FEDERAL COURT OF AUSTRALIA

Luppino v Fisher [2018] FCA 2106

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| File number: |  |
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| Judge: | **WHITE J** |
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| Date of judgment: | 19 December 2018 |
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| Catchwords: | **CRIMINAL LAW** – interlocutory application by the Second Defendant seeking disclosure from the Plaintiff of the password(s) to a mobile phone pending resolution of the Plaintiff’s challenge to an order made pursuant to s 3LA of the *Crimes Act 1914* (Cth) – consideration of the common law privilege against self‑incrimination – the disclosure sought would infringe the privilege – application dismissed.  |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5, 6, 16*Crimes Act 1914* (Cth) s 3LA *Federal Court of Australia Act 1976* (Cth) s 23*Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) s 6  |
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| Cases cited: | *Reid v Howard* [1995] HCA 40; (1995) 184 CLR 1*Sorby v The Commonwealth of Australia* [1983] HCA 10;(1983) 152 CLR 281  |
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| Date of hearing: | 19 December 2018 |
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| Registry: | South Australia |
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| Division: | General Division |
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| National Practice Area: | Federal Crime and Related Proceedings |
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| Category: | Catchwords |
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| Number of paragraphs: | 36 |
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| Counsel for the Plaintiff: | Mr M Abbott QC with Mr S McDonald |
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| Solicitor for the Plaintiff: | Patsouris & Associates |
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| Counsel for the First Defendant: | The First Defendant did not appear |
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| Counsel for the Second Defendant: | Mr P d’Assumpcao |
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| Solicitor for the Second Defendant: | Australian Government Solicitor |

ORDERS

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|  | SAD 288 of 2018 |
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| BETWEEN: | DANIEL LUPPINOPlaintiff |
| AND: | GREGORY CHARLES FISHERFirst DefendantCOMMISSIONER OF THE AUSTRALIAN FEDERAL POLICESecond Defendant |

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| JUDGE: | WHITE J |
| DATE OF ORDER: | 19 DECEMBER 2018 |

THE COURT ORDERS THAT:

1. The reference to the “Third Defendant” in Order 4, 7 and 8 in the orders made on 6 December 2018 be amended to read the “Second Defendant”.
2. The Second Defendant’s Interlocutory Application of 10 December 2018 is dismissed.
3. The Second Defendant is to pay the Plaintiff’s costs of, and incidental to, the application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

EX TEMPORE REASONS FOR JUDGMENT

WHITE J:

1. This is a judgment on an interlocutory application seeking the disclosure by the plaintiff, in confidential form, of the password or passwords to a mobile phone and to the applications on that phone.
2. Although the application involves some important issues of principle, there are a number of reasons why it is desirable for the Court to give a decision on it now, rather than reserving judgment. One of these is that the very nature of the relief which is sought is such that a deferral by the Court of its decision could, by itself, result in the effect which the application is intended to avoid. Another is that the imminent holiday period many mean that some time may lapse before the Court can prepare formal reasons, even though it has reached a firm view as to the fate of the application.
3. On 30 August 2018, the first defendant, who is a Magistrate in the Magistrates Court of South Australia, made an order requiring the plaintiff in these proceedings to provide to a Constable any information or assistance which is reasonable and necessary to allow the Constable to access data on a Samsung device and to copy and/or convert the data in that device into an intelligible form. The Samsung device had been seized on 27 August 2018, from a vehicle being driven by the plaintiff, by members of the Australian Federal Police (AFP) acting pursuant a search warrant issued by a different Magistrate on 24 August 2018.
4. In making the order on 30 August 2018, the Magistrate was purporting to exercise the power vested in him pursuant to s 3LA of the *Crimes Act 1914* (Cth). I have said “purporting” so as to use a neutral expression because there is a dispute in the proceedings as to whether s 3LA did authorise the Magistrate to make the order in the terms which he did and/or whether the making of the order was in the terms required by s 3LA.
5. The Magistrate’s order was served on the plaintiff on 30 August 2018 and it seems that the AFP may allege that the plaintiff was then requested to provide the password, or passwords, to the Samsung device, that he declined to do so, and that he has not provided the passwords since.
6. On 5 September 2018, the plaintiff commenced proceedings in the Supreme Court of South Australia seeking judicial review of the Magistrate’s decision pursuant to ss 5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act). The plaintiff alleges on multiple grounds that the Magistrate’s order is invalid.
7. The first defendant to the proceedings is the Magistrate who made the order on 30 August 2018. He has not appeared and has not filed a submitting appearance. Nevertheless, I considered it appropriate to proceed with the present hearing in his absence.
8. The second defendant to the proceedings is the Commissioner for the Australian Federal Police (the Commissioner).
9. On 21 September 2018, the Supreme Court transferred the proceedings to this Court pursuant s 6(1) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). The parties have continued to bear the same designations in this Court as they had in the Supreme Court.
10. At the case management hearing on 6 December 2018, the Court listed the application for hearing on 5 March 2019 and made timetabling orders with respect to the preparation for that hearing.
11. At the same case management hearing, counsel for the Commissioner made an oral application for an interlocutory order requiring the plaintiff to provide the password to the Samsung device but in a way by which its confidentiality would be protected until the present proceedings have been concluded. The Commissioner has since filed an interlocutory application seeking relief in similar terms. This judgment concerns that application.
12. By the interlocutory application filed, the Commissioner seeks the following orders:

1. On or before Monday, 24 December 2018, pursuant to s 16(1)(d) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and/or s 23 of the *Federal Court of Australia Act 1976* (Cth), the Plaintiff is to provide:

1.1. all passwords necessary to access the Gold Samsung Phone (the **device**), the subject of this proceeding, seized pursuant to a warrant issued under 3E of the *Crimes Act 1914* (Cth) and executed on 27 August 2018 at Commercial Road, Salisbury; and

1.2. all passwords of which he is aware necessary to access any applications contained on the device (collectively, the **information**);

and further direct that the information:

1.3. be placed in a sealed envelope, marked with the title of the proceeding and the action number;

1.4. bear the words: ‘NOT TO BE OPENED WITHOUT LEAVE OF A JUDGE’ on the front of the envelope;

1.5. be hand-delivered to a staff member of the South Australian Registry of the Court for the attention of the Chambers of the Honourable Justice White; and

1.6. be placed in a secure place at all times when it is not required for the purpose of the proceeding.

2. In furtherance of order 1, on or before Monday, 24 December 2018, the Plaintiff is to file an affidavit deposing to his compliance with order 1, and specifically attesting to the fact that he disclosed, in the material contained in the sealed envelope, all passwords of which he is aware that are required to access any application on the device.

1. During the course of the hearing, I granted leave to the Commissioner to amend para 1.1 of the application so as to insert the words “of which he is aware” after the word “all passwords” in the first line.
2. At the conclusion of the oral submissions, counsel for the Commissioner made an application to amend further the interlocutory application so as to accommodate a matter which the Court had raised. This concerned the application that the Court be the repository for the sealed envelope which is the subject of proposed Order 1.5.
3. I had indicated to counsel that I considered it inappropriate for the Court to be involved as the repository for the envelope because, in general, this Court does not become involved in the executive acts relating to the enforcement of its orders. That is because the Court must be able to deal, in an independent way, with any disputes concerning compliance with its orders or their enforcement. It would not be appropriate for the Court to create a situation in which a party may have to adduce evidence from the Court’s own staff as to disputes concerning compliance with the Court’s orders, and in which it may, possibly, have to hear, and make findings about, the evidence of its own staff in order to determine a dispute concerning compliance with the Court’s orders.
4. Counsel for the Commissioner accepted that this concern of the Court was appropriate. At the conclusion of the oral submissions, counsel proposed an alternative. That was to the effect that the Court require the sealed envelope, which is the subject of proposed Order 1 to be hand‑delivered to the Director of the Adelaide Office of the Australian Government Solicitor; that the Director hold the envelope in a “B Class safe” at those premises; and that there be conditions that the envelope not be opened without the leave of a Judge of this Court and, as I think is implicit, that the envelope not be dealt with in any way other than pursuant to an order of a Judge of this Court. For the reasons which will become apparent, I do not think it is necessary to address this alternative in any detail.
5. The affidavit of Stuart Clow, who is an AFP officer, made in support of the application indicates these matters relevantly:
6. his belief that the plaintiff is likely to know the password or passwords necessary in order to be able to comply with the orders sought and the basis upon which he holds that belief;
7. his belief that the Samsung device is likely to contain evidentiary material relevant to an ongoing investigation by the AFP concerning serious Commonwealth offences;
8. his concern that, with the passage of time before the proceedings will be concluded, the plaintiff’s memory of the passwords may fade and/or the plaintiff may assert that he has forgotten the password to the Samsung device, with the consequence that the AFP would lose a forensic benefit from the exercise of the search warrant of 27 August 2018; and
9. that the AFP seeks the orders on the interlocutory application “to ensure that the subject matter of the proceeding is preserved, should the plaintiff ultimately be unsuccessful in challenging the validity of the s 3LA order”.
10. The interlocutory application indicates on its face that it is made pursuant to s 16(1)(d) of the ADJR Act and/or s 23 of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act). Section 23 of the FCA Act provides:

The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

1. The outline of submissions provided by the plaintiff in advance of today’s hearing did not indicate that the plaintiff raised any contest as to the Court’s power to make the orders sought by the Commissioner. However, during the course of the hearing, senior counsel for the plaintiff submitted that, by reason of the common law privilege against self‑incrimination in a criminal offence, the Court lacked power to make either of the two orders proposed. His alternative submission was that, even if the Court does have the power, the privilege operates as a bar to the exercise of that power in the present circumstances.
2. In the view I take of the matter, it is not necessary to determine which of those alternatives is appropriate.
3. The plaintiff’s outline of submissions indicated that he opposed the making of the order on five separate grounds. However, it is necessary to address only one of those, namely, the plaintiff’s submission that the making of the orders would undermine his fundamental common law right not to incriminate himself in the commission of a criminal offence. This was the basis for opposition on which counsel relied in the oral submissions.
4. The plaintiff emphasised, and it was not disputed, that the privilege against self‑incrimination is not ousted by s 16 of the ADJR Act or by s 23 of the FCA Act.
5. The fundamental nature of the privilege against self‑incrimination is well‑established. In *Sorby v The Commonwealth of Australia* [1983] HCA 10; (1983) 152 CLR 281 at 294, Gibbs CJ spoke of the privilege as follows:

If a witness is compelled to answer questions which may show that he has committed a crime with which he may be charged, his answers may place him in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence. The traditional objection that exists to allowing the executive to compel a man to convict himself out of his own mouth applies even when the words of the witness may not be used as an admission. It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt.

1. In *Reid v Howard* [1995] HCA 40;(1995) 184 CLR 1, the privilege was considered in some detail by the High Court. In his separate judgment, Deane J said at 5:

… “The privilege against self‑incrimination is deeply ingrained in the common law”. It reflects “a cardinal principle” which lies at the heart of the administration of the criminal law in this country. It can be, and has increasingly been, overridden or modified by the legislature. It can be waived by the person entitled to claim it. Otherwise, it is unqualified. In particular, *it should not be modified by judicially devised exceptions or qualifications*. Unless it appears that the assertion of potential incrimination is unsustainable, *a claim to the benefit of the privilege cannot, in the absence of statutory warrant, properly be disregarded or overridden by the courts*.

… The relevant question relating to those matters is whether, putting to one side the question of privilege, the Supreme Court possessed jurisdiction and power to make the order for disclosure which it made. If it did, the effect of a failure to advert or give due effect to the privilege is not something which goes to jurisdiction or power. It is something which gives rise to an erroneous exercise of jurisdiction and power.

(Emphasis added and citations omitted)

1. The plurality (Toohey, Gaudron, McHugh and Gummow JJ) in *Reid v Howard* said at 11‑14:

The privilege, which has been described as a “fundamental … bulwark of liberty”, is not simply a rule of evidence, but a basic and substantive common law right. It developed after the abolition of the Star Chamber by the Long Parliament in 1641, and, by 1737, it was said that “there [was] no rule more established in equity”. More recently, the privilege has been described as “deeply ingrained in the common law”. It operates so that a person cannot be compelled “to answer any question, or to produce any document or thing, if to do so ‘may tend to bring him into peril and possibility of being convicted as a criminal’”.

…

The privilege against self-incrimination may be abridged by statute or waived but, that aside, it has generally been accepted that it is without “real exception”. …

…

There is simply no scope for an exception to the privilege, other than by statute. At common law, it is necessarily of general application – a universal right which, as Murphy J pointed out in *Pyneboard Pty Ltd v Trade Practices Commission*, protects the innocent and the guilty. There is no basis for excepting any class or category of person whether by reference to legal status, legal relationship or, even, the offence in which he or she might be incriminated because, as already indicated, its purpose is the completely general purpose of protecting against “the peril and possibility of being convicted as a criminal”. For the same reason, there can be no exception in civil proceedings, whether generally or of one kind or another. Moreover, it would be anomalous to allow that a person could refuse to answer questions in criminal proceedings or before investigative bodies where the privilege has not been abrogated if that person could be compelled to answer interrogatories *or otherwise make disclosure with respect to the same matter in civil proceedings*.

(Citations omitted and emphasis added)

1. Section 3LA of the Crimes Act is a statutory abrogation of the privilege. However, it was not suggested that s 3LA constitutes legislative authority for the proposed orders, or that they could be justified as an incident of the statutory abrogation. Rather, as already indicated, the Commissioner sought the orders pursuant to s 23 of the FCA Act and/or s 16(1)(d) of the ADJR Act.
2. In my view, it is apparent that proposed Order 2 would involve directly an infringement of the privilege against self-incrimination. That is because of the terms of s 3LA(5) which, in respect of an order of the kind made by the Magistrate in the present case and as in force on 30 August 2018, provides:

A person commits an offence if the person fails to comply with the order.

Penalty for contravention of this subsection: Imprisonment for 2 years.

1. Proposed Order 2 would require the plaintiff to file an affidavit deposing to his compliance with proposed Order 1, and then to depose specifically that he had disclosed in the material contained in the sealed envelope all passwords of which he is aware that are required to access any application on the device. The filing of an affidavit in those terms would involve an acknowledgement by the plaintiff that, despite what he said to the members of the AFP on 30 August 2018, he does know the passwords to the Samsung device. It would be evidence out of the plaintiff’s own mouth which could be relied upon in a prosecution for an offence pursuant to s 3LA(5).
2. Counsel for the Commissioner did not really contest to the contrary of that proposition, although, in fairness, he did not concede that compliance with the proposed Order 2 would necessarily infringe the privilege. For this reason, the Court ought not make proposed Order 2.
3. Proposed Order 1 requires separate consideration. Many of the submissions of senior counsel for the plaintiff with respect to proposed Order 1 concerned the effect it might have on the privilege against self-incrimination with respect to the alleged underlying serious Commonwealth offences to which the execution of the search warrant on 27 August 2018 related and to which Mr Clow referred in his affidavit.
4. I consider that the matter can be dealt with on a narrower basis without deciding the merit, or otherwise, of the more broadly based submissions. The proposed order would require the plaintiff, if he is aware of the password or passwords in question, to record them and, furthermore, to record them in a way in which that information would cease to be within his own control. The use which could be made of the information, even though kept confidential for a time, would ultimately be at the discretion of the Court.
5. In other words, the recording could be an interim step, which may lead to the further disclosure of the information in ways to which the plaintiff does not consent. In particular, the disclosure of the information without his consent could be used to implicate him in criminal offences. In my view, given the fundamental nature of the common law privilege against self-incrimination, that course would be inappropriate.
6. It is unnecessary to determine whether that is so as a question of lack of power, or as a matter constituting a bar on the exercise of the power, or as a matter of general discretion.
7. For those reasons I consider that orders of the proposed kind would not be appropriate and the Court should refuse to make them.
8. I note again the alternative submission of the Commissioner concerning the hand delivery to the Director of the Adelaide office of the Australian Government Solicitor. I indicate, that, even had I had been satisfied that the orders of the general kind sought by the Commissioner were otherwise appropriate, I think it unlikely that I would have been satisfied that it would be appropriate for the Court to make an order requiring delivery by the plaintiff to the Commissioner’s own solicitors for them to hold pursuant to the orders. However, it is unnecessary to pursue that question further.
9. For these reasons, the Second Defendant’s interlocutory application of 10 December 2018 is dismissed.

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| I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 21 December 2018