



HIGH COURT OF AUSTRALIA

16 June 2010

Manager, Public Information

HOGAN v AUSTRALIAN CRIME COMMISSION & ORS

[2010] HCA 21

Today, the High Court held that the Federal Court should not make orders prohibiting or restricting the publication of documents in evidence before it unless they are necessary to prevent prejudice to the administration of justice.

As part of an investigation known as Operation Wickenby, the Australian Crime Commission (ACC) used its powers under the *Australian Crime Commission Act 2002* (Cth) to require a firm of accountants to produce documents relating to the appellant, Paul Hogan, and other individuals and entities. An adviser to Mr Hogan commenced proceedings in the Federal Court to restrain the ACC and its Chief Executive Officer from using or disseminating the documents that related to Mr Hogan. Mr Hogan was later joined as a party. The adviser claimed legal professional privilege over the documents on Mr Hogan's behalf; the ACC disputed the claim. One of the ACC's arguments was that the documents were made in furtherance of a crime or fraud such that no privilege existed.

During the proceedings, Mr Hogan sought discovery from the ACC in relation to its claim that the documents were made in furtherance of a crime or fraud. An affidavit supporting the discovery application was affirmed by Mr Hogan's solicitor and filed in court. The exhibit to the affidavit contained a schedule produced by the ACC. The schedule detailed inferences, as to Mr Hogan's alleged involvement in tax evasion schemes, that the ACC said could be drawn from the documents it had obtained from the firm of accountants. The exhibit also included file notes and accounting advices that concerned Mr Hogan's taxation and financial affairs. On Mr Hogan's application (which was not opposed by the ACC), the trial judge made orders under s 50 of the *Federal Court of Australia Act 1976* (Cth) restricting the publication of the schedule, file notes and accounting advices, among other documents, to the parties and their legal advisers. Section 50 enables the Court to make such order forbidding or restricting the publication of particular evidence or the name of a party or witness as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.

The ACC later abandoned its reliance on the crime or fraud exception to legal professional privilege, and the proceeding originally brought by Mr Hogan's adviser was eventually dismissed. However, on 15 July 2008, Mr Hogan sought orders that the restrictions on the publication of the documents contained in the exhibit to his solicitor's affidavit remain in force. On 5 August 2008, Nationwide News Pty Limited ("News") and John Fairfax Publications Pty Limited ("Fairfax") made an application for leave to inspect the documents held by the Registry of the Federal Court in relation to the proceeding. They also sought the vacation of all orders under s 50 of the *Federal Court of Australia Act* restricting the publication of documents relating to the proceeding. The trial judge refused Mr Hogan's application, vacated all orders restricting the publication of the documents and gave leave to News and Fairfax to inspect and copy the documents, including the schedule, file notes and accounting advices.

The Full Court of the Federal Court by majority dismissed an appeal by Mr Hogan from the vacation of the order that restricted the publication of the schedule, file notes and accounting

advices. By special leave, Mr Hogan appealed to the High Court seeking relief that would have reinstated the s 50 order in relation to the documents and would have dismissed the application made by News and Fairfax for leave to inspect and copy them. Mr Hogan claimed that the trial judge and the Full Court had failed to recognise the inherently confidential nature of the documents.

The High Court today unanimously dismissed Mr Hogan's appeal. The Court did not agree that the material was inherently confidential. The question was whether an order under s 50 was necessary to prevent prejudice to the administration of justice by the Federal Court. In this context, the Court held that the administration of justice includes not only the generally recognised interest in open justice openly arrived at but also restraints upon disclosure where this would prejudice the proper exercise of the Federal Court's adjudicative function. The High Court noted that Mr Hogan had not adduced evidence of any specific prejudice that would or might flow from disclosure of the material, nor was he relying on a claim of legal professional privilege over the material. The placing of the material in evidence was a forensic decision.

In relation to the application made by News and Fairfax, the Court held that leave was properly granted to inspect and copy documents held by the Registry because Mr Hogan had adduced no evidence of apprehended particular or specific harm or damage.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*