

## **DOES SIR CLIFF RICHARD'S CASE BRING AUSTRALIA'S PRIVACY LAWS OUT OF THE SHADOWS?**

*Andrea Beatty and Chelsea Payne, Keypoint Law*

The recent ruling finding the BBC had infringed Sir Cliff Richard's right to privacy raises questions as to the state of Australia's privacy laws. The case considered whether the BBC's live broadcast of a police raid on Sir Cliff's home in 2014 amounted to a breach of privacy.

This article will outline the British High Court of Justice's approach to balancing an individual's right to privacy with the media's right to freedom of expression. It will also examine Britain and Australia's current privacy laws, and whether Sir Cliff's case will have an impact on Australia's privacy rights.

### **The case**

On 14 August 2014, the BBC live broadcasted a raid by South Yorkshire Police on Sir Cliff's home concerning allegations of a historic sexual offence involving a young boy in the 1980s. BBC reporter, Daniel Johnson, had previously approached South Yorkshire police following a tip-off of the investigation where it was agreed he would receive advanced notice of the search. Following the search, the BBC attempted to provide Sir Cliff and his team a right of reply however, the BBC broke the story before a reply was received.

The Court's main issue for determination was whether Sir Cliff had a legitimate expectation of privacy regarding the police investigation and the search of his apartment. In making his decision, Justice Mann considered the balance between Sir Cliff's right to privacy and the BBC's right to freedom of expression. His Honour found that whether or not a reasonable expectation exists depends on the circumstances of each case.<sup>1</sup>

### ***Sir Cliff's right to privacy***

As a general rule, Justice Mann held it is not necessary for persons outside of an investigating force to know the identity of a suspect.<sup>2</sup> As the public is not universally capable of upholding the presumption of innocence and displaying an open- and broad-minded view of an investigation, a stigma attaches to suspects that they would wish to avoid.<sup>3</sup>

Despite no invariable right to privacy existing,<sup>4</sup> his Honour did not believe that a search, without more, removed a legitimate expectation to privacy.<sup>5</sup> His Honour also held that Sir Cliff's public

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<sup>1</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [237].

<sup>2</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [248].

<sup>3</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [248].

<sup>4</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [251].

<sup>5</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [255].

prominence and his promotion of Christian beliefs did not detract from this reasonable expectation.<sup>6</sup>

### ***Balancing the right to privacy against the BBC's right to freedom of expression***

In balancing the BBC's right to freedom of expression against Sir Cliff's right to privacy, Justice Mann had regard to the criteria set forth in *Axel Springer AG v Germany* [2012] EMLR 15, including:

- the story's contribution to a debate of general interest: his Honour found that in light of other high-profile sexual offence investigations, the issue was of general public interest.<sup>7</sup> However, his Honour did not believe that the identity of the suspect was a legitimate addition to the public's knowledge.<sup>8</sup> He added that if it were found to be a legitimate addition, it would be heavily outweighed by the seriousness of the invasion<sup>9</sup>
- the content, form and consequences of the publication: his Honour found that the BBC had invaded Sir Cliff's privacy rights 'in a big way'.<sup>10</sup> The style of the BBC's reporting did not favour their argument, with his Honour finding it added 'drama and a degree of sensationalism'<sup>11</sup>, and
- the severity of the sanction imposed: his Honour believed that sanctions would not have a chilling effect on reporting, finding that there was no positive obligation on the BBC to report the story.<sup>12</sup>

His Honour therefore concluded that Sir Cliff's right was not outweighed by the BBC's right to freedom of expression. Whilst Justice Mann found that the case was capable of significantly impacting on press reporting, the impact would not be to a degree that required Parliamentary intervention.<sup>13</sup>

The Court awarded Sir Cliff £210,000 in damages, which included £20,000 in aggravated damages as the BBC had nominated the story for a 'scoop of the year' award.<sup>14</sup> Sir Cliff is also entitled to further sums for the financial impact of the case, to be determined at a later date.<sup>15</sup>

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<sup>6</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [256].

<sup>7</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [281].

<sup>8</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [282].

<sup>9</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [317].

<sup>10</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [301].

<sup>11</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [318].

<sup>12</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [317].

<sup>13</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [322].

<sup>14</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [361].

<sup>15</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [370].

The BBC is considering appealing the matter, as they believe it demonstrates a shift against press freedom in reporting police investigations.<sup>16</sup>

South Yorkshire Police settled the matter with Sir Cliff in May 2017, agreeing to pay him £400,000 and a further £300,000 in legal costs.<sup>17</sup> The police have apologised to Sir Cliff and made a statement in open court accepting liability.<sup>18</sup>

### Britain's Privacy Laws

Currently, no freestanding common law right to privacy exists in Britain. As a member of the Council of Europe, Britain has incorporated their obligations under the European Convention on Human Rights (**ECHR**) in the *Human Rights Act 1998* (UK), which requires Courts to give regard to the rights under the Convention.<sup>19</sup> These rights under the ECHR include Article 8, which provides the right to respect for private and family life, and Article 10, which provides the right to freedom of expression.

British Conservative MP, Robert Buckland has proposed reporting restrictions to criminalise the media naming suspects before they have been formally charged, unless permission has been sought from a magistrate.<sup>20</sup> His attempt follows Conservative MP Anna Soubry's private member's bill in June 2010,<sup>21</sup> which was withdrawn due to lack of government support. It is likely that Mr. Buckland's proposal will see the same fate, as British Prime Minister Theresa May believes identifying suspects is beneficial as it can encourage other witnesses to come forward.<sup>22</sup>

### Australia's Privacy Laws

Currently, no tort of privacy exists in Australia. Individuals whose privacy has been infringed are restricted to suing the media for defamation under the *Defamation Act 2005* (NSW) or breach of confidence under the *Privacy Act 1988* (Cth), neither of which would be applicable in Sir Cliff's case. In 2008, the Australian Law Reform Commission recommended a statutory cause of action for serious invasions of privacy<sup>23</sup> however, the Government has not adopted this recommendation.

The development of a common law cause of action for invasion of privacy in Australia has been limited. For over six decades, the Courts maintained the finding in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 (**Victoria Park**) that the right to privacy

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<sup>16</sup> Fran Unsworth, statement delivered outside the High Court, London, 18 July 2018.

<sup>17</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [3].

<sup>18</sup> *Sir Cliff Richard OBE v The British Broadcasting Corporation and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch) [3].

<sup>19</sup> See ss 6, 12(4) *Human Rights Act 1998* (UK).

<sup>20</sup> Owen Bowcott, 'Press intrusion: Don't name suspects in the media until charged, urges MP', *The Guardian*, 22 April 2013 <https://www.theguardian.com/media/2013/apr/21/press-intrusion-name-suspects>.

<sup>21</sup> *Anonymity (Arrested Persons) Bill 2010* (UK) Bill 9 <https://publications.parliament.uk/pa/cm201011/cmbills/009/11009.pdf>.

<sup>22</sup> Clive Coleman, 'Cliff Richard: Singer wins BBC privacy case at High Court', *The Guardian*, 18 July 2018 <https://www.theguardian.com/music/2018/jul/18/cliff-richard-wins-damages-from-bbc-over-police-raid-footage>.

<sup>23</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 74.116.

does not exist in Australia.<sup>24</sup> The decision was challenged in 2001 in *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 (***Lenah Game Meats***), which held that *Victoria Park* did not prevent a claim for invasion of privacy.<sup>25</sup>

The decision in *Lenah Game Meats* was upheld two years later in *Grosse v Purvis* (2003) Aust Torts Reports 81-706, where damages were awarded for a breach of privacy, holding that the decision in *Lenah Game Meats* had removed the barrier imposed by *Victoria Park*.<sup>26</sup> The Court also noted that while not applicable in that particular case, public interest should be an available defense.<sup>27</sup> The most recent successful cause of action was in *Doe v Australian Broadcasting Corporation* [2007] VCC 281, where the Court held that in addition to breaching a statutory duty not to reveal confidential information, the defendant was liable in equity for a breach of confidence and in tort for an invasion of privacy.

As a member of the United Nations, Australia is a signatory to the United Nations Declaration of Human Rights (**UNDHR**) and the International Convent on Civil and Political Rights (**ICCPR**), which both declare the right for no arbitrary interference with privacy, family, home or correspondence.<sup>28</sup> However, as the UNDHR is a mere declaratory document and Australia has not incorporated the rights under the ICCPR into domestic law, there is no legal obligation to uphold this right. Whilst an argument of customary international law could be made, no prominent figure has yet to make a successful claim of privacy in an Australian court.

### **Effect of Sir Cliff's case on Australian privacy laws**

It is unlikely that Sir Richard's case will impact Australia's privacy laws. Britain's privacy issues have been prominent in their legal system over the past few decades as a result of controversies such as the media's treatment of Princess Diana and the Murdoch phone-hacking scandal. The celebrity tabloid culture in Australia is less aggressive than in Britain, meaning less pressure is placed on the Government to enact legislative change.

Britain's privacy obligations are also held to a higher standard than in Australia, due to their membership of the Council of Europe. As Sir Cliff's case was an application of Britain's current privacy laws, the success of the case would be more uncertain in Australia, as it would require the development of common law principles. Although some Australian courts have recognised a cause of action for breach of privacy,<sup>29</sup> the reasoning has not been followed since 2008.

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<sup>24</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 496.

<sup>25</sup> *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 [107].

<sup>26</sup> *Grosse v Purvis* (2003) Aust Torts Reports 81-706 [428].

<sup>27</sup> *Grosse v Purvis* (2003) Aust Torts Reports 81-706 [447].

<sup>28</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) Article 12; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Article 17.

<sup>29</sup> See *Grosse v Purvis* (2003) Aust Torts Reports 81-70; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.



Andrea Beatty  
Consulting Principal  
Keypoint Law  
E: [andrea.beatty@keypointlaw.com.au](mailto:andrea.beatty@keypointlaw.com.au)  
M: + 61 405 592 257  
[www.keypointlaw.com.au](http://www.keypointlaw.com.au)  
[www.andreabeatty.com.au](http://www.andreabeatty.com.au)



Chelsea Payne  
Law Graduate  
Keypoint Law  
E: [chelsea.payne@keypointlaw.com.au](mailto:chelsea.payne@keypointlaw.com.au)  
[www.keypointlaw.com.au](http://www.keypointlaw.com.au)  
[www.andreabeatty.com.au](http://www.andreabeatty.com.au)