

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

Not Restricted

S CI 2016 04688

EF (a pseudonym)

Plaintiff

v

CD (a pseudonym)

Defendant

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JUDGE: Ginnane J  
WHERE HELD: Melbourne  
DATE OF HEARING: 22-25 November, 1, 15 December 2016, 20-22, 27-28  
February, 1-3, 16-17, 20-21 March 2017  
DATE OF JUDGMENT: 19 June 2017  
CASE MAY BE CITED AS: EF v CD  
MEDIUM NEUTRAL CITATION: [2017] VSC 351

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EQUITY – Confidence – Identity of police informer – Assurances of confidentiality –  
Disclosure of identity might provide assistance to convicted person to challenge convictions  
– Whether information confidential – Iniquity defence – Public interest defence

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APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr P W Collinson QC with Ms C M Harris	Minter Ellison
For the Defendant	Dr S B McNicol QC with Mr S Bayles, Mr C T Carr and Mr M Hosking	Office of Public Prosecutions

HIS HONOUR:

**Introduction**

- 1 The facts giving rise to this proceeding are to be found in the companion judgment of *AB & EF v CD*.<sup>1</sup> On 11 November 2016, orders were made that this proceeding and proceeding S CI 2016 03143 would be heard together and that evidence in one proceeding was to be treated as evidence in the other.<sup>2</sup> This judgment should be read in conjunction with the first judgment delivered this day in proceeding S CI 2016 03143 ('the first judgment') in which I have set out the assurances of confidentiality given to EF by Victoria Police and the extent of the public knowledge that she had been a police informer. I will not repeat much of that evidence.
- 2 The identity of police informers has been traditionally regarded as confidential except in limited circumstances including the 'substantial assistance' circumstance referred to in the first judgment.<sup>3</sup>
- 3 In this proceeding, EF sued CD, who is the Director of Public Prosecutions ('the Director'), relying on obligations of confidence alleged to be owed to her by Victoria Police and contending that the Director was bound by those obligations to preserve the confidentiality of her role as a police informer.
- 4 EF seeks:
  - (a) a declaration that the information that the Director proposes to provide the seven named persons is subject to an equitable obligation of confidence;
  - (b) an order that the Director be permanently restrained from:
    - (i) sending the proposed letters to any or all of the seven persons, or their legal representatives;
    - (ii) otherwise disclosing the information in the proposed letters to any or all of the persons identified in paragraph 6 above [the seven persons], or their legal representatives.

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<sup>1</sup> *AB & EF v CD* [2017] VSC 350R.

<sup>2</sup> Orders made by Ginnane J on 11 November 2016, [3] and [4].

<sup>3</sup> *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84.

- (c) There be no publication, in Victoria or anywhere else in Australia, of:
  - (i) any report of the proceeding;
  - (ii) any information derived from the proceeding;
  - (iii) any document filed, served or tendered in the proceeding;
  - (iv) the terms of any orders made in this proceeding.

5 EF relied on the statement by Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*<sup>4</sup> of the elements of a cause of action for breach of confidence that:

It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge) (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of that information.<sup>5</sup>

6 In accordance with the statement of Gummow J, a plaintiff seeking to restrain the publication of information on the basis that it constitutes a breach of an equitable obligation of confidence must establish:

- (a) that the specific information is confidential, and not common or public knowledge;
- (b) that the defendant obtained it in circumstances importing an obligation of confidence; and
- (c) that there is actual or threatened misuse of the information in an unauthorised manner.<sup>6</sup>

7 EF argued that a third party, in this case the Director, who knowingly obtained confidential information in breach of confidence may be restrained from publication by the party to whom the confidence is owed.<sup>7</sup> The Director received information in

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<sup>4</sup> (1987) 14 FCR 434.

<sup>5</sup> Ibid 443.

<sup>6</sup> EF's closing submissions, 8.

<sup>7</sup> *Foster v Mountford & Rigby Ltd* (1976) 14 ALR 71, 75.

good faith pursuant to the recommendation of the Kellam Report, but he was on notice of its highly confidential nature. That was made clear by the 'Important Note' on the front cover, which stated:

Consideration of the contents of this report may reasonably be expected to divulge the identity of a police informer. Any release of this report (or any part of it) would be highly likely to endanger the life of the police informer concerned. Accordingly, any application for release of the document should be the subject of legal advice at the highest level and should be resisted strongly on the grounds of public interest immunity.

8 The Director had a statutory basis for not disclosing EF's role as a police informer. Section 416 of the *Criminal Procedure Act 2009* provides:

- (1) Nothing in this Act derogates from a duty otherwise imposed on the prosecution to disclose to the accused material relevant to a charge.
- (2) Nothing in this Act requires the prosecution to disclose to the accused material which the prosecution is required or permitted to withhold under this or any other Act or any rule of law.

9 EF was assured that the fact that she was the source of information to police would be kept confidential.<sup>8</sup> Detective Senior Sergeant [\*Redacted] told her when she raised her concerns that 'all I can say to you is that it will be one hundred per cent secure...'.<sup>9</sup> There is other evidence to the same effect that I have referred to in the first judgment.

10 The doctrine of confidential information can protect the identity of police informers. In *Chief Commissioner of Police v The Herald & Weekly Times Pty Ltd*, Cavanough J stated that:

The confidentiality of the identity of the informers (both police informers and others) and of the information they provide to the authorities has been recognised in cases brought against media defendants to restrain the publication of such information on the basis of the equitable obligation of confidence.<sup>10</sup>

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<sup>8</sup> Transcript of Proceedings, *AB & EF v CD* (Supreme Court of Victoria S CI 2016 03143, Ginnane J, 22-25 November, 1, 15 December 2016, 20-22, 27-28 February, 1-3, 16-17, 20-21 March 2017) 262-3 (28 February 2017) ('T'); and exhibit AC-9.

<sup>9</sup> Exhibit AC-9; see also T 429.13-T 430.16 (1 March 2017).

<sup>10</sup> [2014] VSC 156R at 19 (Cavanough J) citing *G v Day* [1982] 1 NSWLR 24; and *Falconer v Australian Broadcasting Corporation* (1992) 1 VR 662.

11 The Director submitted that because of his public duty, he could not acquire information subject to an obligation of confidence as that would mean that he would be prevented from disclosing it when he has a duty to do so. He could not be subject to equitable obligations of confidence any more than a prosecutor could be from complying with the disclosure obligations required by the *Criminal Procedure Act 2009*.

12 The Director submitted that he was provided with the Kellam Report to determine whether miscarriages of justice had occurred and he could not stay silent if he formed the view that they had. The obligation of confidence owed by Victoria Police to EF must, at least, have been subject to the qualification that if the information was found by a court not to be subject to public interest immunity, then Victoria Police could be required to disclose it. The same qualification should apply to any obligation of confidence that might otherwise arise.

13 I accept the Director's submission. In my opinion, if disclosure of the informer's identity might provide substantial assistance to a person to challenge a conviction, then no obligation of confidence protects it from disclosure and such a disclosure is not a misuse of the information.

14 Deane J in stated *A v Hayden*:

[T]he the courts of this country will not lend their aid to enforce a promise not to disclose information where the circumstances are such that enforcement or insistence upon observance of the promise would obstruct the due administration of the criminal law of Australia, whether Commonwealth or state.<sup>11</sup>

15 In *WV v Crown Prosecution Service*<sup>12</sup>, Lord Justice Thomas referred to the statement of Lord Diplock in *D v National Society for the Prevention of Cruelty to Children*<sup>13</sup>, that the communication of information in confidence may not protect the information being disclosed, if the nature of the information or the identity of the informant would assist

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<sup>11</sup> (1986) 156 CLR 532, 595.

<sup>12</sup> [2011] EWHC 2480 (Admin).

<sup>13</sup> [1978] AC 171, 218.

the court to ascertain facts, which were relevant to an issue upon which it was adjudicating.

16 However, I have decided in the first proceeding that the particulars in some of the Director's proposed disclosures do not appear to state accurately the roles that EF played in respect of some of the seven persons.

17 I will hear the parties as to the orders that should be made as a result of that conclusion.

18 I will deal shortly with the other issues in the case.

**Was the information otherwise confidential?**

19 The Director also submitted that the information that EF had been an informer was not confidential because it was already in the public domain. This was clear from the relevant media articles, together with the press releases issued by the Independent Broad-based Anti-corruption Commission about the Kellam Report, the course that the Karam proceeding has taken and the background knowledge of the named individuals. Three of them had taken steps to obtain information. The Court should conclude that the information was accessible to the seven named persons and therefore was not confidential.

20 EF said in evidence that 'the whole world knows who Lawyer X is now'<sup>14</sup> and:

When I say 'the whole world,' I probably should clarify that to anyone who would have a reason to harm me, because the people – a lot of people in prison, the Herald Sun is their Bible. It's known as the Bible in there. There was a – initially, when the first article came out and it said 'Lawyer X' there was a bit of speculation about who it was. But as more articles came out, anyone who would want to do me harm or was sitting in prison would read the stories about Lawyer X and know it was me.<sup>15</sup>

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<sup>14</sup> T 331 (28 February 2017).

<sup>15</sup> T 331 (28 February 2017).

21 In the first proceeding, affidavit evidence by Mr Karam and by his solicitor, Ms Garde-Wilson demonstrated that he had been told of EF's activities as a police informer. Ms Garde-Wilson said in her affidavit:

The identity of Lawyer X is common knowledge, at least within the legal fraternity, I am aware of Lawyer X's true identity.<sup>16</sup>

22 Tony Mokbel has brought proceedings under the *Freedom of Information Act 1982* for information about EF, whom he identified by name in his request for information.

23 The Director contended that it is clear that because of generally available information, EF's identity was accessible to any person with a particular interest in it. The available information went beyond speculative gossip, innuendo and assertion.<sup>17</sup>

24 EF said that, after the publication of an article in the Herald Sun newspaper in March 2014 revealed her confidential status, she became a 'persona non grata' to her colleagues in the legal profession.<sup>18</sup>

25 However, for reasons I gave in greater detail in the first judgment, I consider that the information that the Director proposes to disclose will go beyond speculation and involve official confirmation of EF's role as a police informer. I do not consider that that information is presently in the public domain so as to lose its confidential nature. Therefore, the information would be entitled to protection as confidential if it were not otherwise open to be disclosed because of the substantial assistance that it might provide the seven named persons.

26 Lest I be wrong in that conclusion, I proceed to consider the Director's defences to EF's proceeding.

### **The Director's iniquity defence**

27 The Director submitted that if he did owe an obligation of confidence in respect of the information that he wishes to disclose, he was nevertheless entitled to disclose it to

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<sup>16</sup> Garde-Wilson Affidavit at [4].

<sup>17</sup> See *AFL v The Age Co Ltd (No 2)* (2006) 15 VR 419, 433 [56].

<sup>18</sup> T 329 (28 February 2017).

the named persons because it falls within the rule that 'there is no confidence as to the disclosure of an iniquity'.<sup>19</sup>

28 The Director submitted that the proposed disclosures to the seven named persons will disclose a serious misdeed of public importance. That is, that at the time, or about the time, that EF was the lawyer for the persons, she was also a police informer providing information about them to the police. The disclosure would reveal that Victoria Police engaged a lawyer as a police informer, and that that lawyer provided information to Victoria Police about her clients. The disclosure was prima facie evidence of a bona fide and reasonably tenable charge of that iniquity. The seven named persons have a direct and real interest in redressing the iniquity insofar as it applies to them.

29 The Director has not yet determined the precise terms of the disclosure, but it would disclose an iniquity. The precise form of the disclosures could not determine whether there was an iniquity or whether the Director was entitled to disclose it.

30 EF submitted that the iniquity defence was not made out and did not satisfy the requirements of the defence as identified by Kellam J in *Australian Football League v The Age Co Ltd (No 2)*:

The proposed disclosure will in fact disclose the existence of or the real likelihood of, the existence of an iniquity that is a crime, civil wrong or serious misdeed of public importance.<sup>20</sup>

31 EF submitted that to invoke the iniquity defence, the disclosure must itself reveal the iniquity.<sup>21</sup> A disclosure of facts which would serve as a 'starting point' to identify an iniquity, as the Director characterised the contents of proposed disclosure letters, would not suffice.

32 I consider that in the unusual circumstances of this case that the proposed disclosures do reveal the real likelihood of a serious misdeed of public importance. The disclosures are proposed to be made with the qualification that the information 'could

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<sup>19</sup> *Collector of Customs v Corrs Pavey* (1987) 14 FCR 434 at 438 and *Gartside v Outram* (1856) 26 LJ Ch (NS) 113.

<sup>20</sup> (2006) 15 VR 419, 436 [69].

<sup>21</sup> *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, 523.



be interpreted to mean'. However, they are proposed to be made by the Director, a statutory office holder with wide functions concerning the prosecution of criminal offences. I do consider that the proposed disclosures would reveal 'reasonable grounds to believe' EF and members of Victoria Police are 'implicated in' a serious misdeed of public importance.<sup>22</sup>

33 Therefore, the iniquity defence would be established, if the proposed disclosures were otherwise protected as confidential information.

### **Director's public interest defence**

34 The Director also relied on a public interest defence to EF's claim for breach of confidence. He submitted that if the Court found that the iniquity defence did not apply, it should decide that the Director was entitled to make the proposed disclosures. The public interest in doing so outweighed any relevant countervailing public interest.

35 The public interest defence has been accepted in England, particularly in *Lion Laboratories Ltd v Evans*<sup>23</sup> where the Court of Appeal decided that a clear public interest in avoiding miscarriages of justice, should result in the Court not restraining disclosure of information, when otherwise the disclosure would be in breach of confidence.

36 EF submitted that because the information that is subject to the equitable obligation was confidential in her hands, as a private citizen, any public interest defence may have a limited application to the information.

37 There is authority that the public interest defence is not available in Australia, although the matter has not been decided conclusively. I consider that I should apply the observations in *British American Tobacco Australia Limited v Gordon*<sup>24</sup> and decide that the defence is not available.

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<sup>22</sup> *A v Hayden* (1984) 156 CLR 532, 547 (Gibbs CJ).

<sup>23</sup> [1985] QB 526 and *G v Day* [1982] 1 NSWLR 35, 36-7.

<sup>24</sup> *British American Tobacco Australia Limited v Gordon (No 3)* [2009] VSC 619 [103]-[116].

## **Conclusion**

- 38 I consider that no obligation of confidence in the identity of EF as a police informer or the role that she played in respect of the seven named persons prevents the Director from disclosing information to them that is based on evidence about that role that might provide them with substantial assistance in challenging their convictions.
- 39 The orders sought by EF relate to the Director's proposed disclosures. In the first proceeding, I have decided that some of the particulars of those proposed disclosures are not, or appear not, to be supported by the evidence. In those circumstances, I will hear the parties, if they wish, as to the appropriate orders that should be made in this proceeding.

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