

AUSTRALIA / JUDGMENT

Gazecki v Fell

[2026] NSWSC 923**COURT**

Supreme Court

DECIDED

07 August 2026

BEFORE

Campbell J

CASE / FILE NUMBER

2026/00183612

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Supreme Court

New South Wales

Medium Neutral Citation: Gazecki v Fell [2026] NSWSC 923**Hearing dates:** 31 July 2026**Date of orders:** 7 August 2026**Decision date:** 07 August 2026**Jurisdiction:** Common Law**Before:** Campbell J

Decision: (1) Under r 33.4 of the Uniform Civil Procedure Rules 2005 (NSW) set aside the subpoena to produce directed to the Commissioner of Police, New South Wales Police Force at the request of the plaintiff filed on 11 May 2026.

(2) Under r 33.10 of the Uniform Civil Procedure Rules 2005 (NSW) direct the Registrar to return the documents produced in response to the said subpoena to the Commissioner of Police, New South Wales Police Force.

(3) The plaintiff is to pay the defendant's costs of the Notice of Motion filed on 29 June 2026.

For other case management orders, see [38]

Catchwords: CIVIL PROCEDURE — subpoenas — application to set aside — abuse of process — whether legitimate forensic purpose can be identified

Legislation Cited: Defamation Act 2005 (NSW), s 27(2)(b)(i)
Justices Act 1902 (NSW), s 26
Uniform Civil Procedure Rules 2005 (NSW), rr 33.4

Cases Cited:	ACN 008 664 257 Pty Ltd v HIH Casualty and General Insurance Limited (in liq) [2005] NSWSC 881 Air Canada v Secretary of State for Trade [1983] 2 AC 394 Alister v The Queen (1984) 154 CLR 404; [1984] HCA 85 Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd (1952) 72 WN (NSW) 250 Commissioner for Railways v Small (1938) 38 SR (NSW) 564 Fried v NAB [2000] FCA 911; (2000) 175 ALR 194 In the matter of Stone Cliff Pty Ltd (Deregistered) & Ors [2017] NSWSC 918 Kazal v Independent Commission Against Corruption [2018] NSWSC 1370 Maddison v Goldrick [1976] 1 NSWLR 651 Montenegro v Legal Profession Admission Board [2026] NSWCA 21 National Employers' Mutual General Insurance Association Ltd v Waind [1978] 1 NSWLR 372 Portal Software International v Bodsworth [2005] NSWSC 1115 R v Saleam (1989) 60 NSWLR 14 Re Bird v Military Rehabilitation and Compensation Commission [2006] AATA 109; (2006) 91 ALD 691 Secretary of the Department of Planning, Industry and Environment v Blacktown City Council (2021) 118 NSWLR 336; [2021] NSWCA 145
Category:	Procedural rulings
Parties:	John Janek Gazecki (Plaintiff) Stephen Fell (Defendant)
Representation:	
Counsel:	J Gazecki (Self-Represented solicitor) (Plaintiff) B Gallifuoco (Defendant)
Solicitors:	J Gazecki (Self-Represented solicitor) (Plaintiff) Pikes & Verekers Lawyers (Defendant)
File Number(s):	2026/00183612
Publication restriction:	Nil

JUDGMENT

HIS HONOUR: By Statement of Claim filed on 5 May 2026, the plaintiff sues the defendant for defamation. The putative cause of action pleads the publication of a single defamatory matter, being an email sent to the solicitor for, and an employee of, the MidCoast Council (“the Council”) with whom the plaintiff was engaged in pending litigation in the New South Wales Land and Environment Court (“the LEC”). The plaintiff pleads re-publication to other officers of the Council and its barrister briefed in the proceedings. The email, which forms Schedule A to the Statement of Claim, is addressed to the LEC. It contains a number of representations about the impediment of passage over an easement appurtenant to the defendant’s property, said to have been caused by flooding from a “failed and blocked” stock dam located on the neighbouring property which is occupied by the plaintiff and his wife, the latter of whom is the registered proprietor. The

proceedings in the LEC, on the evidence before me, are concerned with whether the plaintiff and/or his wife obtained consent for the development of the dam.

The defendant made a number of statements of and concerning both the plaintiff and his wife. He also states:

“Coincidentally during this time I have had: my property; my infrastructure; my car; and my farm machinery vandalised (reported to Police on multiple occasions).”

The plaintiff pleads that the email conveys six defamatory imputations of the plaintiff under the following headings: threats and intimidation; harassment; abuse of legal process; threats of retaliatory litigation; interference of legal rights; and criminal conduct – vandalism. So far as the last matter is concerned, the plaintiff has formulated the imputation in the following terms:

“The plaintiff is responsible for acts of vandalism and damage to his neighbour’s property.”

Subpoena to the police

The matter first came before me in the Defamation List on 26 June 2026. On that occasion, the substantial interlocutory dispute raised related to whether a subpoena issued at the request of the plaintiff to the Commissioner of the New South Wales Police Force on 11 May 2026 was an abuse of process. On the list day the plaintiff, who is a practising solicitor, appeared in his own interests and the defendant was represented by Ms B Gallifuoco of counsel. I made directions for filing and service of a Notice of Motion to set aside the subpoena under r 33.4 of the Uniform Civil Procedure Rules 2005 (NSW) (“UCPR”) and for the exchange of evidence and submissions. The matter was listed for argument on 31 July 2026.

The terms of the schedule to the subpoena

The terms of the schedule are as follows:

“Schedule

The documents or things you must produce are as follows:

- (1) Copy of any complaint, email or letter from [the defendant], emanating from [an email address associated with the defendant] for the period 1 January 2018 to 11 May 2026, regarding:
 - (a) [the plaintiffs address in] Warranulla, NSW, 2423;
 - (b) [the plaintiff];
 - (c) [an ‘alias’ of the plaintiff];
 - (d) [the plaintiff’s wife]; and
 - (e) [the previous owner/occupier of the property mentioned in (a)].

- (2) Copy of any event reports for any complaints from [the defendant], regarding the subject matter in paragraphs 1(a) to (e) above.
- (3) Copy of any notebook entries and body worn video footage attached to event reports related to paragraph (2) above.
- (4) Copies of any file notes or internal communications regarding any telephone contact from [the defendant], regarding the subject matter in paragraphs 1(a) to (e) above.”

The relevant rule

UCPR r 33.4 provides:

- (1) The Court may, on the application of a party or any person having a sufficient interest, set aside a subpoena in whole or in part, or grant other relief in respect of it.
- (2) An application under subrule (1) must be made on notice to the issuing party.
- (3) The court may order that the applicant give notice of the application to any other party or to any other person having a sufficient interest.

Principles to be applied

A subpoena to produce documents will be set aside if the documents described in the schedule lack legitimate forensic purpose. Absent legitimate forensic purpose, the subpoena constitutes an abuse of process. In civil proceedings (the test may not be identical in criminal proceedings), the issue of the subpoena will have a legitimate forensic purpose if the documents sought have an apparent relevance to the issues in the case and/or bear upon the cross-examination of witnesses expected to be called in the proceedings. This is the formulation of the principle established by *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* (2021) 118 NSWLR 336; [2021] NSWCA 145 (“Blacktown City Council”). In his leading judgment, Bell P (as the Chief Justice then was) (Brereton JA agreeing with concurring reasons; McCallum JA also agreeing), reviewed previous authorities and formulated the principle in these terms (at [65]):

“It is sufficient, in my view, to justify a subpoena as having been issued for a legitimate forensic purpose if the documents sought are ‘apparently relevant’ or, to use the words of Nicholas J in ICAP at first instance, it can be seen that the documents sought to be produced by way of subpoena will materially assist on an identified issue or there is a reasonable basis beyond speculation that it is likely the documents subpoenaed will so assist. Of course, if it can be shown that the material assistance will be to the party that issued the subpoena, the prospect of the forensic purpose of the issuing party being impugned as illegitimate will be virtually non-existent.” (Emphasis in original.)

(ICAP is a reference is to *ICAP Australia Pty Ltd v BCG Partners (Australia) Pty Ltd* [2009] NSWCA 307. That decision of the Court of Appeal received some negative treatment in *Blacktown City Council*).

His Honour emphasised that it is unnecessary for the party issuing the subpoena to prove that the documents are likely to assist or advance the party's own case (at [66]).

It is also clear that the concept of "apparent relevance" extends beyond the substantive issues in the case presented by the pleadings, particulars, affidavits or witness statements (at [68]) to the collateral issue "[bearing] upon the cross-examination of witnesses expected to be called in the proceedings" (Blacktown City Council at [80]). This follows the line of authority commencing with *Maddison v Goldrick* [1976] 1 NSWLR 651 ("Maddison"). Maddison arose out of a subpoena issued in summary criminal proceedings in the Magistrate's Court conducted in accordance with the provisions of the Justices Act 1902 (NSW) (now repealed). Section 26 of that Act authorised the issue of a summons for the production of documents. The Court of Appeal regarded it as necessary that the issue of the summons was for a "legitimate forensic endeavour" (Maddison at 668, Samuels JA). Justice Samuels regarded "the opportunity to pursue a proper and ... fruitful course in cross-examination" as, "on the face of it, a legitimate forensic endeavour" (at 667-668); see also *Blacktown City Council* (at [38]).

In *Blacktown City Council*, Bell P referred to the "plain difference between 'apparent relevance' and 'fishing', the latter being the metaphor that is frequently deployed in this area of discourse" (at [68], citations omitted). His Honour continued:

"The word 'apparent' admits of the possibility that the documents sought by way of subpoena may not ultimately turn out to be relevant. Their apparent relevance, however, should be able to be ascertained by an examination of the description or identification of the document or documents sought in the schedule to the subpoena in light of the issues in the case, as they present themselves on the pleadings, in particulars and/or in affidavits or witness statements if they have been filed or served at the time of the issue of the subpoena."

From this I would infer that the question of apparent relevance is to be determined "before inspection is ordered": *Alister v The Queen* (1984) 154 CLR 404; [1984] HCA 85 (Gibbs CJ at 414, applying *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 439).

In his separate concurring judgment (with which Bell P expressly agreed at [81]), Brereton JA (at [89]) formulated the applicable principle as follows:

"In my view, at least in civil proceedings and in the absence of any question of public interest immunity, no more is required to support the issue of a subpoena for production than that there is a reasonable basis for supposing that the material called for will likely add, in the end, in some way or another, to the relevant evidence in the case. This reflects the notions that the documents relate to, throw light on, or are sufficiently relevant to the dispute; that they 'appear relevant in the sense that they relate to the subject matter of the proceedings'; or that they could possibly throw light on the issues in the case. Moreover, documents will add 'in some way' to the relevant evidence in the case if they are capable of assisting in cross-examination, or go to credit, and notwithstanding that they are inadmissible according to the rules of evidence." (Footnotes omitted, my emphasis).

In a short concurring note, McCallum JA agreed with both Bell P and Brereton JA.

I have emphasised that “apparent relevance” extends to a case where the documents described in the schedule to the subpoena are capable of assisting in cross-examination, or go to the credit, of expected witnesses because Ms Gallifuoco argued strongly to the contrary by reference to the decision in *Re Bird and Military Rehabilitation and Compensation Commission* [2006] AATA 109; (2006) 91 ALD 691. In that matter, Tribunal Member AF Cunningham of the Administrative Appeals Tribunal set aside a summons to produce documents issued at the request of an applicant for compensation on the ground that “a summons issued only for the purpose of finding documents going to the credit of a witness is not used for a legitimate forensic purpose and is an abuse of process” (drawn from the headnote). The summons required production of the service file of persons who were not parties to the proceedings but who were expected to be called as witnesses. In setting aside the summons, the learned Tribunal Member relied in particular upon the decision of the Federal Court of Australia in *Fried v National Australia Bank Ltd* [2000] FCA 911; (2000) 175 ALR 194 (“*Fried v NAB*”) in which Weinberg J (as his Honour then was) stated (at [29]):

“It is not appropriate ... for a court to permit a subpoena to stand which does little more than trawl for documents which may be used to impugn the credit of a particular witness. This is particularly so when the documents sought have nothing to do with any of the issues in dispute in the proceeding. The court must be alert to ensure that any subpoena which is issued has a legitimate forensic purpose. That purpose must be identifiable, and likely to facilitate the conduct of the proceeding, not merely to oppress a party or witness.”

Justice Weinberg accepted “that it may be legitimate to issue a subpoena directed to a third party in order to obtain documents which are to be used solely to impeach the credit of a witness” (at [24]). His Honour referred to relevant authorities, including *R v Saleam* (1989) 16 NSWLR 14 at 19, referring to Maddison. Justice Weinberg was clearly concerned that:

“[t]he court should scrutinise carefully any subpoena directed towards the production of documents which are relevant to credit only, particularly when the documents are said to bear only upon matters which go to credit, and which are wholly unrelated to the issues in dispute.” (*Fried v NAB* at [27]).

His Honour also had regard to the limited admissibility of evidence going only to a witness’s credit permissible under the Evidence Act 1995 (Cth). It should also be pointed out that Maddison and *R v Saleam* were concerned with statements made to police by witnesses to be called in the proceedings, the contents of which would naturally go beyond their credit and into the area of their version of the facts in issue.

Given the explicit contrary statements by Bell P and Brereton JA in *Blacktown City Council* there is a question about whether the formulation by Weinberg J represents the law to be applied by New South Wales courts. Clearly, I am bound by *Blacktown City Council*. It is notable, however, that Weinberg J cast the dictum in language appropriate to “fishing” and “oppression”. Requiring a subpoena to be issued by the Court to a stranger to the litigation in a faint and unfounded hope that something may “turn up” adverse to the credit of a witness to be called by an opposing party would lack a legitimate forensic purpose, amount to “fishing” and require the subpoena to be set

aside.

Fishing

Returning to the bounds of “apparent relevance” and the distinction from a “fishing expedition”, regard may be had to the judgment of Stern JA sitting as a single judge of appeal in *Montenegro v Legal Profession Admission Board* [2026] NSWCA 21. Her Honour observed, “it is not appropriate to use a Notice to Produce to seek documents that are necessary to plead or particularise a claim that cannot currently be pleaded or particularised” (at [48]). I interpolate, for this purpose, there is no distinction between a Notice to Produce on the one hand, and a subpoena to produce documents, on the other. Her Honour referred with approval to the judgment of Davies J in *Kazal v Independent Commission Against Corruption* [2018] NSWSC 1370 where his Honour said (at [26]):

“Where nothing is currently pleaded against [a party], one possibility, deriving from the matters put forward by the plaintiff to justify the Notices to Produce is that the provision of the material might turn up matters that at the present time he does not know. That, of course, would be a classic example of a fishing expedition.” (Citations omitted).

Her Honour also referred to *In the matter of Stone Cliff Pty Ltd (Deregistered) & Ors* [2017] NSWSC 918 where Black J held it was not open to a party at whose request a subpoena was issued “to use the processes for compulsory production of documents, whether by subpoena or notice to produce or otherwise, to conduct an enquiry into the ‘question’ ... whether... a case might or might not exist” (at [16]). In *ACN 008 664 257 Pty Ltd v HIH Casualty and General Insurance Limited (in liq)* [2005] NSWSC 881 Einstein J held that (at [32]):

“To submit that documents sought under a subpoena may assist in informing the precise nature of an amendment is not an acceptable approach, where the touchstone comprises the necessity for a subpoena as issued to be shown to be pursuing a legitimate forensic purpose” (emphasis in original).

Finally, her Honour considered *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN (NSW) 250 (at 254):

“A ‘fishing expedition’, in the sense in which the phrase has been used in the law, means that a person who has no evidence that there are a particular kind of fish in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not. If, however, there is material before the court pointing to the probability that a party to litigation has in his possession documents tending to destroy his case or to support the case of his opponent and that privilege from inspection of such documents has been wrongly claimed, an application by that opponent to be allowed to inspect them cannot properly be described as a mere ‘fishing expedition’.”

A question of onus

The question of where the onus lies in an application to set aside a subpoena or notice to produce, was considered by Brereton J in *Portal Software International v Bodsworth* [2005] NSWSC 1115 (at [28]-[29]).

“The fact that an application to set aside a subpoena amounts to an assertion of an abuse of process suggests that ordinarily some onus would lie on the person contending that there is such an abuse of process to make that allegation good.”

However, where the relevance of the documents sought by subpoena is raised at the first stage, the party issuing the subpoena bears at least a forensic onus of showing the relevance of the documents sought to issues in the proceedings. In *Santos Ltd v Pipelines Authority of Australia* (1996) 66 SASR 388, DeBelle J, with whom Cox and Prior JJ agreed, stated that ‘a party seeking to uphold the issue of a subpoena to produce documents must prove that the documents have an apparent relevance to the issues in the arbitration.’ In *Hatton v The Attorney-General*, the Full Court of the Family Court held that a primary judge had not erred in requiring the party who had issued a subpoena to demonstrate the apparent relevance of the documents sought to the issues. The rationale of this approach is that a non-party will not know what the issues are, so as to be able to demonstrate irrelevance.”

The “first stage” is a reference to the first of the “three steps” in the procedure of a third party bringing subpoenaed documents to court described by Moffitt P in *National Employers’ Mutual General Insurance Association Ltd v Waind* [1978] 1 NSWLR 372 at 381, being that of production to the court. Brereton J’s observation was specifically approved in *Blacktown City Council* (at [73]).

To my mind, having regard to the observations of Brereton J and the language of the rule, the legal onus of establishing an abuse of process rests upon the party applying to set the subpoena aside. However, this onus, to the usual civil standard of the balance of probabilities, will be easily discharged if the party, upon whose application the subpoena was issued, fails to discharge his forensic onus of establishing the apparent relevance of the documents and therefore a legitimate forensic purpose by application of the principles discussed in *Blacktown City Council*.

The evidence and argument

The defendant, the moving party, read the affidavits of the defendant’s solicitor, Robert Tassell sworn on 29 June 2026 and 15 July 2026 and tendered Exhibits RT-1 and RT-2, referred to respectively in those affidavits. The plaintiff read his affidavit sworn on 3 July 2026. All affidavits were read without objection.

Ms Gallifuoco relied in particular on the following matters:

When the matter was first before the Court on 26 June 2026 and there was debate about the subpoena the subject of the defendant’s application, the plaintiff indicated that he had inspected documents produced by the Council. From that material, inter alia, he formed the view that

“correspondence between the defendant and the police exists. It can lead to further enquiries that will demonstrate the extent of the publication, whether it’s gone to third parties after the police and so forth ... these are facts which will be of great benefit to the plaintiff in amending its (sic) statement of claim as well” (Transcript 26 June 2026, 1.40-48T; Exhibit RT-2 page 1).

A letter from the plaintiff to the defendant’s solicitors indicating an intention to amend the Statement of Claim to incorporate new defamatory matter arising from the Council file. The letter included an assertion that defamatory statements had been made to the police.

Letter from the plaintiff to the defendant’s solicitors reiterating that the Council material indicated that the defendant communicated defamatory allegations concerning the plaintiff to police. The plaintiff also asserted that the documents sought “are capable of having direct forensic relevance” to the issues of: content and repetition of pleaded imputations; the extent of publication and dissemination of the allegations; causation and damages; and the plaintiff’s proposed application to amend the Statement of Claim.

Ms Gallifuoco relied principally upon two matters. First, investigations to determine whether or not fresh causes of action should be pleaded are outside the scope of apparent relevance or legitimate forensic purpose for the issue of a subpoena. Secondly, the search for documents relating to credit alone are beyond the reach of apparent relevance.

The plaintiff relied in particular upon the following matters:

A conversation with the defendant shortly after he and his wife took up residence at the property during which the plaintiff produced the printout of an email to local police about the previous owner of the property and during which the defendant allegedly said he had reported the former neighbour to police on several occasions, and they took him to court.

On 21 August 2023 another neighbour passed on to the plaintiff that the defendant “was going around making some fairly serious accusations about you which he says he reported to police”.

Because of these matters, the plaintiff said he formed the view that “any correspondence passing between the defendant and the police would shed light on the [alleged defamatory matter] already pleaded, and identify if further publications were made, and whether those publications were made to third parties, which would result in leave being sought for the [Statement of Claim] to be amended”: Gazecki Affidavit of 3 July 2026 at [41]. He regarded early access to police material would enable any necessary amendments to be made before the close of pleadings.

The plaintiff relied upon the contents of a file note made by an officer of the Council concerning a telephone conversation between that officer and the defendant on 24 April 2025 where complaints were made to the officer about the conduct of the plaintiff. The defendant apparently also reported “broken gates/locks and had dirt put in his tractor fuel tanks etc. This was reported to Taree Rural Crime Division” (sic). Unlike other matters recorded in the file note, the plaintiff’s name was not mentioned in relation to those matters.

Mr Gazecki argued that his purpose in issuing the subpoena was not for the purpose of amending his Statement of Claim to add additional causes of action, but simply to expand the current pleading. He also argued that there were other legitimate forensic purposes of relevance, including the matters I have listed above.

He also pointed out that when the defendant's solicitor responded to his concerns notice, he raised the availability of defences of justification and qualified privilege and it was legitimate for him to obtain evidence in anticipation of rebutting those defences if pleaded.

Consideration

First, the starting point for the consideration of the matter is the central consideration that by the Statement of Claim filed on 5 May 2026, the plaintiff brings a case based upon a single publication of allegedly defamatory matter of and concerning the plaintiff and no one else on 3 November 2025.

Secondly, of the six imputations said to be conveyed by that single publication of defamatory matter only one, imputation (f), relating to "criminal conduct – vandalism" is likely to be informed by any documents which may be within the power, custody or control of police.

Thirdly as Mr Gazecki acknowledged, any alleged defamation arising from a report of alleged criminal conduct to police is defeasible by the defence of absolute privilege raised under s 27(2) (b)(i) of the Defamation Act 2005 (NSW) ("the Defamation Act"). Accordingly, it is unlikely anything in police files would legitimately found the "expansion" of the Statement of Claim by the pleading of additional causes of action.

Fourthly, the breadth of the subpoena must be considered. It searches for documents covering the period 2018 to 26 May 2026. It is not limited to complaints to police of acts of vandalism by the plaintiff alone, but seeks to capture complaints of any kind, not only against the plaintiff, but "regarding" the property where the plaintiff resides, the previous occupant and the plaintiff's wife.

Fifthly, the terms of the schedule are inapt to capture any republication of the single allegedly defamatory matter relied upon, which could only arise in the period between 3 November 2025 and 26 May 2026. That evidence of republication of the alleged defamatory matter may be discovered is entirely speculative.

Sixthly, none of the matters I have referred to above, relied upon by Mr Gazeki, being: the content and repetition of the pleaded imputations; the extent of publication and dissemination of the allegations; and causation and damages relating to the alleged defamatory publication of 3 November 2025 can be advanced by trawling through documents which date as far back as 2018. Once again, as a matter of legal principle, and common sense, such matters must post-date the publication sued upon. I repeat any publication to police themselves is protected by the defence of absolute privilege.

Seventhly, to the extent to which the plaintiff wishes to amend the Statement of Claim to incorporate additional defamatory publications for the reasons I have rehearsed above, this matter classically falls into the category of a “fishing expedition”, despite Mr Gazecki’s argument to the contrary (Exhibit RT-1, page 22 [8](d)).

Eighthly, while I would be prepared to accept that (given the provisions of the Defamation Act) concerns notices and offers to make amends and other responses are capable of informing the issues in dispute for present purposes, I am not of the view that a subpoena of the breadth of the one currently under consideration could sensibly inform the nature of the issues in dispute, particularly when amendments to the Statement of Claim are in contemplation.

Ninthly, the current issue about the contested subpoena has somewhat overtaken the usual order of case management in the Defamation List. As Ms Gallifuoco pointed out, there has been no “interrogation” of the imputations relied upon and in particular the vandalism imputation. It is clear that neither the publication complained of nor the file note made by the Council officer expressly associates the plaintiff with the reports of vandalism, and there is no pleading of extrinsic facts raising a “true innuendo”. This is a matter which would normally be determined at an early stage in the proceedings and before the defendant was required to plead to the Statement of Claim. Given this consideration, and the potential availability of an indefeasible defence of absolute privilege, it is far from clear that documents within the care, custody or control of the police have the requisite apparent relevance, even bearing in mind the relatively low threshold and inherent flexibility of that principle as explained in *Blacktown City Council*.

Tenthly, I have borne in mind that matters going only to the defendant’s credit as a witness may of themselves lend apparent relevance to a subpoena, but until pleadings are closed and proper particulars appropriately furnished, it is difficult to conceive of the subpoena in question going to that single issue. While it is always possible something useful in that regard might fall out from the production and inspection of documents from third parties to the plaintiff’s advantage, such a consideration hardly qualifies as apparent relevance, as opposed to fishing, under the *Blacktown City Council* principle.

For these reasons, I am not satisfied that the plaintiff has discharged his forensic onus in relation to legitimate forensic purpose, and I am satisfied that the subpoena should be set aside as an abuse of process.

In arriving at this decision, I have given consideration to whether the schedule to the subpoena might legitimately be read down by a process of construction or by severance. However, in the end, I am of the view that such a process would in truth involve not merely setting aside the subpoena in part, but substantially re-writing it, which I consider to be beyond the powers of the Court, notwithstanding the width of the power conferred by UCPR r 33.4(1).

I have also borne in mind that it appears that the Commissioner of Police has produced documents in answer to the subpoena. While this would be relevant to an argument based upon oppression, it says nothing about the question of apparent relevance of the documents described in the schedule to the subpoena, having regard to the consideration that the question of apparent relevance must be determined prospectively and prior to inspection.

Orders

My orders are:

Under r 33.4 of the Uniform Civil Procedure Rules 2005 (NSW) set aside the subpoena to produce directed to the Commissioner of Police, New South Wales Police Force at the request of the plaintiff filed on 11 May 2026.

Under r 33.10 of the Uniform Civil Procedure Rules 2005 (NSW) direct the Registrar to return the documents produced in response to the said subpoena to the Commissioner of Police, New South Wales Police Force.

The plaintiff is to pay the defendant's costs of the Notice of Motion filed on 29 June 2026.

Direct that the plaintiff is to serve any proposed Amended Statement of Claim on which he wishes to rely on the defendant's solicitors by 5pm on Friday, 4 September 2026.

In accordance with clause 13(a) of Practice Note SC CL 4, the defendant must notify the plaintiff in writing of his objections (if any) to the proposed amended pleading by 5pm on Wednesday, 16 September 2026.

The plaintiff is to respond in writing to the defendant's objections by 5pm on Monday, 21 September 2026, setting out whether he accepts or rejects the defendant's objections and in respect of those rejected, set out succinctly the reasons why.

In the event of a dispute about the proposed Amended Statement of Claim, the defendant is to forward to the List Judge's Chambers by 9:00am on Wednesday, 23 September 2026 a copy of the proposed Amended Statement of Claim, the defendant's objections and the plaintiff's response.

Listed for Directions on Friday, 25 September 2026.

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Decision last updated:

07 August 2026

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Prepared on 29 October 2026 · Esheria