Middleton J Dismisses the Applications

Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority; James Albert Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority [2014] FCA 1019

On 19 September 2014, Federal Court Justice Middleton dismissed the EFC and Hird applications for a declaration that " *the investigation conducted by ASADA … which was referred to as part of "Operation Cobia" … was ultra vires ",* and injunctions restraining ASADA from issuing any notice or relying on information obtained in the investigation, and a permanent injunction restraining ASADA from using any information from the investigation for any purpose under its Act. The joint investigation was, according to ASADA, was part of a wider investigation by ASADA under the *Australian Sports Anti-Doping Authority Act 2006* (Cth) ('the Act') and Sch 1 ('the NAD Scheme') of the *Australian Sports Anti-Doping Authority Regulations 2006* (Cth) ('the Regulations'). EFC and Hird said that ASADA had no power to conduct the investigation in the way it was conducted (involving the use by ASADA of AFL "compulsory powers" and unauthorised disclosure of information), that the investigation was undertaken for improper purposes, and that ASADA breached its confidentiality obligations during the course of the investigation and in the provision to the AFL of an interim report.

Justice Middleton set the scene:

> *ASADA has very important national and international functions to perform. The fight against doping requires constant vigilance, upgrading of investigatory techniques, and well-resourced and co-ordinated authorised bodies to educate, monitor, investigate and prosecute in appropriate situations. The adoption of innovative processes and methods of investigation is to be strongly supported. ASADA and a "sporting administration" or "sporting administration body" (such as the AFL) may need to co-operate with each other for the purposes of implementing their own responsibilities. However, all statutory authorities (including ASADA) must comply with the rule of law and proceed only in a manner (expressly or impliedly) authorised by law. The essential question in these proceedings is whether ASADA has so complied with the rule of law in conducting, in the manner and for the purposes it did, the investigation. ….. The focus of these proceedings is upon ASADA, and its conduct and purpose in carrying out the investigation, and in receiving the co-operation of the AFL.*

His Honour set out the detailed grounds of the application:

> *(a) At all relevant times up to and including 31 July 2013, cl 3.27(1) of the NAD Scheme, as contemplated by s 13(1)(f) of the Act, empowered ASADA to conduct investigations of possible anti-doping rule violations that may have been committed by athletes or support persons.*
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> *(b) Neither the Act, the Regulations nor the NAD Scheme authorised ASADA to conduct a "joint investigation" with any other entity, including a sporting administration body.*
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> *(c) At all relevant times up to and including 31 July 2013, the conducting of a "joint investigation" by ASADA was inconsistent with:*
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> *(i) the constraints imposed on "entrusted persons" (including members of ASADA staff) by s 71 of the Act relating to the disclosure of NAD Scheme personal information; and*
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> *(ii) the limited circumstances in which cl 4.21 of the NAD Scheme, read with s 13(1)(g) of the Act, permitted disclosure of that information to a sporting administration body — namely, where:*
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> *(a) the information was information of the kind described in cl 4.21(1) of the NAD Scheme; and*
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> *(b) the disclosure was for the purpose of or in connection with an investigation into possible violations of the anti-doping rules within s 13(1)(g) of the Act;*
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> *and therefore ASADA's conduct was ultra vires the Act, the Regulations and the NAD Scheme.*
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> *(d) In about February 2013, ASADA and the AFL entered into an agreement whereby ASADA and the AFL would conduct, each with the aid of the other, what both ASADA and the AFL thereafter described as a "joint investigation".*
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> *(e) From February 2013, despite the absence of any power in ASADA to conduct a joint investigation and the constraints on the disclosure of information by members of ASADA staff,*

ASADA purported to conduct with the AFL a joint investigation into Essendon, its players and officials in respect of allegations of anti-doping rule violations under the Act.

(f) *In the course of the joint investigation and before 1 August 2013, members of ASADA staff and employees of the AFL jointly interviewed Mr Hird and the Essendon players, and represented the investigation as:*
- *(i)* *a joint investigation between the AFL and ASADA; and*
- *(ii)* *an investigation to which Essendon, Mr Hird and the Essendon players were compelled to provide information in answer to questions asked by members of ASADA staff and employees of the AFL.*

(g) *Further, in the course of the joint investigation:*
- *(i)* *ASADA provided the AFL with immediate access to confidential information provided by Mr Hird, Essendon and the Essendon players at interviews by permitting AFL personnel to attend, jointly conduct, and tape record those interviews for purposes extraneous to ASADA's investigation; and*
- *(ii)* *ASADA provided the AFL with access to documents and records obtained by ASADA in the course of its investigation and permitted the AFL to use this information for purposes extraneous to ASADA's investigation.*

(h) *In August 2013, ASADA prepared and published the Interim Report based on information obtained during the joint investigation. The Interim Report was provided to a number of persons and entities who were neither athletes nor persons otherwise permitted by the Act or the Regulations to receive the information contained in the Interim Report.*

(i) *By providing the Interim Report, including any versions or drafts thereof, to the AFL, ASADA:*
- *(i)* *acted in breach of the confidentiality obligations imposed on ASADA by the Act (ss 13(1)(f) and (g) and s 71) and the NAD Scheme (cl 4.21); and*
- *(ii)* *acted for extraneous purposes to those of ASADA.*

(j) *Because:*
- *(i)* *ASADA lacked any power to conduct the joint investigation;*
- *(ii)* *the joint investigation contravened the constraints on disclosure of NAD Scheme personal information; and*
- *(iii)* *the Interim Report was divulged and communicated by ASADA in breach of its obligations of confidentiality and for purposes extraneous to the furthering of ASADA's own investigation,*

the information collected during the joint investigation (being the information on which the Interim Report was based) cannot qualify as evidence or information received by the CEO for the purposes of cl 4.07A(1) of the NAD Scheme, as it has stood since 1 August 2013.

(k) *In the absence of such evidence or information, the CEO has no power, under cll 4.07A(1) and (2) of the NAD Scheme, to:*
- *(i)* *determine that there is a possible non-presence anti-doping rule violation that warrants action by the CEO; or*
- *(ii)* *give a notice to Mr Hird or any Essendon player of that possible non-presence anti-doping rule violation.*

(l) *All notices purportedly issued by ASADA to Essendon players under cl 4.07A of the NAD Scheme are invalid.*

(m) *Mr Hird is and was at all relevant times employed as coach of Essendon, a club registered with the AFL and subject to the AFL Regulations and the Player Rules.*

(n) *The issuing by the CEO of any notices to Mr Hird or to any Essendon player arising from or relying on information obtained in the joint investigation is likely to cause damage to Mr Hird's and to Essendon's reputation and business interests.*

The substantive EFC and Hird argument was that ASADA was using AFL powers (to compel co-operation in circumstances where interviewees were not then able to claim the privileges against self-incrimination or self-exposure to a penalty) that ASADA did not have under the Act or the NAD Scheme.

ASADA said, in response:

1. AFL's compulsory powers enabled the AFL to compel Essendon players and personnel to provide information as directed by the AFL, including by attending interviews (at which ASADA and the AFL were present), in circumstances where interviewees were not then able to claim the privileges against self-incrimination or self-exposure to a penalty.
2. ASADA denied any unlawful conduct, and said the decision to issue the Notices was valid.

3. Even if the CEO's decision to issue the Notices was based substantially upon information obtained *ultra vires* the Act, the Regulations and/or the NAD Scheme or was otherwise unlawfully obtained:
    a. that is a factor which the law recognises can be taken into account (and should be left to be taken into account) by decision-makers who have responsibility for making downstream decisions under the Act and NAD Scheme;
    b. the grant of relief should be refused on discretionary grounds because the information in question, having been obtained by the AFL (as to which there is no alleged illegality), would have to be provided (or re-provided) by the AFL to ASADA in any event by virtue of requirements contained in the NAD Scheme and the AFL Code;
    c. the grant of relief should be refused on discretionary grounds because EFC and Hird agreed, by their adoption of the Player Rules (which incorporate the AFL Code and which form part of the contractual arrangements between the AFL, Mr Hird and Essendon), that information obtained by the AFL in relation to possible anti-doping rule violations may be provided by the AFL to ASADA;
    d. the grant of relief should be refused on discretionary grounds because ASADA could lawfully obtain all of the exact same information (again) by the issue of disclosure notices under the NAD Scheme, and then issue fresh show-cause notices to the 34 Players;
    e. the grant of relief should be refused on discretionary grounds because both EFC and Hird:
        i. requested that the AFL and ASADA conduct an investigation in early February 2013 and thereafter expressed support for the conduct of the investigation;
        ii. knew from early 2013 that the AFL and ASADA proposed to conduct, and did conduct, an investigation which would involve ASADA being provided with information obtained as a result of the AFL's exercise of its compulsory powers;
        iii. were legally represented at all material times and advertently declined to take action to vindicate the rights they now assert;
        iv. delay in taking steps to vindicate the rights they now assert led to the ongoing conduct of the investigation over many months and to the acquisition by ASADA of a vast amount of information, all of which information EFC and Hird Hird now sought to permanently enjoin the use of or reliance on (in circumstances where, had EFC and Hird taken timely action to enforce the rights they now asserted, alternative steps could have been taken by ASADA to acquire the same information lawfully); and
        v. the AFL, followers of the AFL competition, and the public at large are all aware of the existence of very serious issues surrounding adherence to anti-doping rules by EFC and Hird, in circumstances where EFC and Hird brought the game into disrepute by failing to implement proper governance and accountability mechanisms with respect to enforcement of those rules.

    There is, therefore, a compelling public interest against the grant of relief.

<u>The Substantive Issues</u>

At paragraph 15, His Honour set out the substantive issues in the proceeding:

1. Did ASADA have the power to conduct the "joint investigation" with the AFL?
2. Did ASADA conduct the investigation for improper purposes, in particular:
    a. in order to circumvent the limitations on its own powers by obtaining the benefit of the AFL's "compulsory powers" in aid of its own investigation; or
    b. in order to assist the AFL to investigate and take action for the AFL's own purposes?
3. Did ASADA breach the obligations of confidentiality or restrictions on disclosure imposed on it under its governing legislation in the conduct of the investigation and in the provision of information from the investigation, including the Interim Report, to the AFL and Essendon?
4. Did ASADA act for improper purposes in providing information from the investigation, including the Interim Report, to the AFL and others?

<u>Judicial Review</u>

Justice Middleton noted the principles relating to judicial review, at paragraph 259:

> *Judicial review can be described broadly as the function of courts to provide remedies to people adversely affected by unlawful government action. Importantly, the purpose of judicial review is to ensure the legality of government action, rather than its correctness ..*

Remedy and discretion

And at paragraph 261, the legal principles applying to remedy and discretion, referring to High Court authority in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ('*Ex parte Aala*') at [55]-[56], Gaudron and Gummow JJ in relation to public law remedies:

> *[55] No doubt the discretion with respect to all remedies in s 75(v) is not to be exercised lightly against the grant of a final remedy, particularly where the officers of the Commonwealth in question do not constitute a federal court and there is no avenue of appeal to this court under s 73 of the Constitution. The discretion is to be exercised against the background of the animating principle described by Gaudron J in* Enfield City Corporation v Development Assessment Commission. *Her Honour said:*
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> > Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less. [footnote omitted]
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> *[56] Some guidance, though it cannot be exhaustive, as to the circumstances which may attract an exercise of discretion adverse to an applicant is indicated in the following passage from the judgment of Latham CJ, Rich, Dixon, McTiernan and Webb JJ in a mandamus case,* R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd. *Their Honours said:*
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> > For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.

Statutory Construction

His Honour then turned to the statutory construction question. At paragraphs 263-264:

> *… in addition to determining the nature, conduct and purpose of the investigation, the answer to whether the CEO or ASADA exceeded its lawful authority will depend upon the proper interpretation of the Act and the NAD Scheme ….The task of the Court is to interpret the Act and the NAD Scheme, seeking to ascertain the legislative intention*

His Honour concluded, in relation to the legal principles affecting statutory interpretation:

1. The Court must give primacy to the text of the legislation, although context and purpose are important.
2. The context to be considered in these proceedings includes the international context. It may in some instances be necessary and appropriate to consider legislation in its historical context. The modern approach to statutory interpretation requires that the context be considered in the first instance, not merely at some later stage, uses "context" to include such things as the existing state of the law and the mischief which, by legitimate means the court may discern the statute was intended to remedy.
3. A statute must not only be interpreted by reference to the legislation viewed as a whole but also to give effect to "harmonious goals". The "essential features of [the] legislative design" should also be considered.

Privilege against self-incrimination

Justice Middleton then reviewed the authorities in relation to the common law privilege against self-incrimination.

At paragraph 280, His Honour said:

> *The common law privilege against self-incrimination entitles a person to refuse to answer any question, or to produce any document, if the answer or the document would tend to incriminate that person: …. Although broadly referred to as the privilege against self-incrimination, the concept encompasses distinct privileges relating to criminal matters, and self-exposure to a civil or administrative penalty and self-exposure to the forfeiture of an existing right.*

His Honour said, at paragraph 282:

> *The privilege has been described by the High Court as a human right which protects personal freedom, privacy and dignity…*

And at paragraph 283:

> *Rationales for the privilege include preventing the abuse of power and convictions based on false confessions, protecting the quality of evidence and the requirement that the prosecution prove the offence, and avoiding putting a person in a position where the person will be exposed to punishment whether they tell the truth, lie, or refuse to provide the information.*

His Honour then addressed certain details/exceptions applying to the common law right against self-incrimination, including:

1. Some protections, such as the competency of an accused person to give evidence as a witness for the prosecution, cannot be waived. The privilege against self-incrimination, however, although a "human right", can be waived.
2. The privilege applies in non-judicial proceedings, such as inquiries, unless it is expressly or impliedly abrogated by a governing statute. However, any abrogation of the privilege against self-incrimination must be clear and unmistakable. The abrogation or curtailment is not, however, found only where express words deal with the subject. The conclusion that the privilege may be impliedly excluded may be more readily drawn where the obligation to answer questions do not form part of an examination on oath.
3. There are limitations on the extent of protection given by the privilege against self-incrimination. It protects only against self-incrimination and cannot be invoked to shield others from incrimination.
4. Assuming a claim for privilege must be made, no particular form of words is required, but there must at least be an attempt to claim or invoke the privilege by suitable language or conduct.

Justice Middleton reviewed the legislation, its history, the legislative scheme, recent amendments, and then turned to the submissions of the parties.

His Honour concluded in relation to the EFC and Hird arguments as ASADA's power to conduct a joint investigation, at paragraphs 405-412:

1. The argument that Parliament did not authorise a "joint investigation" is too wide. Whether any investigation is lawful or not will depend upon the characterisation of its purpose, and the conduct and nature of that investigation. ASADA's investigation of ASADA, was for the purpose of investigating anti-doping violations.
2. The nature and conduct of the investigation was lawful.
3. Though the Act provides no express power to conduct a "joint investigation", the CEO has the power to do all things "convenient" to be done "in connection" with the performance of his or her functions, including doing anything incidental to, or conducive to, the performance of the elaborated functions in Section 21 of the Act.
4. There may be many avenues for ASADA to obtain information, and it should not be assumed that one avenue is not to seek (appropriately) information from a sporting administration body such as the AFL. In fact, cl 4.21(2)(a) and s 13(1)(g) envisage that ASADA may disclose protected information for the purposes of its investigation, which may involve the AFL in return co-operating with ASADA.
5. ASADA was not assisted by AFL personnel in a capacity of agency, employment, servant or member of the ASADA staff. The arrangement between ASADA and the AFL was one wherein ASADA sought the co-operation of the AFL for the purposes of ASADA's investigation into possible anti-doping violations.
6. It cannot be concluded, without first knowing the purpose, nature and conduct of an investigation, whether as a matter of law or principle, the Act or the NAD Scheme authorises a particular investigation, labelled "joint" or otherwise.

His Honour concluded in relation to the EFC and Hird arguments as ASADA's improper purpose in conducting a joint investigation so as to benefit from AFL's coercive powers, at paragraphs 426-427:

1. The "desire" to use or "harness" the AFL's compulsory powers can immediately be accepted as one consideration that was relevant to ASADA's interest in seeking the co-operation of the AFL. It was not ASADA's *purpose* for conducting of the investigation.
2. ASADA's purpose was to investigate possible anti-doping violations. The "harnessing" of the "compulsory powers" of the AFL needs to be put in context. ASADA was not using any power of compulsion or any power of sanction under the Act or NAD Scheme. Mr Hird and the 34 Players could refuse to produce

documents to, and to answer questions put to them by ASADA or the AFL, but in doing so would breach their contractual obligations with Essendon and the AFL. Whether or not the 34 Players (or even Mr Hird) felt they had no choice to answer questions in front of ASADA and the AFL, is not to the point. The legal consequences of Mr Hird and the 34 Players voluntarily entering into the contractual regime with Essendon and the AFL, and subjecting themselves to the Player Rules and AFL Code, included undertaking certain obligations and relinquishing certain rights. One such right was the right to claim the privilege against self-incrimination before the AFL subject to the carve out in r 1.9 of the Player Rules. Similarly, obligations were imposed on Mr Hird and the 34 Players to co-operate with the AFL and ASADA in investigations. There is no suggestion in these proceedings that Mr Hird or any of the 34 Players did not understand the nature of the contractual obligations undertaken, or the rights they were giving up, in return for the right or privilege to play or coach AFL football for Essendon in the AFL competition.

For these reasons, Justice Middleton dismissed the EFC and Hird applications.

Discretionary Considerations

His Honour then recorded, at paragraphs 466-496 his views as to the discretionary considerations:

1. Judicial review remedies can always be refused on discretionary grounds. Any applicant for judicial review needs to establish the substantive ground for relief and persuade the Court to grant the appropriate relief. The Court needs to determine the appropriate relief to grant, which may involve setting aside the Notices and granting injunctive relief. The question at this stage of the enquiry is whether it would have been just that the remedy be withheld.
2. The courts have a responsibility to vindicate rights and ensure that public bodies act within the law. I do not consider that the discretion to refuse relief should be described as exceptional or rare in circumstances where a public body has acted unlawfully. However, there is a basic presumption that appropriate relief should follow upon a finding of unlawfulness.
3. In these proceedings, His Honour would not have declined to set aside the Notices or grant injunctive orders on the basis of public policy, delay, acquiescence or the conduct of either Essendon or Mr Hird. The conduct of either Essendon or Mr Hird, relied upon by ASADA, did not have the "immediate and necessary relation" to the relief sought following upon the unlawful conduct of ASADA. In any event, the interests of the 34 Players need to be considered, and there is no suggestion that any of the 34 Players acted in any way improperly which would be relevant to the relief sought in these proceedings, particularly in relation to the relief sought of setting aside the Notices. As to delay and acquiescence, they do not in themselves result in relief being refused — the question is whether it is just that the remedy sought be withheld. In this case, there was no relevant delay; once the Notices were issued, these proceedings were immediately commenced by Essendon and Mr Hird. During the course of the investigation, Essendon, the 34 Players and Mr Hird hoped (maybe even anticipated) that the CEO would decide not to issue any notices at all. In that event, Essendon and Mr Hird would not have needed to agitate the issue of the legality of the investigation. Whilst there was considerable acquiescence and co-operation with the investigation by Mr Hird and Essendon, ASADA itself continued with the investigation knowing of some legal uncertainty.
4. In any event, ASADA had the ultimate responsibility to act within the law and administer the Act and the NAD Scheme. The public policy consideration of upholding the rule of law would have favoured the granting of the relief sought over any other public policy consideration relevant to these proceedings.
5. His Honour did not accept the contention of ASADA that no injunctive relief should be granted because subsequent downstream decision-makers will be able to make the appropriate evidentiary rulings, assuming some of the evidence was obtained unlawfully during the investigation. The Court, here, was only concerned with the lawfulness of the investigation, and the future conduct of ASADA in using information obtained (said to be obtained unlawfully) in the course of the investigation. Any injunctive relief would only be directed to ASADA, and its subsequent use of unlawfully obtained information. This could not affect downstream decision-makers, who will need to consider the position if and when unlawfully obtained evidence is sought to be tendered and relied upon before them.
6. The only grounds that His Honour believed would have precluded relief were the grounds of inevitable outcome and utility. The AFL could itself have separately and lawfully (pursuant to the contractual regime) compelled the 34 Players and Mr Hird to provide the very information in fact provided by them in the course of the investigation. ASADA could then have requested the provision of information from the AFL, or the AFL could have volunteered the information. The privileges against self-incrimination would not have been claimed in relation to the AFL due to the contractual obligations of Mr Hird and the 34 Players. In such a scenario, there would have been no question of unauthorised information being divulged or communicated by ASADA, as the AFL would have divulged or communicated the information to ASADA.

7. If His Honour had come to the view that the provision of the Interim Report to the AFL was unlawful, he would have been disinclined to make the declaration sought.

Conclusions

Justice Middleton has handed down a superb legal review in relation to multi-facetted application.

In my view, His Honour's review of the law and facts in relation to the common law protection against self-incrimination is potentially far-reaching for athletes charged with an anti-doping violation in the future. In my view, this is a critical re-statement of the common law rights applying to athletes and others charged with an anti-doping violation, particularly in relation to the non-analytical positives (charged with an anti-doping violation without having failed a chemical test). In other cases, the argument by sports federations and/or WADA/USADA/ASADA …., has been that the process is a contractual one, accordingly the common law protections that might apply to criminal charges do not apply.

Like Lance before Judge Sam Sparks, here the court has been willing to give athletes the appropriate legal protections (rather than merely point them to their contractual position), the particular case merely lacked the right facts.