and I dismiss them.

Conclusions on the pleaded immunities

[182] Since I have dismissed all causes of action on the merits of the claims, it is unnecessary for the defendants to fall back on the immunities from suit which they claim. But for completeness I record that, for the reasons expressed, I conclude that the search was conducted in accordance with a lawfully issued warrant, in a reasonable manner, and in good faith. If necessary, therefore, I would have held that the defendants were entitled to rely on the statutory immunities they have pleaded.

Summary of findings and result

[183] I have held:

(a) The warrant to search the property at 27 Clansman Terrace and to seize the items listed was validly obtained because the application provided sufficient relevant information to justify it. Specifically, the application:

(i) adequately disclosed allegations of particular offending; and

(ii) justified a search of the property for evidence. (See [37]-[43])

(b) The warrant disclosed the date on which it was issued. (See [44]-[64])

(c) The warrant was not a general warrant and it was not otherwise invalid. More specifically:

(i) The warrant contained a sufficient description of the alleged offending. (See [69]-[74])

(ii) The description of the items of which seizure was authorised was sufficiently specific to provide reasonable limitations on the search of the premises and the seizure of private property. (See [75]-[86])

(iii) The warrant did not purport to authorise the seizure of items not reasonably connected to the alleged offence or offences referred to. (See [75]-[86])

(d) The warrant was not obtained in bad faith as a pretext for searching Mr Siemer's home and seizing his property for some ulterior purpose. (See [87]-[90])

(e) The second plaintiff, Spartan News Limited, has no standing to bring any claims independently of the plaintiff members of the Siemer family. (See [105]-[108])

(f) Stephanie Siemer has no standing to bring a claim for trespass to land. (See [109])

(g) Detective Superintendent Lovelock and Deputy Registrar Reid cannot be held vicariously liable for the actions of the Police officers who executed the search warrant, and the claims against them must be dismissed. (See [119]-[130])

(h) Because the search warrant was valid, the claim for trespass to land must fail. (See [138]-[140])

(i) The doctrine of trespass *ab initio* does not apply in New Zealand (see [141]-[147]) and, in any event, the Police did not do anything to render their initial lawful entry unlawful. (See [148]-[149]

(j) The claim for breach of privacy cannot be sustained. (See [150]-[153])

(k) Because the search warrant was valid, the claim for trespass to goods must fail. (See [154]-[157])

(l) The Police may fairly be criticised for having detained some of the plaintiffs' goods for an unduly long time, due to administrative inattention, but conversion by detention is not established. (See [158]-[161])

(m) The plaintiffs were not falsely imprisoned. (See [162]-[165])

(n) The tort of intimidation is an economic tort and there is no basis for such a claim in this proceeding. (See [166]-[168])

(o) Even if the claims in tort against the Police officers who executed the search warrant could be made out, the Police officers are entitled to immunity from suit under s 26 Crimes Act 1961. (See [111]-[116] and [182])

(p) The claims against the Attorney-General based on alleged vicarious liability must also be dismissed. (See [169]).

(q) The search of the premises and the seizure of property were not conducted in an unlawful or unreasonable manner, and the members of the Siemer family were not arrested or detained. The claims based on alleged NZBoRA breaches must fail accordingly. (See [170]-[181])

[184] The result is that I have dismissed all of the plaintiffs' claims against all of the defendants; the plaintiffs are not entitled to remedies.

Costs

[185] The defendants are entitled to costs. In the event that the parties cannot agree, the defendants shall have until 20 February 2015 to file and serve a memorandum as to costs. The plaintiffs shall have until 27 March 2015 to file and

serve a memorandum in reply. Costs shall then be determined on the papers unless the Court directs otherwise.

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Toogood J