

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No M73/2018

AB (A PSEUDONYM)

APPELLANT

AND

CD (A PSEUDONYM) & ORS

RESPONDENTS

Matter No M74/2018

EF (A PSEUDONYM)

APPELLANT

AND

CD (A PSEUDONYM) & ORS

RESPONDENTS

AB (a pseudonym) v CD (a pseudonym)

EF (a pseudonym) v CD (a pseudonym)

[2018] HCA 58

5 November 2018

M73/2018 & M74/2018

ORDER

The orders of the Court, as varied on 23 November 2018 and as further varied on 3 December 2018, are as follows:

- 1. Special leave to appeal granted on 9 May 2018 is revoked in each matter.*
- 2. The following orders made by the Honourable Justice Nettle are revoked:*

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- (a) *Orders 1 and 2 made on 21 December 2017, as varied on 25 May 2018; and*
- (b) *Order 2(c) made on 17 October 2018.*

3.1 *Pursuant to s 77RE(1) of the Judiciary Act 1903 (Cth), by reason of the necessity to prevent prejudice to the proper administration of justice within the meaning of s 77RF(1)(a) of the Judiciary Act, there be no disclosure other than disclosure in accordance with Orders 4.1-4.9 herein, whether by publication or otherwise, of:*

- (a) *any document filed in these proceedings (including in proceeding No. M183 of 2017 and No. M185 of 2017);*
- (b) *any information derived from any document filed in these proceedings (including in proceeding No. M183 of 2017 and No. M185 of 2017);*
- (c) *any order made in these proceedings (including in proceeding No. M183 of 2017 and No. M185 of 2017);*
- (d) *any transcript of any hearing in these proceedings (except the directions hearing on 21 December 2017 and the granting of special leave to appeal on 9 May 2018 in proceeding No. M183 of 2017 and No. M185 of 2017);*
- (e) *any information derived from the hearing on 5 November 2018, or from the transcript of that hearing; or*
- (f) *the real name or image of EF in connection with these proceedings and with proceeding No. M183 of 2017 and No. M185 of 2017,*

until 5 February 2019.

3.2 *Pursuant to s 77RE(1) of the Judiciary Act, by reason of the necessity to prevent prejudice to the proper administration of justice within the meaning of s 77RF(1)(a) of the Judiciary Act, there be no disclosure other than disclosure in accordance with Orders 4.1-4.9 herein, whether by publication or otherwise, of any information tending to reveal the identity of the other parties to these proceedings (including proceeding No. M183 of 2017 and No. M185 of 2017), until 9am on 3 December 2018.*

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- 4.1 *AB may provide the Legislation Committee of the Victorian Cabinet, being the Cabinet Committee that has oversight of significant litigation, any information about these proceedings that AB considers necessary for the purpose of briefing that Committee about these proceedings from time to time as the occasion requires.*
- 4.1A *Neither Order 3.1 nor Order 3.2 prohibits disclosure for the purpose of briefing the following persons holding office in the State of Victoria about these proceedings from time to time as the occasion requires:*
- (a) the Premier;*
 - (b) the Attorney-General;*
 - (c) the Minister for Police;*
 - (d) the Special Minister of State;*
 - (e) the Secretary to the Department of Justice & Regulation; and*
 - (f) the Secretary to the Department of Premier and Cabinet.*
- 4.2 *AB, CD or the Commonwealth Director of Public Prosecutions may provide a copy of these orders, the transcript of the hearing on 5 November 2018 and this Court's reasons for decision relating to the revocation of special leave to the President of the Court of Appeal of the Supreme Court of Victoria, the Honourable Christopher Maxwell AC, or in his absence the Acting President of the Court of Appeal, who may provide copies of the same to or inform any of the Judges of the Supreme Court as he considers necessary.*
- 4.3 *AB and CD may provide the Honourable Robert Redlich QC, Commissioner of the Independent Broad-based Anti-corruption Commission, any information about these proceedings that AB or CD considers necessary for the purpose of keeping Mr Redlich QC informed about these proceedings, including copies of any applications and orders made in these proceedings, from time to time as the occasion requires.*

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- 4.4 *The Commonwealth Director of Public Prosecutions may provide the Attorney-General for the Commonwealth and the Attorney-General's Chief of Staff, any information about these proceedings that the Commonwealth Director of Public Prosecutions considers necessary for the purpose of briefing the Attorney-General about these proceedings from time to time as the occasion requires.*
- 4.5 *The Commonwealth Director of Public Prosecutions may provide the Commissioner of the Australian Federal Police any information about these proceedings that the Commonwealth Director of Public Prosecutions considers necessary for the purpose of briefing the Commissioner about these proceedings from time to time as the occasion requires.*
- 4.6 *Order 3.1 does not prohibit disclosure from 3 December 2018 of:*
- (a) *any document filed in proceeding No. S CI 2016 03143 or No. S CI 2016 04688 in the Supreme Court of Victoria, and any judgment given or order made in those proceedings;*
 - (b) *any document filed in proceeding No. S APCI 2017 0082, No. S APCI 2017 0083 or No. S APCI 2017 0087 in the Court of Appeal of the Supreme Court of Victoria, and any judgment given or order made in those proceedings.*

For the avoidance of doubt, Order 4.6 does not otherwise affect the operation or the effect of any suppression order in respect of such documents made by the Supreme Court of Victoria (including the Court of Appeal).

- 4.7 *Order 3.1 does not prohibit CD from 3 December 2018 from sending, to each of the persons named in paragraph 2(b) of the orders sought in the Notice of Appeal in proceeding No. M73 of 2018 dated 23 May 2018, letters substantively in the terms identified in exhibits JRC-11 and JRC-17 to the confidential affidavit of John Ross Champion SC sworn 2 August 2016 and filed in the Supreme Court of Victoria in proceeding No. S CI 2016 03143.*
- 4.8 *Order 3.1 does not prohibit disclosure from 3 December 2018 of:*
- (a) *the terms of these orders;*

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- (b) *the fact that there was a hearing on 5 November 2018, in proceeding No. M73 of 2018 and No. M74 of 2018 in the High Court of Australia, to determine whether special leave to appeal, which was granted on 9 May 2018, should be revoked;*
 - (c) *the fact that special leave to appeal was revoked, and the date on which special leave was revoked;*
 - (d) *the fact that the appeals were appeals from a decision of the Court of Appeal of the Supreme Court of Victoria in proceeding No. S APCI 2017 0082, No. S APCI 2017 0083 and No. S APCI 2017 0087 which are the subject of orders made by the Court of Appeal under the Open Courts Act 2013 (Vic); and*
 - (e) *this Court's reasons for decision relating to the revocation of special leave to appeal.*
- 4.9 *Order 3.1 does not prohibit disclosure, by AB, CD or the Commonwealth Director of Public Prosecutions to any person to whom they owe obligations of disclosure, from 3 December 2018 of any information tending to reveal the identity of any of the parties to these proceedings (including proceeding No. M183 of 2017 and No. M185 of 2017), provided they do not use EF's real name or image.*
5. *The whole of the Court's file shall remain closed until 5 February 2019.*
6. *Any party which seeks limited redactions from materials on the Court file shall make application to the High Court no later than 2.30pm on 21 December 2018 identifying in the application the specific information to be redacted by reference to the specific documents on the Court file.*

On appeal from the Supreme Court of Victoria

Representation

N C Hutley SC with E M Nekvapil and D P McCredden for AB in both matters (instructed by Victorian Government Solicitor)

S B McNicol QC with C T Carr and K A O'Gorman for CD in both matters (instructed by Solicitor for Public Prosecutions (Vic))

P W Collinson QC and C M Harris QC for EF in both matters (instructed by MinterEllison)

W J Abraham QC with R J Sharp and M R Wilson for the Commonwealth Director of Public Prosecutions in both matters (instructed by Director of Public Prosecutions (Cth))

C J Horan QC with K M Evans for the Victorian Equal Opportunity and Human Rights Commission in both matters (instructed by Victorian Equal Opportunity and Human Rights Commission)

W B Zichy-Woinarski QC with J M Davidson appearing as amici curiae in both matters (instructed by Russell Kennedy Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

AB (a pseudonym) v CD (a pseudonym)

EF (a pseudonym) v CD (a pseudonym)

Criminal law – Prosecution's duty of disclosure – Public interest immunity – Where legal counsel for several accused ("EF") was enlisted as police informer – Where EF provided information to police that had potential to undermine each accused's defences to criminal charges – Where each accused convicted of criminal offences – Where first respondent proposed to disclose to each convicted person information about EF's conduct – Whether information subject to public interest immunity – Whether first respondent permitted to make proposed disclosures.

Practice and procedure – High Court – Special leave to appeal – Whether special leave to appeal ought to be revoked.

Words and phrases – "adequately protect", "disclosure", "police informer", "integrity of the criminal justice system", "public interest immunity", "witness protection".

Witness Protection Act 1991 (Vic), s 3B(2)(b).

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. Early in February 2015, the Victorian Independent Broad-based Anti-corruption Commission provided to the Chief Commissioner of Victoria Police ("AB"), and AB in turn provided to the Victorian Director of Public Prosecutions ("CD"), a copy of a report ("the IBAC Report") concerning the way in which Victoria Police had deployed EF, a police informer, in obtaining criminal convictions against Antonios ("Tony") Mokbel and six of his criminal associates ("the Convicted Persons"). The Report concluded among other things that EF, while purporting to act as counsel for the Convicted Persons, provided information to Victoria Police that had the potential to undermine the Convicted Persons' defences to criminal charges of which they were later convicted and that EF also provided information to Victoria Police about other persons for whom EF had acted as counsel and who later made statements against Mokbel and various of the other Convicted Persons. Following a review of the prosecutions of the Convicted Persons, CD concluded that he was under a duty as Director of Public Prosecutions to disclose some of the information from the IBAC Report ("the information") to the Convicted Persons.

2 In the months which followed, Victoria Police undertook an assessment of the risk to EF if CD were to disclose the information to the Convicted Persons. The conclusion reached was that, if the information were disclosed, the risk of death to EF would become "almost certain". On 10 June 2016, AB instituted proceedings in the Supreme Court of Victoria seeking declarations that the information that CD proposed to disclose and other information in the IBAC Report was subject to public interest immunity and thus that CD is not permitted by law to make the proposed disclosures. On 11 November 2016, EF was added as a plaintiff to the proceeding. On 15 November 2016, EF instituted a separate proceeding in the Supreme Court of Victoria seeking similar relief on the basis of an equitable obligation of confidence.

3 Both proceedings were heard together in camera without notice to the Convicted Persons and with publication of the proceedings being suppressed. The Convicted Persons' interests were, however, amply represented throughout the proceedings and subsequently on appeal to the Court of Appeal of the Supreme Court of Victoria, and before this Court, by amici curiae. The Victorian Equal Opportunity and Human Rights Commission intervened in the proceeding instituted by AB and the Commonwealth Director of Public Prosecutions was granted leave in the Court of Appeal to intervene in support of disclosure.

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4 On 19 June 2017, Ginnane J gave judgment in each proceeding dismissing AB's and EF's claims for relief. Relevantly, his Honour dismissed the claim for public interest immunity on the basis that, although there was a clear public interest in preserving the anonymity of EF as a police informer, and thus in keeping her and her children safe from the harm likely to result from disclosure of the information, there was a competing and more powerful public interest in favour of disclosure because of the assistance that the information might afford the Convicted Persons in having their convictions overturned and, more fundamentally, in order to maintain public confidence in the integrity of the criminal justice system.

5 On 21 November 2017, the Court of Appeal of the Supreme Court of Victoria (Ferguson CJ, Osborn and McLeish JJA) dismissed AB's and EF's appeals from the orders of Ginnane J. Like Ginnane J, the Court of Appeal held that, despite the risk to EF and her children, the very great importance of ensuring that the court's processes are used fairly and of preserving public confidence in the court meant that the public interest in disclosure outweighed the public interest in immunity.

6 On 9 May 2018, AB was granted special leave to appeal to this Court on grounds to the effect that the Court of Appeal erred in failing to appreciate that there is a discrete public interest in the State of Victoria adhering to the responsibility which it assumed by reason of the assurances given by Victoria Police to EF that her identity as a police informer would not be disclosed. At the same time, EF was granted special leave to appeal on grounds to the effect that the Court of Appeal erred by assuming, contrary to the evidence, that EF might choose to enter into the witness protection program once it was determined that the information would be disclosed, by finding and taking into account that EF's refusal to enter witness protection may become unreasonable, and by not concluding that the public interest favoured non-disclosure given the gravity of the consequences of disclosure to EF and her children.

7 The full written arguments thereafter presented by all parties and interveners made it apparent, as it was not apparent at the time of granting special leave to appeal, that the only arguable issue underpinning the various grounds of appeal was whether it was no longer possible adequately to protect the safety of EF and her children in the event of disclosure. Accordingly, in order to clarify the relevant facts that had been the foundation of the grant of special leave, the Court sought from AB, and was provided with, further detailed evidence as to what can be done to secure the safety of EF and her children in the event of

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disclosure. The effect of that evidence is that the safety of EF and her children may adequately be protected if EF agrees to enter into the witness protection program¹.

8 Given that conclusion, the parties were invited to present oral argument as to why special leave to appeal should not now be revoked, and, today, their oral arguments were heard in camera. Having now considered those arguments, the Court is unanimously of the view that special leave to appeal should be revoked.

9 As Ginnane J and the Court of Appeal held, there is a clear public interest in maintaining the anonymity of a police informer, and so, where a question of disclosure of a police informer's identity arises before the trial of an accused, and the Crown is not prepared to disclose the identity of the informer, as is sometimes the case, the Crown may choose not to proceed with the prosecution or the trial may be stayed.

10 Here the situation is very different, if not unique, and it is greatly to be hoped that it will never be repeated. EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will². As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system. It follows, as Ginnane J and the Court of Appeal held, that the public interest favouring disclosure is compelling: the maintenance of the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each Convicted Person's conviction be re-examined in light of the information. The public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system.

1 See *Witness Protection Act 1991* (Vic), s 3B(2)(b).

2 See *Victoria Police Act 2013* (Vic), Sch 2, and formerly *Police Regulation Act 1958* (Vic), Second Schedule.

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11 To say so is not to overlook that, on the evidence before the courts below and now before this Court, EF and her children will be at grave risk of harm unless EF agrees to enter into the witness protection program. Nor is it to ignore that, thus far, EF has declined to do so, taking the view that Victoria Police cannot be trusted to maintain confidentiality and apparently that she would prefer to wear the risk than subject herself and her children to the limitations and burdens that witness protection would surely entail. It is further not without significance that Victoria Police may bear a large measure of responsibility for putting EF in the position in which she now finds herself by encouraging her to inform against her clients as she did. But large though those considerations may be, they do not detract from the conclusion that it is essential in the public interest for the information to be disclosed.

12 Generally speaking, it is of the utmost importance that assurances of anonymity of the kind that were given to EF are honoured. If they were not, informers could not be protected and persons would be unwilling to provide information to the police which may assist in the prosecution of offenders. That is why police informer anonymity is ordinarily protected by public interest immunity. But where, as here, the agency of police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest in disclosure to which the public interest in informer anonymity must yield. If EF chooses to expose herself to consequent risk by declining to enter into the witness protection program, she will be bound by the consequences. If she chooses to expose her children to similar risks, the State is empowered to take action to protect them from harm³.

13 Either way, however, it is appropriate that special leave to appeal be revoked in these two proceedings and the decision of the Court of Appeal be allowed to take effect.

3 See *Children, Youth and Families Act 2005* (Vic), s 240.

