IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 5184 of 2006

AUSTRALIAN FOOTBALL LEAGUE AND AUSTRALIAN FOOTBALL LEAGUE PLAYERS' ASSOCIATION INC — Plaintiffs

v

THE AGE COMPANY LTD AND ORS — Defendants

- and -

No. 5237 of 2006

AUSTRALIAN FOOTBALL LEAGUE AND AUSTRALIAN FOOTBALL LEAGUE PLAYERS' ASSOCIATION INC — Plaintiffs

v

NATIONWIDE NEWS PTY LIMITED — Defendant

JUDGE:	KELLAM J
WHERE HELD:	Melbourne
DATE OF HEARING:	23, 24, 25 May and 8 June 2006
DATE OF JUDGMENT:	30 August 2006
CASE MAY BE CITED AS:	AFL and Anor v The Age Company Limited and Ors
MEDIUM NEUTRAL CITATION:	[2006] VSC 308

CONFIDENTIAL INFORMATION – Whether confidential information is in the public domain – Whether "public interest" requires disclosure of otherwise confidential information - Whether the confidential information reveals an "iniquity".

APPEARANCES:	Counsel	Solicitors
In proceeding 5184 of 2006		
For the Plaintiffs	Mr W. Houghton Q.C. with Mr M. Connock	Browne & Co
For the Defendants	Mr S. Marks S.C. with Mr T. McEvoy	Minter Ellison
In proceeding 5237 of 2006		
For the Plaintiffs	Mr M. Connock	Browne & Co
For the Defendants	Mr S. Marks S.C. with Mr T. McEvoy	Minter Ellison

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HIS HONOUR:

1 The Australian Football League ("AFL") and the Australian Football League Players' Association ("Players' Association") seek a permanent injunction to restrain the defendants, all of whom are publishers of newspapers in Australia, from publishing or otherwise disseminating any material tending to identify any AFL player who has tested positive or who is deemed to have tested positive under the AFL Illicit Drugs Policy. In addition, they seek a declaration that the identity of any AFL player who has tested positive under the AFL Illicit Drugs Policy is confidential information.

The Background

2 The AFL administers the game of Australian football. There are 16 clubs in the AFL competition in which their teams participate pursuant to licence. The AFL makes rules and regulations which are binding on AFL clubs pursuant to the licence. The Players' Association represents the interests of the football players who are members of the 16 clubs and who participate in the AFL competition. Each player in the competition is required to enter into an agreement between himself, the AFL club of which he is a member, and the AFL.

3 The AFL Anti-Doping Code was introduced in 1990 and has been amended on a number of occasions since that time. Under this Code the AFL prohibits the use of certain substances (and methods of using substances). It addresses the issue of the use of performance enhancing drugs by AFL players during competition. It imposes serious sanctions upon players who, upon testing, are found to be positive to performance enhancing drugs. These sanctions include life-time ineligibility to play football. This Code complies with the requirements of the World Anti-Doping Agency in that the AFL prohibits the classes of substances which are prohibited by that agency.

4 On 14 February 2005, and after negotiations between the AFL and the Players' Association, the AFL Illicit Drugs Policy ("IDP") was introduced. It is quite different from the Anti-Doping Code which applies to performance enhancing substances and

to in-competition testing. The IDP applies to the use of illicit drugs by players and to testing for such drugs out of competition. The classes of drugs which are proscribed by the policy are first, stimulants of the nature of amphetamine, cocaine, benzoamphetamine, methamphetamine and other similar substances. Secondly, narcotics of the nature of heroin, morphine, pethidine, and similar substances are proscribed in circumstances where there is no evidence of reasonable therapeutic use. Thirdly, cannabinoids of the nature of hashish, marijuana and other similar substances are proscribed.

The circumstances under which the Illicit Drugs Policy came into existence

5 The evidence before me is that the IDP came into existence after extensive debate between the AFL and the Players' Association. The Players' Association agreed to the introduction of the policy on the basis that its primary focus was to be aimed at the education and rehabilitation of players and furthermore, on the basis of requirement of confidentiality of the first and second positive test of any player.

The terms of the Illicit Drugs Policy

6 The statement of principles and objectives of the AFL Illicit Drugs Policy states:

> "1.7 This illicit drugs policy differs in some important respects from the AFL Anti-Doping Code by addressing the problem of illicit drug taking by focussing primarily on education and rehabilitation of players and others in the AFL system who are found to have been involved with illicit drugs.
>
> 1.8 The AFL is advised and accepts that:
>
> 1.8.1 A more rehabilitative mode of management including education, counselling and monitoring treatment, is appropriate in discouraging the use of illicit drugs; and
>
> 1.8.2 The dangers posed by marijuana are less severe than other substances such as cocaine and ecstasy such that a less severe regime in respect of marijuana is appropriate.
>
> 1.9 For habitual offenders however, the AFL proposes to protect the vast majority of its playing group and others in the community who are influenced and affected by the behaviour of players, by administering strict and severe sanctions in cases where it is satisfied that education, counselling and treatment are not an

effective response to the problem of illicit drugs."

7 The policy provides that all tests conducted on match days are to be dealt with under the AFL Anti-Doping Code to the exclusion of the Illicit Drugs Policy; that is, a positive finding of the proscribed stimulants or narcotics in a player on a match day is to be treated as a breach of the Anti-Doping Code. However, a positive finding of cannabinoids on match day is to be treated as a breach of the IDP.

8 The IDP provides that a person contravenes the IDP where there is an indication of presence in a person's body tissue or fluids of any of the illicit substances set out in the policy, or where a person possesses, uses or administers any of the illicit substances, or where a person engages in trafficking of any of the illicit substances set out in the policy.

9 The policy provides that the AFL Medical Officer shall be responsible for the supervision and administration of the policy and more specifically to receive from the Australian Sports Drug Agency ("ASDA")[1] the results of any positive test for illicit drugs. It should be noted that ASDA is the AFL testing agency for the purpose of the policy.

10 The scheme which applies where a positive test is returned to the AFL from ASDA is that for the first positive test the AFL Medical Officer informs the player, who is then required to attend upon the AFL Medical Officer for the purposes of education, counselling and treatment. The player may elect to involve his club medical officer in such education, counselling and treatment. If a second positive test is returned, then the AFL Medical Officer is to inform the player and once again the AFL Medical Officer is required to deal with the player with a view to educating, counselling and treating the player. However, on a second positive test the relevant club medical officer is to be informed with a view to involving that medical officer in further educating, counselling and treatment. A third or subsequent positive test results in the player being deemed to have engaged in conduct which is "unbecoming" and is

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1 ASDA was established under the *Australian Sports Drug Agency Act* 1990 (Cth). The body is now known as the Australian Sports Anti-Doping Authority, the change being effected pursuant to the *Australian Sports Anti-Doping Authority Act* 2006 (Cth) which received assent on 13 March 2006.

to be referred to the AFL Tribunal. The Tribunal is to conduct a hearing in respect of sanction only. The sanctions have a mandatory suspension period of between six and 12 matches for a positive test of stimulants or narcotics and a maximum of six matches for cannabinoids.

The drug testing arrangements

11 Drug testing under the Illicit Drugs Policy is undertaken pursuant to a drug testing agreement between the AFL and ASDA. The agreement between the AFL and ASDA contains a confidentiality clause in the following terms:

> "The terms of this agreement shall remain confidential between the parties except to the extent required by law or for the purposes of obtaining legal advice. The client acknowledges that ASDA is subject to statutory obligation of confidentiality as set out in the *ASDA Act* and the *Privacy Act* 1998 (Cth). ASDA agrees to keep confidential the competitor details provided on drug testing forms and any … Positive test or deemed Positive test under the Illicit Drugs Policy, except to the extent disclosure is authorised under the *ASDA Act* and Regulations. The Client agrees to maintain confidentiality regarding the presence of ASDA conducting Drug Testing Services."

12 It is apparent that the information as to the names of players who have tested positive on one occasion or on two occasions under the IDP is information of a confidential nature as between ASDA, the medical officer of the AFL and the player and in some circumstances the medical officer of the relevant AFL club. The defendants do not contend otherwise.

13 Thus the scheme of the IDP is that the first two positive tests are to be confidential as between the player and the relevant AFL medical officer or officers. A third positive test will result in the matter becoming public and being referred to the AFL Tribunal for sanction.

The Issues in the Proceedings

14 The defendants filed amended defences shortly prior to the hearing of these proceedings whereby they admit the existence of the IDP and the fact that AFL players are bound by the IDP.

15 The defendants concede that in early March 2006 they received information regarding the identity of three AFL players who, it was said, had been the subject of positive drug tests. It is conceded by each of the defendants that that information was confidential and that at the time each defendant received the confidential information, each of them was aware that the information was private information, which the plaintiffs desired to keep confidential.

16 However, the defendants contend that the information is no longer confidential. First, it is contended that the confidential information has passed into the public domain and that injunctive relief should not be granted as it would serve no purpose and would be futile. Secondly, it is contended that the confidential information discloses iniquitous behaviour and therefore there can be no breach of confidence. Furthermore, it is argued that the protection of the confidential information must give way to the public interest in the identity of the three AFL players being disclosed to the public at large. Accordingly, it is contended by the media defendants that the plaintiffs have no right to rely upon the confidentiality of the information.

The public domain

17 The media defendants contend that there is ample evidence of widespread public dissemination of the names of the three AFL players in the context of their having tested positive to illicit drug tests conducted by ASDA under the AFL Illicit Drugs Policy.

The evidence as to dissemination

18 The general background to the dissemination is that on 10 March 2006, one Simon Tidy who purported to be employed by ASDA, was interviewed on Melbourne Radio Station 3AW about an assertion allegedly made by ASDA that 15 AFL players had, over the time of the IDP, tested positive to illicit drugs. He, however, did not name any player. Nevertheless, his comments promoted discussion in newspapers and elsewhere about the matter. From 10 March 2006 up until 15 March 2006 when Hollingworth J made restraining orders against the defendants in proceeding

No. 5184 of 2006, (and indeed thereafter) there were four sources of dissemination of the confidential information.

The Discussion Fora

19 First, discussion fora on various internet websites commenced to be used by a number of anonymous contributors, whereby speculation, rumour and general discussion as to the possible identity of players took place. The defendants produced before me an expert report of one Dr Graeme Johanson, the Director of the Centre for Networking Research at the Faculty of Information Technology, Monash University. Admissible parts of that report establish the following: That following the creation of the worldwide web in the early 1990s, online discussions by internet users became possible and accessible for popular use. So-called "web based chat" has gained acceptance within and outside the IT community. An "on-line forum" is a general term used to describe a series of postings by members of a particular website, of messages and replies, either in real time, or with delays. Presently, fora take the form of websites where members of the website participate and respond to messages from other members. A forum is "like a disjointed conversation amongst a large group of people, in which anyone can participate, and more often, anyone can simply browse at any time".[2] A given website might be general and will host a series of discussions on numerous unrelated topics. Alternatively, it might be a site specific to some particular subject. For example, there are websites which relate to sports in general, particular sports or to particular clubs and organisations related to particular sports. The process of posting commences by having a member of a forum log on to a website. As I understand the evidence, all that is usually required to become a member of a particular forum is to provide a user name and a password and an e-mail address. Having logged on to the particular website the member can start a new discussion called a "post" to which others might reply. A post and a series of replies and contributions by others is referred to as a "thread". It should be noted that members who use such discussion fora almost invariably are anonymous and use pseudonyms as their user names. Furthermore, Dr Johanson stated that one

2 Report Dr Graeme Johanson p.9.

person "can adopt numerous pseudonyms".

20 Dr Johanson's report contains the following statement:[3]

> "There is little or nothing to restrain malicious or libellous information from being propagated by people so inclined. Conversely, the same anonymity can protect individuals wishing to get information into the public domain, which may have wide ranging and controversial consequences … ".

21 Prior to the restraining orders being made by Hollingworth J on 15 March 2006, and commencing on 12 March 2006, there had been posts and threads on various discussion fora speculating about clubs to which the players in question might belong, and the identity of the players, including such descriptions as "tall players". It should be noted that each such web site is an unofficial website devoted mainly to exchanges of opinions by supporters of AFL football. They are not endorsed by the AFL nor are they conducted under the authority of the AFL.

22 The names of three players were published in a discussion forum, some two days after Hollingworth J made restraining orders against the defendants in these proceedings.[4]

23 Subsequently, on 22 March 2006, the players who it was said were three persons who had twice tested positive, were named by a posting on a discussion forum.[5]

24 On 24 March 2006, a thread was posted on a discussion forum naming a player and stating that he "knows a lot about ice".[6]

25 On 31 March 2006, a thread was posted on a website whereby three players were named in the context of their not having been selected to play football as at that date. It was suggested by one anonymous contributor that one of them may have had a "nostril related hamstring".

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3 At p.7.

4 See paragraph 16 of the Affidavit of David Stanley Poulton sworn 15 May 2006, and Exhibit AFL-5 thereto.

5 Affidavit of David Stanley Poulton sworn 15 May 2006, and Exhibit AFL-6 thereto.

6 Paragraph 18 and Exhibit AFL-7 of the Poulton affidavit of 15 May 2006.

26 On 7 April 2006, further mention of one or more of the names occurred in the context of discussions about the court proceedings which had been issued by the plaintiffs in this Court. There was, however, no mention of them as being associated specifically with positive drug tests.

27 In addition to the above discussion fora which named three players directly, there were two sites which referred to two of the above discussion fora, without naming the players. That took place on 15 March and 18 March 2006.[7]

28 In addition, a number of discussion fora contained hints to players' names by use of word play similar to rhyming slang.[8]

29 Three sites contained assertions made on 14 and 22 March and 7 April 2006 by anonymous contributors, that they knew the names of the players who had tested positive on two occasions under the IDP, without naming such players.

30 It should be observed that the affidavit of Mr Poulton filed on behalf of the defendants deposes that although some threads had been removed from some websites, as at the date of the swearing of his affidavit on 15 May 2006, a number of the threads in question were accessible to those searching the forum discussion sites referred to by him.

The Print Media

31 Secondly, on 16 March 2006 the Sydney Morning Herald newspaper prepared an electronic version of an article "Reluctance to name is AFL's shame" which referred to the named players. That article was removed by the newspaper before publication but an electronic copy was forwarded to Media Monitors Pty Ltd who made the article available to various of its government customers between 5.42am and 10.20am on 16 March 2006 either through a Media portal web site or in hard copy. Hard copies were supplied to the Australian Institute of Sport, the Australian Customs Service and the Office of the Prime Minister. The AFL, the office of the

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7 See paragraphs 23 and 24 of the Poulton affidavit and Exhibits 12 and 13 thereof.

8 See paragraphs 25 to 28 of the Poulton affidavit.

Commonwealth Games and ASDA received the article by access to the Media portal web site. In addition, an e-mail copy was sent to the office of the Senate. However, all such users agreed to destroy the document at the request of Media Monitors who were informed early that morning of the orders made by Hollingworth J. In addition, information on the Media portal was withdrawn at 10.30am. The evidence before me is that only a small number of users who have access to the Media portal log in on a daily basis and that many "will not have used their log-ins during March 2006".[9]

Pay Television

32 Thirdly, in the course of a Fox pay TV program broadcast on 6 April 2006 and known as "Fox Footy", a telephone call made to the program hosts on air named a player as being one of the named players. The hosts of the program entered into no discussion about the matter. There is no evidence before me as to how many persons watched that program that day.

Other dissemination

33 Fourthly, there is evidence that Mr Brendan Gale, the chief executive of the second defendant, discussed the name of one of the named players with the president of the football club of which that player is a member and, furthermore, that the chief executive or one of his staff discussed the matter with one or more of the parents and managers of the named players. Mr Gale gave evidence that on 13 March 2005 he had had a conversation with a journalist who named a player and sought confirmation from Mr Gale that such player had tested positive to illicit drugs. At that time, Mr Gale did not know the names of any such persons. On 14 March 2006, Mr Gale was telephoned by the football manager of the "Kangaroos" football team who asserted that he knew the names of three players who had twice tested positive. That day Mr Gale sent an e-mail to Mr Anderson, the General Manager of Football Operations of the first defendant, expressing concern that a journalist had informed him, Mr Gale, that the names of the relevant players had been obtained easily

9 Affidavit of Gregg Amies sworn 15 May 2006.

through Commonwealth Games and Olympic Games sources. Subsequently, a meeting of the Executive of the Players' Association took place on 15 March 2006 at which concerns about the breach of confidentiality were discussed. Although the Players' Association had no confirmation of any drug test results it had been in touch with the players who were the "subject of press speculation". On 16 March 2006 a memo was sent by the Players' Association to all AFL players stating "Unfortunately the nature of the football industry is such that regardless of whether the media continues to be prevented from identifying the players, AFL clubs and industry personnel will inevitably become aware of particular players who might be involved."

34 In the course of cross-examination Mr Gale said that the AFL is a "small industry", although he stated that there are over 1,300 accredited journalists covering AFL football, being two journalists per player. However, Mr Gale said that beyond the matters referred to above he was not able to say "one way or the other" whether the identity of the players who had twice tested positive was known amongst "a number of people in the AFL family". In addition, Mr Anderson, the General Manager of Football Operations of the AFL, gave evidence that he had read the Media Monitors article referred to above which had been sent to the AFL, and that he had been informed by Mr Gale that one of the named players had been in touch with Mr Gale. Accordingly, it is clear that the names of three players who were believed to have tested positive, were known by at least some persons within the AFL community, other than those required to be informed under the IDP. It is also clear that at least one journalist asserted to Mr Gale that she knew the names of those who had tested positive on two occasions.

The law in relation to the public domain

35 Information will be confidential only if it is not "public property and public knowledge".[10] Put another way, information will not have the necessary quality of confidence about it if it is "public knowledge, commonly known, publicly known,

10 *Saltman Engineering Co Limited v Campbell Engineering Co Limited* [1963] 3 All ER 413 at 415.

well-known, public property … or common knowledge".[11]

36 The issue before me is whether the information the subject of confidentiality, has received sufficient publicity to effectively destroy the purpose of confidentiality, and thus to make it pointless on the part of the Court to restrain the further publication of confidential information.

The submission of the defendants as to the public domain

37 As stated above, the media defendants contend that there is ample evidence of widespread public dissemination of the names of the three AFL players in the context of their having tested positive to illicit drugs when so tested. It is submitted that the Court in such circumstances cannot sensibly restrain the media defendants from publishing what is, it is submitted, known publicly. The defendants submit that even where confidentiality has been destroyed wrongfully, if the information is in the public domain, then the confidentiality does not continue to exist. In this regard, the defendants rely upon the statement of Lord Goff in *Attorney-General v Guardian Newspapers Limited and Ors (No. 2)*[12] (the "Spycatcher case") where his Lordship said:

> " … it is difficult to see how a confidant who publishes the relevant confidential information to the whole world can be under any further obligation not to disclose the information, simply because it was he who wrongfully destroyed its confidentiality. The information has, after all, already been so fully disclosed that it is in the public domain; how, therefore, can he thereafter be sensibly restrained from disclosing it? Is he not even to be permitted to mention in public what is now common knowledge? For his wrongful act, he may be held liable in damages, or may be required to make restitution; but, to adapt (sic) the words of Lord Buckmaster (in *Mustad's* case[13]) the confidential information, as confidential information, has ceased to exist, and with it should go, as a matter of principle, the obligation of confidence."

38 The media defendants submit that if the confidential information has entered the public domain then the information in question has lost any confidential quality it

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11 The Law of Trade Secrets and Personal Secrets, Dean 2nd ed. 2002, Thompson Law Book Co.

12 [1990] 1 AC 109 at 286-287.

13 *Mustad and Son v Allcock & Co and Anor* [1963] 3 All ER 416.

may have had previously. That is plainly so. It would be entirely pointless and indeed, would bring the administration of justice into disrepute, for the Court to endeavour to restrain the publication of matters which are well-known by a large number of members of the public. I do not understand the plaintiffs to argue to the contrary. The real issue between the parties is whether the confidential material has entered the public domain. It is obvious from what I have set out above that the names of three players who have allegedly tested positive to illicit substances are known by a number of people in the community. However, the question of whether or not the information can be said to have passed into the public domain is a question of fact. As Gaudron J said in *Johns v Australian Securities Commission*:[14]

> "There is a question whether an obligation of confidence is extinguished because of subsequent publication to the world at large by third parties or, even, by the person who owed the duty in the first place. Again in that situation, it is sometimes said that the information has passed into the public domain. The question that then arises is, in essence, whether the information has lost its confidential quality. And as already pointed out, that is largely a question of fact."

39 In the *Spy Catcher* case Lord Goff described the expression "public domain" as meaning:

> "No more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential."[15]

40 A number of considerations have been regarded by the courts as being relevant to the question of whether information has entered the public domain. In determining whether the information should be regarded as being confidential the degree of accessibility has been seen to be an important factor. In *Franchi v Franchi*,[16] Cross J said:

> "Clearly a claim that the disclosure of some information would be a breach of confidence is not defeated simply by proving that there are other people in the world who know the facts in question besides the

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14 (1992-1993) 178 CLR 408 at 461-462.

15 *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at 282.

16 [1967] RPC 149 at 152-153.

> man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them. (sic)"

41 In that case, Cross J was dealing with a trade secret, but he used the following phrase which appears to me to be of general application:[17]

> "It must be a question of degree depending on the particular case, but if relative secrecy remains, the plaintiff can still succeed."

42 Nevertheless, in *Woodward v Hutchins*,[18] a somewhat narrower interpretation of what is the public domain was applied. The Court of Appeal dealt with the claim for confidentiality by a rock group against their former press agent who had published details of their private lives, including what Lord Denning MR described as "a very unsavoury episode in a jumbo jet". It was said by Lord Denning:[19]

> "But what is confidential. As Bridge LJ pointed out in the course of the argument, Mr Hutchins, as a press agent, might attend a dance which many others attended. Any incident which took place at the dance would be known to all present. The information would be in the public domain. There can be no objection to the incidents being made known generally, it would not be confidential information. So in this case, the incident on this Jumbo jet was in the public domain. It was known to all passengers on the flight."

However, in my view, the case of *Woodward v Hutchins*, stands on its own facts, being that there was nothing in the defendant's engagement which required him to regard as being confidential the behaviour of members of the rock group in a public place.

43 The question of whether even limited publication would become known to an "ever-widening group of people" has been regarded as an appropriate factor to be considered. In *Commonwealth of Australia v John Fairfax & Sons Limited*,[20] Mason J gave consideration to the issue of dissemination of confidential material in which as many as 100 volumes of books had been sold already.

44 He said:[21]

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17 At 153.
18 [1977] 1 WLR 760.
19 At 764.
20 (1980) 147 CLR 39.
21 At p.50.

> "The sales of the book already made, including those made to Indonesia and the United States, the countries most likely to be affected by its contents, and the publication of the first instalment in the two newspapers, indicate that the detriment which the plaintiff apprehends will not be avoided by the grant of injunction. In other circumstances the circulation of about 100 copies of a book may not be enough to disentitle the possessor of confidential information from protection by injunction, but in this case it is likely that what is in the book will become known to an ever widening group of people here and overseas, including foreign governments."

45 However, in *G v Day and Ors*,[22] Yeldham J gave consideration to circumstances where the confidential information (disclosure of the plaintiff's name) on television on two occasions had taken place. His Honour said:[23]

> "In the present case the references to the plaintiff on television were transitory and brief. His name was mentioned once only on each occasion. It was not reported in any permanent form (other than in the script) and there is no suggestion that any reaction from any viewer was conveyed to the plaintiff. Probably his name would not be remembered by any who did not already known him. I regard these disclosures as being of a limited and impermanent nature. Any publication in a newspaper would, on the contrary, be in a permanent form for all its readers to note."

46 Accordingly, it would appear that as a general rule, the publication of confidential information in widely circulated print media would place information in the public domain. However, there are few authorities dealing with the effect of publication of confidential material on the internet. One authority is *E.P.P. National Buying Group Pty Ltd v Levy*,[24] where Barrett J gave consideration to the circumstances whereby the defendant's case was that much of the material that the plaintiff sought to bring within a contractual restraint of confidentiality was in the public domain. His Honour said:[25]

> "It is true that the names and contact details of a number of members are available on the internet. In fact, participants in the member to member segment of the programme, that is, members who use the programme not only as an advantageous buying tool but also as a selling and promotional mechanism targeting other members, receive,

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22 [1982] 1 NSWLR 24.
23 At p.40.
24 [2001] NSWSC 482.
25 At paragraph 15.

> as part of their membership, inclusion in the EPP website with an on-line listing of their own business. Clearly, therefore, the particulars those members place on the website become available throughout the world to anyone with internet access. Rather than being kept confidential in any way, those particulars are subjected to processes intended to give them very wide publicity. The particulars, needless to say, identify by name and location the businesses of particular members."

47 The circumstances to which Barrett J was referring in *E.P.P. National Buying Group Pty Ltd v Levy* were that the plaintiff operated a business which involved the introduction of small businesses in need of goods and services to suppliers, who would be prepared to do business with those parties on terms more favourable than those that could be obtained through other channels. Members of the buying group paid a membership fee to the plaintiff in return for the privilege of access to the favoured buyer arrangements. Membership was sold through agents who were remunerated by way of an amount of money per member introduced. The defendants in the case were agents who had each entered into an agent's contract and a confidentiality deed. The agency was terminated. After the termination of their agency the defendants approached members of the plaintiff with proposals that those members do business with the defendants, or with their interests. The plaintiff commenced proceedings seeking damages and interlocutory injunctions in relation to the contracted obligations of confidentiality. In these circumstances his Honour said:[26]

> "It must be said at the outset that part of the information that the defendants have used is in the public domain. I regard everything which is accessible through resort to the internet as being in the public domain. It is true that someone can obtain that information only if they have access to a computer which has a modem which connects to an internet service provider who, for a fee, provides a connection to the internet. But those barriers are, in my view, no more challenging or significant in today's Australia complete with internet cafes, than those involved in access to a newspaper or television content, both of which should, according to precedent, be seen as involving the public domain."

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26 At paragraph 20.

The submission of the plaintiffs as to the public domain

48 However, the plaintiffs submit that there has been no more than limited speculation in the internet exchanges. In some parts they refer to many different players. Other parts acknowledge expressly the rumour-like nature of the postings. The plaintiffs contend that the internet exchanges do not amount to the information being in the "public domain". They submit further that the information, even if published in some internet postings, is not common knowledge. It is argued that even if the names are known by some persons, there is nevertheless much to protect, as is clear by the desire of the media to publish the information. The plaintiffs submit that even if any of the published speculation has named one or more players who may have tested positive, whether co-incidental or not, such publication has been limited.

49 They contend, first, that the publication of three names as part of the speculation that occurred when the Sydney Morning Herald was distributed electronically to a small number of organisations and then recalled is of no consequence. By itself, I accept that this publication would not be sufficient to say that the confidential information has entered the public domain.

50 The plaintiffs contend further that the mention of a name on Fox Footy by a caller was momentary, speculative and heard by a limited audience only. There is no evidence before me as to the size of the audience but by itself, I accept that this incident would not be of such moment that it could be said that the information came into the public domain by reason thereof.

51 As to the dissemination of any confidential material within the AFL, the evidence before me is of limited oral discussion of one of the purported names by the Chief Executive of the Players' Association with the President of that Association and discussion with the players named and one or more of their parents and/or their managers. There is no evidence before me of the extent of dissemination of gossip, speculation or information amongst the so-called "AFL family". There is evidence that some journalists have stated to Mr Gale and others that they have possession of information as to the names of the players who have twice tested positive. No such

journalist gave evidence before me, however. There is no evidence before me that any such information has any documentary basis, and it is extremely difficult to discern whether such beliefs are based upon credible sources, or instead upon general gossip and speculation. I do not consider that the evidence in these regards is such as to say that the confidential information of the identity of any player who has tested positive under the IDP is in the public domain.

Conclusion as to whether or not the confidential information is in the public domain

52 The strongest argument as to the information being in the public domain is not that revealed by the above three possible sources of the release of the confidential information, being the Sydney Morning Herald, Fox Footy and inside the so-called "AFL family". Each of those sources disseminated information to a limited audience. There has been no dissemination to the public at large, being the readers of national newspapers, or the viewers of free to air television or by other mass media outlets. In my view, the strongest argument relates to the information referred to in the various internet postings, or alternatively, that in conjunction with the above three possible sources of release of confidential information.

53 The nature of the information appearing on the various internet sites referred to by Mr Poulton in his affidavit of 15 May 2006 bears some consideration. An analysis of the exhibits produced by Mr Poulton does show that the websites in question over the period of March and April of 2006 contain a large number of references to the issue of drug testing by the AFL. However, much of what is placed upon the websites referred to by Mr Poulton, is speculation. For example, Exhibit AFL1 names three players about whom there is no suggestion before me of any positive test under the IDP. Some of the postings express the fact that they are "surmise". There is surmise as to the club to which players who may have tested positive belong. One posting states, "Only a guess based on which paper the report came from". Exhibit AFL3 contains similar speculation by those posting the entries. Exhibit AFL4 contains a discussion about trading certain players at the end of the year. Some correspondents appear to treat the discussion as a genuine discussion

about trading players. Others treat the discussion thread as an opportunity to speculate about who may have tested positive. Assertions are made to the effect that "these are rumoured names". Likewise, Exhibit AFL5, which refers to another website, contains statements from correspondents such as, "I hope like hell it is (player X)" and, "Nothing like a bit of gossip". Exhibit AFL10 contains the comment: "The whole point of being on this site is having the freedom to post whatever nonsense we feel like". Other of the exhibits to which Mr Poulton referred reveal similar sentiments to the effect that the information is gossip and speculation. On the other hand, there are several positive assertions as to the identity of the players who tested positive, but by an unnamed person or persons using a pseudonym. The question is whether such internet postings have put the confidential information into the public domain.

54 As stated above, Barrett J in *EPP v Levy*,[27] said in the circumstances of the case before him that he regarded "… everything which is accessible through resort to the internet as being in the public domain". However, it should be noted that Barrett J was referring to a web site operated by a commercial entity which permitted members of a buying group to place the particulars of their businesses upon the web site. The viewer of such a web site would be entitled to treat the appearance of such particulars on the web site as being information of at least some veracity and authority. Likewise, the reader of a newspaper, or the viewer of a television station is entitled to treat a news report appearing therein as having at least some veracity and accountability. Whilst it is true that this might vary according to the nature of the news media publishing the report, a reader or viewer knows that some entity, be it the reporter or publisher of a newspaper or in the case of a radio or television station, the speaker, a producer or corporate owner is identifiable and accountable. For instance, the average member of the public is aware of the fact that a newspaper or television or radio station may be subject to the laws of defamation if it published wrongful information without good cause. No doubt the public is aware that other processes such as the control exercised by the Australian Press Council are

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applicable. The public regards information published by the print, television and radio media as being generally credible.

55 Can it be said, however, that a "discussion forum" which enables opinions, gossip, trivia, rumour and speculation to be published as an assertion of fact by anonymous contributors places the information the subject of such discussion, into the public domain? There can be little doubt that, as the High Court in *Dow Jones v Gutnick*[28] observed, the internet throws up many challenges for established principles of common law, but that does not mean that it can be a "law free zone". The fact is that anyone, be it a disgruntled employee, a journalist, or anyone else interested in propagating what might otherwise be confidential information can put information upon a discussion forum under an assumed name. Indeed, the lack of accountability is such that one person can place such information upon a discussion forum, or for that matter on numerous discussion fora, in many different names. If speculation, gossip or even assertion from an anonymous source, thus being incapable of being verified or in any way held accountable, is to be regarded as the putting of information in the public domain, then the opportunity for the unethical, and the malicious, to breach confidentiality and then claim that there is no confidentiality is unrestrained. For example, an unethical intending publisher could, without having access to confidential information, speculate by use of an assumed name, as to what might be confidential. This speculation could be placed on a number of discussion fora under a number of pseudonyms and asserted to be fact. Could it then be asserted, as here, that the fact that the material has been the subject of assertion in "chat rooms" means that confidentiality is lost?

56 In my view, the fact that such speculative gossip, innuendo and assertion by unknown persons has been placed on the web sites of various discussion fora does not make confidential material lose its confidential nature. Obviously there are many users of the internet and an unknown, but no doubt significant, number of users of such web sites as those referred to above might well have seen the names to

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28 (2002) 210 CLR 515, particularly at 617-619.

which anonymous persons have referred in their postings. However, it is still in the realm of speculation. That is a vastly different proposition from the circumstances of publication of material by a newspaper, television station or other source of dissemination of news and other material such as radio or authorised web sites conducted by such sources. Those sources are accountable for the information they publish and are, to an extent at least, trusted by the public to report material to that public accurately. On the evidence before me the public, and particularly that part of the public who use internet chat rooms have no such expectation of authenticity, veracity or otherwise of the information posted on such websites.

The Iniquity Rule

The submission of the defendants as to iniquity

57 The defendants contend further that there is no confidence recognised by the law in circumstances of iniquity. Put another way, Mr Marks of Senior Counsel for the defendants, contends that the information the AFL seeks to have remain confidential, is information which reveals that AFL players have committed a criminal offence. He points out that in all States and Territories of Australia it is an offence to use and/or possess "a drug of dependence" or a "prohibited drug". Each of the drugs, the subject of the IDP, would fall into the category of either a "drug of dependence" or a "prohibited drug" in the various Australian States and Territories. By way of example, the Victorian legislation provides under s.73 of the *Drugs Poisons and Controlled Substances Act* 1981 that a person who has possession of a drug of dependence is guilty of an indictable offence. Where the drug is a small quantity of cannabis the penalty is not more than $500 provided that the offence was not related to trafficking in cannabis. In any other case and provided that the purpose was not related to trafficking, the maximum penalty is $3,000 and/or imprisonment for up to a maximum of one year. Similar provisions pertain in other States and Territories. Mr Marks argues that the law in Australia is that information concerning a crime, wrong or misdeed of public importance will not be recognised by the law as being confidential. He submits that persons privy to such information cannot, by private agreement or otherwise, prevent its disclosure by reverting to the equitable doctrine

of breach of confidence. He submits that there is simply no confidence in equity as to the disclosure of an iniquity.

58 Mr Marks relies upon the early case of *Gartside v Outram*.[29] In that case, in relation to a claim for confidentiality of a trade secret, the Court held that an employee could not be made the object of confidential obligation where the obligation related to information concerning the fraudulent conduct of his employer. Wood VC said:[30]

> "The true doctrine is, that there is no confidence as to the disclosure of iniquity."

59 Mr Marks relies upon the statement of Lord Denning in *Initial Services Limited v Putterill*[31] where Lord Denning said:[32]

> "There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press."

60 However it should be observed that the introductory words of Lord Denning prior to the above statement contain a rider which appears in the following terms:[33]

> "The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the *Restrictive Trade Practices Act* to the Registrar."

61 In *A and Ors v Hayden*,[34] Gibbs CJ gave consideration to the concept of iniquity. He referred[35] to the conclusion of Sheppard J in *Allied Mills Industries Pty Ltd v Trade Practices Commission*[36] who after a careful review of the authorities said:

> "The public interest in the disclosure … of iniquity will always outweigh the public interest in the preservation of private and confidential information."

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29 (1856) 26 LJ Ch 113.
30 At 114.
31 [1968] 1 QB 396.
32 At 406.
33 At 405-406.
34 1984 CLR 542.
35 At 545.
36 (1981) 55 FLR at 166.

In relation to that conclusion the Chief Justice said:[37]

> "That is too broad a statement, unless 'iniquity' is confined to mean serious crime. The public interest does not, in every case, require the disclosure of the fact that a criminal offence, however trivial, has been committed."

He said further:[38]

> "It is clear that a person who owes a duty to maintain confidentiality will not be allowed to escape from his obligation simply because he alleges that crimes have been committed and that it is in the public interest that he should disclose information relating to them."

62 In his submission, Mr Marks notes that Gibbs CJ made no reference to the rider attached by Lord Denning in *Initial Services Limited* requiring the information to be imparted to someone with an appropriate interest in receiving it, before the rule would apply. Mr Marks submits that there is an essential flaw in the rider attached to the rule by Lord Denning in *Initial Services Limited*. He contends that if the information lacked the confidential character because it concerned iniquity, then it could not matter to whom it was disclosed. He submits that the identity and interest of the person receiving it could not affect the confidential character of the information. He argues that if it were otherwise, the information would have a different character of confidentiality depending upon who had possession of it. In this regard Mr Marks relies upon the judgment of Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs*.[39] Gummow J, under a heading "*Gartside v Outram*; for what principle is it authority?" reviewed a number of the relevant authorities and said:[40]

> "From this consideration of *Gartside v Outram* I conclude that that case provides insufficient basis for any 'public interest defence' of the kind that, in its name, has been developed in the recent English authorities. The truth as to what *Gartside v Outram* decided is less striking and more readily understood in terms of basic principles. It is that any court of law or equity would have been extremely unlikely to imply in a contract between master and servant an obligation that the servant's

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37 At 545-6.
38 At 546.
39 (1987) 14 FCR 434.
40 At 454-6.

> good faith to his master required him to keep secret details of his master's gross bad faith to his customers."

63 He went on to say that the principle, in equity where there is no reliance on contractual confidence is;[41]

> " … no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed."

64 Although this articulation of the rule by Gummow J appears similar indeed to that formulated in *Gartside v Outram*, together with the rider attached by Lord Denning in *Initial Services v Putterill*, Mr Marks relies upon a further statement of Gummow J[42] that:

> "It is no great step to say that information as to crimes, wrongs and misdeeds, in the sense I have described, lacks what Lord Green MR called 'the necessary quality of confidence: *Saltman Engineering Co Limited v Campbell Engineering Co* [1963] 3 All ER 413N at 415'."

65 Mr Marks submits that it is clear from that statement that there is no confidence in the disclosure of iniquity and that if that is so, it is illogical to assert that there is any restriction upon anyone to whom such disclosure should be made.

The submission of the plaintiffs as to iniquity

66 The submission of the plaintiffs is that it is not enough that publication will disclose an iniquity. It is submitted that the disclosure of the iniquity must be necessary as a matter of public welfare, for example in the interests of the administration of justice. It is submitted further that even where the so-called iniquity rule has a sphere of operation, it overrides the confidence only insofar as the confidence would conceal the existence of the iniquity from those who have a real interest in receiving it.

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41 At 456.

42 At 456.

Conclusion as to whether or not the iniquity rule permits publication by the defendants of otherwise confidential material

67 Gurry,[43] in considering the statement by Denning MR in *Initial Services Ltd* that disclosure of an iniquity must be made to one who has a proper interest in the disclosure, states as follows:

> "This element of the defence can operate as an important control device to ensure that attempts are not made to justify capricious disclosures. It seems settled that the proper authority to whom information relating to crime should be disclosed is the police or the Director of Public Prosecutions. Where the misdeed is a breach of statutory duty, the statutory authority charged with administering the relevant legislation would have a 'proper interest' to receive the information. Where it is a civil wrong, the individual against whom the tort has been, or is intended to be, committed, is presumably the proper person to whom disclosure should be made. Thus in *Gartside v Outram* Wood VC considered that disclosure of fraudulent business practices to the defrauded customers was justified.
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> If the event or practice affects the community as a whole, then there are grounds for justifying a general disclosure through, for example the media or by the publication of a book. In *Church of Scientology v Kaufman*,[44] Goff J considered that the publication of a book exposing the malpractices of scientology, which affected, or had a potential effect on, the general public was legitimate."

68 In my opinion, that statement set out in Gurry, although published more than 20 years ago, does reflect the state of the law in Australia at the present time.

69 In my view, the position advanced by Mr Marks that if information relates to an iniquity being a crime, wrong or misdeed of public importance it will not be recognised by the law as being confidential, is too wide. I accept the submission of the plaintiffs that in order to rely upon the so-called iniquity rule so as to eradicate the protection that would otherwise be granted in equity in respect of confidential information, it is necessary for the person relying upon that defence to establish that;

> (a) 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;[45]

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43 Gurry *Breach of Confidence* (1984) Oxford University Press at p.345.

44 [1973] RPC 635.

45 *AG Australia Holdings Ltd v Burton and Anor* (2002) NSWLR 464 at 523.

(b) that the iniquity to be disclosed is of a character of public importance, in the sense that what is to be disclosed affects the community as a whole, or affects the public welfare; and

(c) that the person who is seeking to protect the confidence is so doing in order to prevent disclosure to a third party with a real and direct interest in redressing the alleged crime, wrong or misdeed.[46]

70 In my view the disclosure of names of players who have tested positive to illicit drugs will not disclose any iniquity of a serious criminal nature. At the highest, such disclosure may establish that the players at some stage had traces of illicit drugs in their urine and thus the information may be relevant to the possibility of, or the suggestion of, a crime having been committed by one of them. However, no crime, be it possession of, or use of such illicit substance, could possibly be proved by such information alone.

71 Furthermore, even if the information can be said to disclose an iniquity, there is no suggestion that it is the intention of the defendants to disclose such matters to a third party with a real interest in redressing any such possible crime. The defendants seek to disclose the information for the purposes of what might be described as an "interesting story" for football fans and for other readers, and for no other purpose.

Public interest

The submission of the defendants as to public interest

72 However, in addition to the iniquity argument, the defendants contend that they are entitled to publish the identity of AFL players who have twice tested positive under the IDP, because it can be inferred from the positive tests that they have used drugs and engaged in seriously wrongful conduct. It is argued that it is in the public interest that such seriously wrongful conduct not be hidden, and that young people should know both the identities of such players and their conduct and, furthermore, that it be appreciated by the public that such conduct by the players will not escape public scrutiny. It is submitted by Mr Marks that it is clear law that the disclosure of information which has been imparted in circumstances otherwise requiring an

46 *Corrs Pavey Whiting and Byrne v Collector of Customs* per Gummow J at 456.

obligation of confidence, can be justified when it is in the public interest so to do. Mr Marks concedes that the precise scope of the public interest exception is unclear upon the authorities, but he contends that in a case where the information sought to be kept confidential discloses anti-social and criminal conduct on the part of AFL players the public interest dictates that the defendants have the right to publicise such disclosure. Mr Marks submits that a number of categories of disclosure of information, including breach of national security, crime, fraudulent or serious misdeeds, and breach of statute, are public interest exceptions well supported by authority. In relation to crimes and wrongful conduct he submits that the public interest defence is closely related to, but not the same as, the iniquity rule. He relies upon the statement of Lord Denning MR (with whom the other members of the Court of Appeal agreed) in *Fraser v Evans*:[47]

> "I do not look on the word 'iniquity' as expressing a principle. It is merely an instance of just cause or excuse from breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret."

The submission of the plaintiffs as to public interest

73 The plaintiffs contend that there is no general public interest defence in the context of breach of confidence cases in equity. It is submitted that the public interest defence in English law is, to use the words of Gummow J, "picturesque" but imprecise. It is argued that this is clear from the statement of Gummow J in *Smith Kline*[48] when he said:

> "I would accept … that (i) an examination of the recent English decisions shows that the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, overall, it is better to respect or override the obligation of confidence; and (ii) equitable principles are best developed by reference to what conscionable behaviour demands of the defendant, not by 'balancing' and then overriding those demands by reference to matters of social or political opinion."

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47 [1969] 1 All ER 8 at 11.

48 (1990) 22 FCR 73 at 211.

74 As submitted by the plaintiffs, it is on this basis that in Australia the correct legal position is that there is no general public interest defence. However the plaintiffs concede that the issue is yet to be determined authoritatively in Australia. In this regard it is submitted in the alternative, that even if a general public interest defence exists requiring the weighing up of competing interests, in this case there is a competing public interest which justifies the protection afforded in equity to the confidential information of the identity of players who have tested positive under the IDP. It is submitted that the argument advanced by the defendants, being that by reason of the "reprehensible" nature of drug use, the media should be free to name AFL players who have twice tested positive to illicit substances, on the basis that those players are in a position to influence the lives of others, is not a tenable proposition. It is argued, first, that there is nothing preventing discussion and debate among members of the community in relation to drug taking in sport, the AFL's anti-doping code, the IDP, the fact that players have twice tested positive, or any related topic. It is argued that it is untenable to suggest that effective discussion or communication is stifled, or that the public interest is affected, because the public cannot satisfy its curiosity regarding the names of players who have twice tested positive under the IDP. It is argued that there are powerful reasons why confidentiality should be protected. Those reasons include the fact that there is an IDP, the aim and object of the IDP and its essential features, the fact that publication may well lead to the eradication of a balanced, health and welfare orientated drug policy, resulting in less drug testing than that which exists currently, with the result that young players and others will be deprived of the opportunity of early education and rehabilitation. Furthermore, it is argued by the plaintiffs that publication of the identity of the players will serve only public curiosity. It is submitted that no public welfare or other interest will be served. The preservation of confidentiality has no impact upon freedom of discussion about the merits of the IDP, the issue of the use of illicit drugs, drugs in sport or any other related topic. Thus it is argued on behalf of the plaintiffs that there is no competing public interest which justifies the setting aside of the protection afforded in equity to the confidential information.

Conclusion as to the question of whether or not the public interest is relevant to the publication of the names of the players

75 It is true that the existence of, and/or the extent of, any public interest defence to a breach of confidentiality is by no means clear and settled in Australia. It would appear that in the UK an approach of balancing public interest with the interests served by confidentiality has developed. The decision in *Lime Laboratories v Evans*[49] establishes that proposition. Griffiths LJ said:

> "The first question to be determined is whether there exists a defence of public interest to actions for breach of confidentiality and copyright, and if so, whether it is limited to situations in which there has been serious wrongdoing by the plaintiffs – the so-called 'iniquity' rule. I am quite satisfied that the defence of public interest is now well established in actions for breach of confidence and, although there is less authority on the point, that it also extends to breach of copyright. … I can see no sensible reason why this defence should be limited to cases in which there has been wrongdoing on the part of the plaintiffs. I believe that the so-called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be so exposed. No doubt it is in such circumstances that the defence will usually arise, but it is not difficult to think of instances where, although there has been no wrong doing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information."

76 It should be noted that there is no suggestion by the defendants in the case before me that the plaintiffs in these proceedings have been guilty of iniquitous behaviour. Rather, it is argued that it is the information which the plaintiffs seek to keep confidential that discloses iniquitous behaviour on the part of others.

77 In *David Syme & Co Limited v GMH Limited*,[50] Samuals JA agreed with the notion that the public interest involved a balance between a countervailing public interest and the public interest in maintaining a right to confidentiality. He referred to the statement of Lord Denning MR in *Woodward v Hutchins*,[51] that it;

> "… is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth."

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49 [1985] QB 526.
50 [1984] 2 NSWLR 294 at 309.
51 [1977] 1 WLR 760 at 764.

78 Samuals JA said, however, that in determining whether or not the public interest outweighs the duty of the confidence, it is necessary to look to the character of the information which is sought to be disclosed and to compare it with the nature of the interest that it is argued requires revelation. [52]

79 This approach of balancing of interests received support from Kirby P in *AG (UK) v Heinemann Publishers Pty Ltd*,[53] when he quoted with approval[54] from the dissenting judgment of Lord Denning in *Schering Chemicals Limited v Falkman*,[55] that:

> "In order to warrant a restraint, there must be a pressing social need for protecting the confidence sufficiently pressing to outweigh the public interest in freedom of the press."[56]

80 However, the defence of public interest in those terms has been rejected by Gummow J on two occasions, the first being the 1987 case of *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)*,[57] and secondly, in 1990, in *Smith Kline and French Laboratories (Australia) Limited v Secretary Department of Community Services and Health*,[58] where he said:

> "My views upon the wisdom of adopting in Australia the English authorities in which the 'public interest' defence has been constructed in recent years from what may be thought inadequate historical and doctrinal materials, have been expressed in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* at 451-458."[59]

81 In *Sullivan v Sclanders*,[60] Gray J considered a number of the above authorities and said, in relation to the facts then before him:

> "I … conclude, upon review of the relevant material, that I can discern no case of iniquity. As a result, whether the iniquity rule or the balancing of public interest approaches apply the result is the same. However, as a matter of strict legal principle I consider the application of the iniquity rule to be the correct approach. Equitable principles

52 At 310.
53 [1987] 10 NSWLR 86.
54 At 169.
55 [1982] QB 1.
56 At 32.
57 (1987) 14 FLR 434.
58 (1990) 22 FLR 73.
59 At 111.
60 (2000) 77 SASR 419 at 425-427.

> are best developed by reference to what conscionable behaviour demands of the defendant rather than by balancing those demands with matters of public interest. This approach avoids the ad hoc judicial idiosyncrasy associated with deciding whether, on the facts overall, it is better to respect or override the obligation of confidence."

82 Gray J went on to say:[61]

> "Even if the balancing of public interest is the correct approach, it was necessary for the learned judge to have considered whether any disgraceful or criminal behaviour was disclosed or whether some matter vital to the public interest required that the material be published."

83 I have concluded already that there is insufficient evidence of iniquity of such a nature that "makes legitimate the publication of confidential information … so as to protect the community from destruction damage or harm", to use the words used by Mason J in *Commonwealth v John Fairfax & Sons Limited*.[62] I respectfully adopt the approach of Gummow J in *Corrs Pavey Whiting and Byrne* and Gray J in *Sullivan v Sclanders* in relation to the narrower "iniquity rule" on the basis that equity "is best developed by reference to what conscionable behaviour demands".[63] However, if I am incorrect in this view, and even if the correct approach is the balancing of public interests, I would take the view that the balance falls in favour of the plaintiffs.

84 It is quite clear that the public interest disclosure must amount to more than public "curiosity" or public "prurience". As Lord Wilberforce said in *British Fuel Corporation v Granada Television Limited*:[64]

> " … There is a wide difference between what is interesting to the public and what it is in the public interest to make known."

85 In this regard, Raff J said in *Sullivan v Sclanders*:[65]

> "An important distinction needs to be drawn between matters that ought to be disclosed in the public interest, and those which are merely of public interest in the sense that many people would like to know them."

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61 At 427.
62 (1980) 147 CLR 39 at 57.
63 Per Gray J, *Sullivan v Sclanders* at 427.
64 [1981] AC 1096 at 1168.
65 At 426.

86 Furthermore, as Griffiths LJ said in *Lime Laboratories Limited v Evans*:[66]

> "The defendants have, in my view, made out a powerful case for publication in the public interest. In these circumstances I can see no alternative but to permit publication. It would surely be wrong to refuse leave to publish material that may lead to a re-appraisal of a machine that has the potential for causing a wrongful conviction of a serious criminal offence. When the press raise the defence of public interest, the Court must appraise it critically; but if convinced that a strong case has been made out, the press should be free to publish, leaving the plaintiff to his remedy in damages. I end with one word of caution: there is a world of difference between what is in the public interest and what is of interest to the public. This judgment is not intended to be a 'mole's charter'."

87 In the case before me the plaintiffs entered into an arrangement whereby players in the AFL competition could be tested for the use of illicit drugs outside of competition. The evidence put before me is to the effect that the IDP was developed as a result of a consultation between the plaintiffs and others including AFL medical officers, drug education and rehabilitation experts and the Australian Drug Foundation. Prior to the policy coming into effect the AFL had conducted statistical testing of players in relation to the use of illicit drugs such as cocaine, ecstasy and marijuana, and had established an increase in the low incidence of use of such drugs by players. The IDP was introduced because the AFL wished to prohibit the use of illicit drugs and "increase education of the AFL playing group in relation to the dangers of illicit drugs and protect players from the risk of harm" and, further, "to increase education of the public at large in relation to the dangers of illicit drugs and to set a positive example".[67] The advice given to the AFL was that a rehabilitative model of management involving education, counselling and monitoring treatment was appropriate to the discouragement of the use of illicit drugs.

88 Tendered before me was an affidavit sworn by Dr Peter Harcourt who is one of two AFL Medical Officers. Dr Harcourt is a Fellow of the Australian College of Sports Physicians and the Medical Co-ordinator of the Victorian Institute of Sport. He is the Chief Medical Officer of Basketball Australia and a Member of the Medical Council

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66 At 553.

67 See clause 1.6 of the IDP.

of FIBA, the world basketball authority. In addition, he is the Anti-Doping Medical Adviser to Cricket Australia and a member of the Australian Drugs Medical Advisory Committee. With others, he was involved in the establishment of the IDP. In his affidavit he expressed the opinion that;

> "… the most effective way of managing health and welfare issues related to the use of illicit substances, such as cocaine, ecstasy, speed and cannabinoids, is education, counselling, medical assessment and rehabilitation, where appropriate, and conducted in a confidential environment".

89 That evidence was supported by an affidavit sworn by the other AFL medical officer, Dr Unglik. These medical opinions were not challenged by the defendants and no evidence was called to the contrary.

90 The intention of the IDP was that for habitual offenders the AFL was to protect the playing group and others in the community by administering severe sanctions where it was satisfied that education, counselling and treatment had proved to be an ineffective response.[68]

91 The IDP came into operation for a period of two years commencing 14 February 2005. There was an agreement between the AFL and the Players' Association to commence negotiations on the possible extension of the policy no later than six months before the expiration of its term (ie August 2006). It is argued before me that bearing in mind that the IDP imposes a regime upon players over and above the World Anti-Doping Association compliant Anti-Doping Code, the IDP reflected "a ground-breaking, innovative and co-operative initiative between a major sporting administration body and a player representative body directed at proactively addressing illicit drug use in a manner designed to protect the health and welfare of players and others whilst simultaneously condemning, and recognising, the potential harm involved with the use or possession of illicit drugs." I accept that argument. The evidence before me is to the effect that the second plaintiff entered into the IDP on the proviso that confidentiality would be provided to players who

68 See clause 1.9 of the IDP.

tested positive to the use of illicit drugs on the first two occasions. The evidence before me is that if the identity of AFL players who have tested positive under the IDP is published in the media it will undermine both the purpose and rationale behind the IDP. There is evidence before me that if that takes place there is at least a likelihood that the Players' Association will withdraw support for the IDP. Inevitably this will lead to its demise. I accept that the loss of confidentiality may be a powerful motive for AFL players to withdraw their support for the policy.

92 No evidence was led before me as to the range of ages of persons playing in the AFL competition. No evidence was led before me as to the statistical analysis conducted by the AFL as to use of illicit drugs by players prior to the development of the IDP. However, it is common knowledge that players as young as 17 are involved in the AFL competition. It is common knowledge that players in the AFL come from a variety of backgrounds and in many cases from rural and indigenous communities. It is common knowledge that, at least in some States of Australia, players in the AFL competition achieve so-called "celebrity status". It is the common knowledge of any judge of this Court that the use of the drugs which are circumscribed by the IDP are, regrettably, commonplace amongst young people in the general community of an age similar to at least some of those in the AFL player cohort. Taking into account the pressures of professional sport, the public scrutiny of players engaged in professional sport, the so-called "celebrity status" of players, their age range and the background of many players in the AFL competition, it is not surprising that some players in the competition are either manipulated by others, or on occasions fall into temptation to use drugs of the nature of those used by many others in the community. On this basis, it appears to me that it can be well argued that the IDP has a sound basis. It can be well argued that a process which is designed to identify players who might use illicit drugs and to endeavour to rehabilitate and educate them before exposing them to public scrutiny is a sensible approach. The emotional and financial damage that might be done to a young player who is detected to be in breach of the IDP, if his first or second breach for that matter were to become public, needs no further explanation. The fact that the confidentiality was implicit in the

acceptance by the players of a significant infringement in their lives, that being that they are to be tested randomly in circumstances well beyond those regarded as being necessary by the World Anti-Doping Authority, is not without significance in consideration of the matter.

93 On the other hand, what is the public interest sought to be served by the publication of otherwise confidential material? The media is well aware of the terms of the IDP. I have no doubt that there is a public interest in discussion of the terms of the IDP. It may be that some would hold the view that the IDP is too lenient in relation to players who test positive. That debate can be had without the identification of players who have tested positive. It may be that some would regard the provision of confidentiality at all as being inappropriate. Any public interest in that debate can be had without the identification of any players who have tested positive. It may well be that there is a public interest in discussion of the manner in which the policy distinguishes between cannabinoids and other drugs. That is a debate which can be had in the absence of the knowledge of the identity of any player who has tested positive. The non-naming of the players who have tested positive does not in any legitimate way derogate from proper public discussion of these issues.

94 In the end result, it appears to me that there is nothing other than the satisfaction of public curiosity in having the confidentiality of the names of those who have tested positive breached by being released. It may well be a wonderful front page story for the newspapers and a scoop for other sections of the media. No doubt photographs of any players concerned will be published and the issue will be productive of many words of journalistic endeavour. However, I can see nothing that is in the public welfare or in the interests of the community at large which can be served by the identification, and perhaps to a degree the vilification and shaming of those who agreed to be tested randomly pursuant to the terms of the IDP, on the basis that such testing would remain confidential until such time as there were to be three positive tests. Accordingly, even if there is a public interest defence to the claim of confidentiality made by the plaintiffs I do not conclude that it outweighs the public

interest in having the information remain confidential.

95 Accordingly, I am satisfied that the plaintiffs have made out their case in each of the proceedings before me that there should be permanent injunctions in each set of proceedings restraining the defendants from publishing or otherwise disseminating any material tending to identify any AFL player who has tested positive on one or two occasions under the AFL Illicit Drugs Policy. In addition, it follows that there should be a declaration made to the effect that the identity of any AFL player who has tested positive under the AFL Illicit Drugs Policy on one or two occasions is confidential. However, both Mr Marks and Mr Houghton of Senior Counsel who appears for the AFL stated to me in the course of the proceeding that submissions may follow as to the terms of such proposed injunctions once the issues have been determined. Accordingly, I will give the parties an opportunity to consider this judgment before hearing submissions on those matters and on the matter of costs.
