IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2018 02999

ROBERT CLIFFORD WELLS — Plaintiff

v

ANDREW STILLMAN — First Defendant

and

MAGISTRATES' COURT OF VICTORIA — Second Defendant

JUDGE:	QUIGLEY J
WHERE HELD:	Melbourne
DATE OF HEARING:	5 December 2019
DATE OF JUDGMENT:	19 February 2020
CASE MAY BE CITED AS:	Wells v Stillman & Anor
MEDIUM NEUTRAL CITATION:	[2020] VSC 51

JUDICIAL REVIEW – Validity of a charge – Whether failure to provide adequate particulars in a charge – Charge of accessing 'police information' without reasonable excuse – Order 56 – *Certiorari* to quash decision of Magistrate dismissing application to invalidate charge – Declaration sought that charge is invalid – Invalidity established – *Criminal Procedure Act 2009* (Vic) sch 1, cl 1-3 – *Victoria Police Act 2013* (Vic) s 227(1) – *Baiada Poultry Pty Ltd v Victorian WorkCover Authority* [2015] VSCA 344; *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 considered – *Southgate Management Ltd v Nitschke* [2018] VSC 236 discussed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr C. Carr	Tony Hargreaves & Partners
For the First Defendant	Ms S. Keating	Independent Broad-based Anti-corruption Commission
For the Second Defendant	No appearance	

HER HONOUR:

Background

1 On 11 December 2015, an investigation known as Operation TIA was commenced by the Independent Broad–based Anti–corruption Commission (IBAC), under s 64(1)(c) of the *Independent Broad–based Anti–corruption Commission Act 2011* (Vic) (IBAC Act).

2 On 6 December 2017 as part of Operation TIA David Sordello, the Team Leader Investigations at IBAC, identified an email dated 20 March 2017 sent from Leading Senior Constable Jeff Bartolo to the Plaintiff, Detective Senior Sgt Wells of Professional Standards Command, Victoria Police. The email attached the employment details of David Sordello.

3 On 3 January 2018, another s 64(1)(c) investigation, Operation Manning, was commenced by IBAC in relation to alleged unlawful access of police information by Wells. On 19 March 2018, a charge was filed against Wells alleging that contrary to s 227(1) of the *Victoria Police Act 2013* (Vic) (**VPA**):

> The accused at Victoria on 20 March 2017, being a member of Victoria Police, without reasonable excuse, accessed police information contrary to his duty not to access the information.

4 In the Magistrates' Court, Wells sought to have this charge struck out on the basis that it was invalid.

The Magistrates' Court Decision

5 On 11 October 2018,[1] the Magistrates' Court of Victoria heard argument on the validity of the charge. In substance, the argument on behalf of Wells was that whilst the charge contained all the legal elements of the offence it did not contain the essential factual ingredients.[2] The charge was argued to be invalid because it did not contain the reasonable particulars required to comply with cl 1(b) of sch 1 of the *Criminal Procedure Act 2009* (Vic) (**CPA**).

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1 Special mention heard before Magistrate Reynolds held to determine the preliminary legal question as to the validity of the charge.

2 Court Book, *Wells v Stillman & Anor* (Supreme Court of Victoria, S ECI 2018 02999, Quigley J, 15 August 2019) 63-64 ('CB').

6 On 25 October 2018, the Magistrate dismissed the application and provided written reasons. His Honour concluded that the charge contained reasonable information of the nature of the offence and complied with the CPA.[3] His Honour identified that s 6(3) of the CPA required compliance with sch 1 of the CPA. As a statutory offence, his Honour noted compliance is achieved by identifying the provisions creating the offence and describing the offence in the words or similar of the provision itself.[4]

7 His Honour accepted that the nature of the duty had been included, identifying that the duty had been articulated as 'to not without reasonable excuse, access police information'.

8 His Honour further noted, if requested, particulars would be provided by the defendant as to the manner or means of accessing and specifying the police information.[5]

This application

9 Wells seeks a declaration that the charge in proceeding J10992024 in the Magistrates' Court of Victoria is invalid and an order in the nature of *certiorari* quashing the order made on 25 October 2018 dismissing his application to strike out the charge.

10 The Originating Motion claimed the Magistrate's decision was erroneous because the charge did not contain the particulars that were necessary to give reasonable information as to the nature of the charge in particular:

(a) it did not contain any particulars that identified the 'police information' that was the subject of the charge;

(b) it did not contain any particulars that identified the 'duty' that the charge alleged was breached;

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3 Magistrate Reynolds' written ruling of 25 October 2018 is Exhibit TRF-8 to the affidavit of Timothy Richard Freeman sworn 20 December 2018: CB 62-67.

4 *Criminal Procedure Act 2009* (Vic) sch 1 cl 1(a), 3 ('CP Act').

5 CB 66-7.

(c) it did not contain any particulars that identified the circumstances that gave rise to the 'duty' that the charge alleged was breached; and

(d) in as much as the Magistrates' Court of Victoria held that the charge was a valid charge because it alleged contravention of a duty not without reasonable excuse to access police information, that was erroneous because the charge did not identify that duty (and there was no such duty).

The Issue for Determination

11 The second defendant, the Magistrates' Court of Victoria informed the Court that it took a *Hardiman* position[6] and has not participated further in this proceeding.

12 The participating parties have joined issue on a single issue, which is the validity of the charge.

13 The parties did not take issue with the proposition that the law is as stated in the High Court in *Kirk v Industrial Court (NSW)* ('*Kirk*')[7] and more recently stated to the same effect by the Victorian Court of Appeal in *Baiada Poultry Pty Ltd v Victorian WorkCover Authority* ('*Baiada*').[8] That is, for a criminal charge to be valid it must include not only the legal elements of the charge but also the essential factual ingredients of the alleged misconduct.

14 Whilst the parties agreed on this statement of the law, they diverged on how the charge met the 'essential factual ingredients' requirement. They also urged opposing conclusions from the cited authorities insofar as they could be fairly analogised with the charge in question here.

Requirements for a Valid Charge

15 The traditional function of a charge at common law was to found the jurisdiction to

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6 By written correspondence dated 18 January 2019: CB 121-2.
7 (2010) 239 CLR 531 ('*Kirk*').
8 (2015) 257 IR 204 ('*Baiada*').

deal with the alleged offence.[9] The modern articulation is commonly understood as lying both in the necessity of informing the court of the identity of the offence with which it is required to deal in addition to providing the accused with the substance of the charge they are called upon to meet.[10] Subject to any statutory provision that permitted a defect to be corrected, a charge 'should be quashed as insufficient in law and invalid if it failed to inform the justices before whom it was laid of the nature of the offence and the manner in which it was committed'.[11]

16 The common law requirement for adequate particulars to be included in a charge did not have a single formula. The rule been described variously as 'the necessity of specifying the time, place and manner of the defendant's acts or omissions'; 'the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given'; and a requirement to specify 'whatever is necessary to show that the person convicted has done something which brought him within the words of the statute'.[12]

17 In Victoria, the CPA now sets out what is required in the content of a criminal charge. Criminal proceedings in this State are commenced by filing a charge sheet,[13] which must – amongst other things – comply with sch 1 of the CPA.[14] Schedule 1 relevantly provides:

> **1. Statement of Offence**
>
> A charge must—
>
> (a) state the offence that the accused is alleged to have committed; and
>
> (b) contain the particulars, in accordance with clause 2, that are necessary to give reasonable information as to the nature of the charge.
>
> **2. Statement of particulars**
>
> (1) Subject to subclause (2), particulars of the offence charged must be set

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9 *John L Pty Ltd v Attorney General (NSW)* (1987) 163 CLR 508, 519 (Mason CJ, Deane and Dawson JJ).
10 Ibid.
11 Ibid.
12 *Baiada* (n 8) 210 [15].
13 CP Act s 6(1).
14 Ibid s 6(3).

out in ordinary language and the use of technical terms is not necessary.

...

3. Statutory offence

(1) In this clause—

statutory offence means an offence created by an Act or subordinate instrument, or by a provision of an Act or subordinate instrument.

(2) For the purposes of clause 1(a), a statement of a statutory offence is sufficient if it—

(a) identifies the provision creating the offence; and

(b) describes the offence in the words of the provision creating it, or in similar words.

(3) If a statutory offence states—

(a) the offence to be committed in alternative ways; or

(b) any element or part of the offence in the alternative—

a charge may state the commission of the offence or the element or part of the offence in the alternative.

18 It should also be noted that s 32 of the CPA specifically provides an accused person is entitled to receive from the informant reasonable particulars of the charge. A request can initiate provision of particulars. In this case, no request for particulars has been made by Wells despite that option being available to him.

19 As can be seen, cl 1 of sch 1 of the CPA identifies two requirements. The charge must state the offence the accused is alleged to have committed and secondly, contain the particulars in accordance with cl 2 that are necessary to give reasonable information as to the nature of the charge. The distinction between the first requirement and the second is as between the legal nature of the charge, required by cl 1(a), and the factual allegations said to bring the defendant within the offence to be set out by cl 1(b). The necessary information must be contained within the charge itself.[15] In this case, the parties agree that the impugned charge complies with cl 1(a) but

15 *DPP v Kypri* (2011) 33 VR 157, [19] ('*Kypri*').

disagree on whether the charge contains the particulars necessary to give reasonable information as to the nature of the charge as required by cl 1(b).

20 Whilst the requirement for particulars to be included in a charge is now on a statutory footing, as explained by Ferguson and McLeish JJA in *Baiada*, the requirements of the CPA:

> do not supplant the common-law requirements. Rather, the common law elucidates what constitutes reasonable information. That is if the charge is to be valid the essential factual elements of the offence, in addition to its legal nature, must be identified in the charge.[16]

21 After discussing the different ways in which the common law requirement for particulars had been expressed in earlier authorities, their Honours concluded:

> The question that arises, bearing these authorities in mind, is whether the present charge contained the particulars necessary to give reasonable information as to the nature of the charge. The "nature of the charge" involves the conduct making up the actual ingredients of the offending…[17]

22 What needs to be asked in each case is whether the charge sufficiently makes known what the accused failed to do and should have done. It can be observed that it is generally necessary to do more than merely reciting the statutory language or using words of general application because this would not generally identify the conduct making up the actual ingredients of the offending. In *Baiada*, the majority found that the particulars were sufficient as the charge sheet specified that it was the failure to ensure as far as reasonably practicable that the chicken processing line was not operating and that there was an adequate system to prevent contact with a processing line when it was being cleaned that allegedly resulted in the breach of the occupational health legislation. That is, there were two alleged omissions on behalf of the defendant which had been identified. They were the things that it was alleged that the defendant in that case should have done or the measures it ought to have taken to comply with the obligations under the legislation.

23 The requirement for sufficient particulars does not go so far as requiring the charge to

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16 *Baiada* (n 8) 208 [5].
17 Ibid 210 [14]-[16].

contain all such material as a defendant may require upon application for particulars for the preparation of the defence. What is necessary are sufficient particulars to make it clear what was the act or omission alleged to constitute the offence.[18] Thus, in *Baiada*, the majority identified that more precise information about what the defendant allegedly should have done to ensure the processing line was not operating and prevent contact with it, needed to be known well before a trial notwithstanding the validity of the charge. Ferguson and McLeish JJA concluded:

> That can and should be done through the provision of further and better particulars. The full boundaries of the case it must meet at trial will then be known. It will have a full opportunity prepare its defence and to marshal evidence to support it.[19]

24 I note that resort to reference to the circumstances of other authorities where the validity of the charge is challenged in respect of sufficiency of particulars must be treated carefully. Such caution was noted in *Downey v Acting District Court Judge Boulton [No 5]*[20] where Basten JA (with whom Allsop P and Macfarlan JA agreed) said in the context of an offence of failing to provide an animal with food, drink and shelter 'which… is proper and sufficient'. The charge in issue used the terms of the relevant section and contained particulars that a cow was 'without proper and sufficient food for over a period of about four weeks which contributed to its poor body condition'. In that case, the complaint in respect of the charge was that it failed to specify which food was not supplied, and content itself with the words of the section. As a consequence, it was argued that the charge failed to identify that which was reasonably practicable to provide. The applicant sought to draw an analogy with the circumstances in *Kirk*, however to this the Court said:

> 49 The analogy with Kirk is superficial only. Further, care must be taken in seeking to rely upon supposedly analogous factual situations in a higher court, as giving rise to a precedent, rather than the precedent being found in the legal principle to be applied in assessing such facts. In Kirk, there were real issues as to what steps the employer should have taken to ensure the safety of its experienced farm manager who

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18 *Baiada* (n 8) 219 [50] (Ferguson and McLeish JJA) citing *John Holland Pty Ltd v Industrial Court (NSW)* (2010) 202 IR 82, [77]–[78], [135]–[139].

19 Ibid 220 [54] (Ferguson and McLeish JJA).

20 [2010] NSWCA 240 ('*Downey*') quoted in *Baiada* (n 8) 241 [150] (Robson AJA).

> was driving the all-terrain vehicle (the ATV). Not only did the uncertainty as to the prosecution case make it (at least) difficult for the defendant to identify whether the relevant steps would have been reasonably practicable, but it also created a difficulty in establishing a causal link between the relevant omissions and the accident. For example, it might have been necessary to ask whether the training which had not been provided would have taught the deceased anything about the vehicle which he did not already know. In the present case, the charge made clear that that which had not been supplied was proper and sufficient food. It was further alleged that that omission contributed to the poor body condition of the animal which, at least by necessary inference, constituted an allegation that whatever had been provided was not both "proper and sufficient".
>
> 50 It followed that the essential elements of the offence were addressed in the charge. The nature of the feed required by cattle, and its availability in the area at the relevant time, would have been matters for evidence. If particulars had been sought, a court may have directed the prosecutor to give them. None were sought, either in the Local Court or the District Court.[21]

The charge in the context of relevant provisions of the VPA

25 The adequacy of a charge must be considered in the legislative context of the charged offence.

26 In this case, Wells is charged with an offence against s 227 of the VPA. That section, which is found in div 1 of pt 13 (entitled 'Confidentiality of Police Information'), reads:

> **Unauthorised access to, use of or disclosure of police information by members or former members of Victoria Police personnel—summary offence**
>
> (1) A member or former member of Victoria Police personnel must not, without reasonable excuse, access, use or disclose any police information if it is the duty of the member or former member not to access, make use of or disclose the information.
>
> Penalty: 240 penalty units or imprisonment for two years or both.
>
> (2) Without limiting what may be a reasonable excuse, it is a reasonable excuse if the member or former member took reasonable steps not to access, use or disclose the police information.

27 Section 225 relevantly defines 'police information' as:

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21 *Downey* (n 20) [49]-[50].

(a) in relation to a member or former member of Victoria Police personnel, any information that has come to the knowledge or into the possession of the member—

(i) in the performance of functions or duties or the exercise of powers as a member of Victoria Police personnel; or

(ii) otherwise as a result of being a member of Victoria Police personnel…

28 Section 226 of the VPA is in the following terms:

Victoria Police personnel duty not to access, use or disclose police information

(1) In determining for the purposes of this Division whether it is the duty of a member or former member of Victoria Police personnel not to access, make use of or disclose police information, regard must be had to the Chief Commissioner's instructions.

(2) Subsection (1) does not limit the matters to which regard may be had in determining for the purposes of this Division whether it is the duty of a member or former member of Victoria Police personnel not to access, make use of or disclose police information.

(3) For the avoidance of doubt, if the access, use or disclosure of police information is authorised under section 230 or 231, then sections 227, 228 and 229 do not apply to that access, use or disclosure.

29 The 'Chief Commissioner's instructions' are defined in s 3 of the VPA to mean any instructions issued under s 60 of the VPA. Section 60 sets out the form the instructions can take as follows:

(1) The Chief Commissioner may from time to time issue, amend and revoke instructions for the general administration of Victoria Police and for the effective and efficient conduct of the operations of Victoria Police.

…

(3) The Chief Commissioner's instructions may apply, adopt or incorporate any matter contained in any document, code, standard, rule, specification or method formulated, issued, prescribed or published by any person, authority or body whether—

(a) wholly or partially, or as amended by the instructions; or

(b) as formulated, issued, prescribed or published at the time the instructions are issued or at any time before the instructions are issued; or

(c) as amended from time to time.

(4) Section 32 of the *Interpretation of Legislation Act 1984* does not apply to the Chief Commissioner's instructions.

(5) Nothing in this section affects or takes away from the application of section 51(a) or 52(1).

The Plaintiff's submissions

30 Counsel for Wells acknowledged that the charge is compliant with cl 1(a) of sch 1.[22] It is with cl 1(b) that the error is alleged. The contention is that the charge did not:

(a) contain any particulars that identified the 'police information' the subject of the charge;

(b) identify the 'duty' the subject of the charge; or

(c) identify the circumstances that gave rise to the 'duty'.

31 Relying on the principles articulated in *Baiada*, Wells argued that a valid charge must include:

(a) the time, place and manner of the defendant's act or omission;

(b) whatever is necessary to show that the person convicted has done something which brought him within the words of the statute;

(c) the nature of the offence and the manner in which it has been committed; and

(d) the essential factual ingredients of the offence.

32 Wells contended that the lack of particularisation of the 'police information' was a defect that was directly analogous with failure to identify the 'material particular' required in *John L Pty Ltd v Attorney-General (NSW)* (*'John L'*).[23]

33 The plaintiff argued that there were three things which need to be pleaded:

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22 Robert Clifford Wells, 'Plaintiff's Outline of Submissions', Submission in *Wells v Stillman & Anor*, S ECI 2018 02999, 9 May 2019, 3 [9].

23 (1987) 163 CLR 508.

(a) the police information;

(b) the duty the subject of the charge; and

(c) the circumstances that gave rise to the duty.

34 He argued, at a minimum, that the police information as the fundament of the charge must be identified.

'Police information'

35 By reference to *Southgate Management Pty Ltd v Nitschke* ('*Southgate Management*')[24] it was argued that the failure to identify the 'police information' would be in some respects akin to a charge in the *Southgate Management* case that alleged simply that the hotel handled 'food'. It would be a broad undefined specification of the subject matter, the thing the subject of the charge.

36 Wells argued that the 'police information' was the 'thing' that was the subject of the charge. Without identifying the 'thing' the charge lacked any real factual content. Moreover, because the charge was not anchored to any particular information, it was devoid of any meaningful attachment to any act of the accused.

37 It was argued that *John L* cannot be distinguished in any relevant way from the facts in the present case. In each case the prohibition concerned doing something with particular information. In *John L* the prohibition was on publishing or causing to be published a statement that was known to be false or misleading; in the present case, the prohibition was on accessing particular information. In both cases, the particular information is the subject matter of the charge and the consequence of failing to identify it constitutes a failure to identify the essential factual ingredients of the offence.

38 It was argued that the decision in *John L* guided the Court of Appeal's interpretation of

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24 [2018] VSC 236 ('*Southgate Management*').

the requirements of cl 1(b) in *Baiada*[25] and that it followed that both the analysis and the result *John L* is directly applicable to a determination of the present issue. The failure to specify the information the subject of the charge in the present case is fatal to the validity of the charge.

39 Wells argued that this point is reinforced by an understanding of the rationale for the rule governing the necessary particulars, being 'the necessity to be able to identify the particular occurrences or transactions which are the subject of the charge'.[26]

40 Given the breadth of the definition of 'police information' in s 225 (it includes, in essence, any information that comes into a police officer's possession in the course of duty), a charge that fails to identify in some way the particular information that is the subject of the charge was said to inevitably fail to provide reasonable information as to the nature of the charge.

'The relevant duty'

41 It was further argued that the Magistrate misconstrued the relevant duty owed by the police officer in holding that the duty was 'a duty not, without reasonable excuse, to access police information'. It was submitted that s 227 of the VPA does not create a duty, but rather enforces an existing duty, established outside the parameters of the VPA, and the duty must therefore be determined by reference to the context and to the Chief Commissioner's instructions. As the existence of the duty depends upon the particular circumstances, it will be necessary to articulate to some degree the circumstances that are said to give rise to the duty. In support of this conclusion Warren CJ's comments regarding a previous iteration of the VPA in *Director Public Prosecutions (Vic) v Zierk*[27] were relied upon:

> I consider the situation here to be in line with the observation in *Enever v The King*, that the section should be taken as having "intended merely to deal with the … disciplinary control of constables leaving the nature of their powers and duties and the responsibility for their actions to be governed by

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25 *Baiada* (n 8) 208 [5], 210 [15], 214 [30], (Ferguson and McLeish JJA) 229-230 [98]-[100] (Robson AJA).
26 *Southgate Management* (n 24)[62] (Priest JA).
27 (2008) 184 A Crim R 582 ('*Zierk*').

> the common law as modified by the Statutes (if any) dealing with that subject".
>
> Similarly, in *Reedman v Hoare*, Windeyer J observed that "the Police Acts themselves do little more than provide for the organization, discipline and government of the force. They presuppose … a body of law, independently existing concerning the powers, privileges, duties and responsibilities of a constable".[28]

42 It was submitted that because s 227 does not create a duty, the mere repetition of the language of s 227 cannot identify the duty that is said to have been breached. Rather, it was necessary in identifying the duty that the charge alleges has been breached to go beyond the words of s 227 and articulate the circumstances giving rise to it by reference to the duty. It follows then, it was submitted, the existence of the duty was an essential element of the offence charged, because without the existence of such a duty, there could be no offence.

The defendant's submissions

43 It was agreed that a charge must set out the essential factual elements of the offence, but that this does not require particulars over and above those sufficient to disclose the nature of the charge. The essential factual elements of an offence are materially different from the particulars of the facts that would enable the accused to understand the boundaries of the case that it must meet at trial.

44 It was submitted that upon request under s 32(2) of the CPA, Wells would be entitled to particulars. However, the terms of the charge are sufficient to provide reasonable information of the nature of the charge and is therefore compliant with sch 1 of the CPA.

45 While acknowledging the principles as stated in *Baiada*, which draw on and elaborate on those from *Johnson v Miller*[29] and *Kirk,* it was argued that these statements must be tempered with the statutory test under sch 1, which affected the common law.

46 The test requires that the terms of the charge provide 'reasonable information' of the

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[28] Ibid 588-589 [26]–[27] (citations omitted).
[29] (1937) 59 CLR 467.

nature of the charge. It was contended that a charge is not invalid because it adopts the words of the statute which creates the offence. The instant charge goes further than the statutory language creating the offence by identifying:

(as) the place and date of the alleged offending;

(b) the identity of the plaintiff;

(c) his status as a police member; and

(d) 'access' as the manner of the offending in respect of 'police information'.

47 *Southgate Management* was relied upon as instructive in relation to what constitutes sufficient particularisation within a given charge. In that case, Priest JA found that the charges as articulated were sufficient to inform Southgate Management as to the legal nature of the relevant offences together with their essential factual elements. This was so because in each case the accused was aware that the prosecution alleged it breached s 11(1) by handling egg mayonnaise intended for sale in a manner that renders it or was likely to render it 'unsafe'(as that term is defined in the *Food Act 1984* (Vic)). The terms of the charge on the charge sheet pursuant to s 11(1) were as follows:

> On or about [date] you, at [the hotel] handled food, namely egg mayonnaise, intended for sale in a manner that rendered, or was likely to render, the food unsafe in contravention of s 11(1) of the Act.

48 The charge did not specify how the mayonnaise was handled, how or in what way the mayonnaise was unsafe, or what specific mayonnaise the charge related to. His Honour observed that upon request, Southgate Management would be entitled to further particulars of how it is alleged to have handled the relevant food (food being capable of being handled in a variety of ways) and the manner in which the handling rendered (or was likely to render) the food unsafe. Furthermore, given the nature of the hotel's operations Southgate Management would be entitled to identification of the particular food, which was the subject of the charge beyond its description in the charge of 'egg mayonnaise'. His Honour found that the fact that further particulars

were needed to be provided, should a request be made for them, did not however render the charges invalid.

49 Stillman argued that the rule governing particulars was not as widely drawn as suggested by Wells' interpretation of *Southgate Management*. It was argued that it is sufficient to have identified that it was 'police information' that was 'accessed' contrary to his duty not to do so.

50 It was asserted that reliance on *Zierk* does not assist the Court as there was no issue raised about the validity of the charge in that case. The issue for that Court was whether the asserted duty not to disclose information existed. That is, what was the source of the duty. It was argued, that question does not arise here where the plaintiff has not yet asked for particulars of the source of the duty.

Is the police information the subject of the charge sufficiently identified?

51 What is clearly apparent from the cases cited by both parties is that the extent of particularisation required for any charge reflects directly the circumstances and articulation of the offence as it is drafted in the respective legislation.

52 In *Kirk*, a case which arose in the context of a failure to maintain a safe workplace, the High Court said:

> The common law requirement is that an information must at least condescend to identifying the essential factual ingredients of the actual offence. These facts need not be as extensive as those which a defendant might obtain an application for particulars.[30]

53 In *DPP v Kypri*, the Court said:

> If the contents of the charge and the summons are sufficient when read as a whole to bring home to a reasonable defendant the essential elements of the offence alleged, the charge not be invalid.[31]

54 Similarly, in *Kidman v Lowndes*, it was said:

> What is necessary to satisfy the requirement that the complaint particularise

30 *Kirk* (n 7) [26].
31 *Kypri* (n 15) [16] (Nettle J).

> the manner in which the offence was committed will vary depending on the essential factual ingredients of the offence and any features which might call for a more detailed elaboration of those factual ingredients. This may include such matters as a reversal of the onus of proof or provisions which allow a defendant to establish a justification or excuse peculiar to the offence.[32]

55 Most recent guidance is provided by the Court of Appeal decision in *Baiada* and by Priest JA in *Southgate Management.*

56 In *Baiada*, the Court of Appeal said although cl 1(b) of sch 1 of the CPA has much in common with the approach of the common law, it has nonetheless affected the common law in that it supplies a statutory test for determining the adequacy of the particulars furnished as part of the charge.[33] In their judgment, Ferguson and McLeish JJA quoted a series of expressions from the common law cases which illustrated the information that is required for a valid charge, including the following:[34]

(a) specifying the time, place and manner of the defendant's acts or omissions;

(b) whatever is necessary to show that the person convicted has done something which brought him within the words of the statute;

(c) the nature of the offence and the manner in which it has been committed; and

(d) the essential factual ingredients of the offence.

57 The question for determination is not whether the legal components of the charge are pleaded in accordance with cl 1(a) of sch 1 but rather whether compliance with cl 1(b) has been achieved on the facts and context of the offence in question.

58 In this, it is necessary in applying the statutory definition to have regard to the common law articulation of this issue.

59 In my view, applying the principles which arise from the cases, to which both parties

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32 314 FLR 358, 373 [56].
33 *Baiada* (n 8) 210 [13] (Ferguson and McLeish JJA).
34 Ibid 210-1 [15]–[16].

referred, I have concluded that the charge is invalid in that it insufficiently particularises a key fact or matter being that of the 'police information' which is the subject or foundation of the charge.

60 Whilst the charge identifies 'police information' as being an element of the charge, and this is sufficient to uphold the legal components required in accordance with the terms of the statute, this is no answer to the complaint in respect of cl 1(b) of sch 1. Save for the identification of the manner of committing the offence being by 'accessing' the police information (there being a variety of ways in which the police information might be dealt with to create an offence) the lack of identification of the 'police information' other than in the reference back to the statutory definition fails to disclose, in my view, 'reasonable information as to the nature of the charge'.

61 Under the VPA the definition of 'police information' is very broad. There is little doubt that in a police officer's day to day activities he or she would be accessing a wide range of 'police information' in accordance with the definition in s 225. A police officer would be accessing police information continuously as part of his or her daily duties.

62 I am mindful that attempting to draw analogies with the facts or offences the subject of other cases is fraught and has the tendency to obscure the task in a particular circumstance. However, I recognise some parallels in the extent of particularisation here with the facts in *Southgate Management.* In the articulation of the charge in *Southgate Management* and the charge before this Court, I am of the view that in answer to the 'what' is the subject of the charge here the 'police information' is more correctly correlated with the term 'food'. In *Southgate Management* the type of food in question was identified as 'egg mayonnaise'. In this case there is no type of 'police information' identified other than by reference back to the statutory definition. This does not give an accused the essential factual elements of the alleged offence. In *Southgate Management*, 'egg mayonnaise' was identified and the further particulars essential for the contest could provide more specification as to the actual egg mayonnaise in issue. This took the particularisation of the 'food' in question

beyond the mere statutory language.

63 Here, the police information is not identified at all and without identification of the police information it makes it impossible to determine whether or not accessing the information was contrary to any police duty.

64 The parties agreed that there is a distinction between particulars required to comply with cl 1(b) and particulars required prior to the hearing or trial. In *Baiada* the Court identified that additional particulars could be required before trial but were not necessary for the charge to be valid. However, the level of particularisation provided in the charge (as discussed at [23] above) provided the essential factual ingredients.

65 What is clear from analysis of the cases referred to by the parties is that where the charge has been upheld as valid, the particularisation is greater than the charge in question here. However, in each case the task is to test the charge against the requirements of the offence and it may be a question of degree as to whether the factual ingredients are in any case, sufficiently particularised.

66 In *Kidman v Lowndes*, the Court noted that there was a difference between fair information and reasonable particularity as to the nature of the offence charged (in effect equivalent to the requirement in cl 1(b) of sch 1 of the CPA) and all details a defendant might require upon application for particulars sufficient to enable the preparation of his or her defence. The latter is so a defendant has such information to prepare the defence and know sufficiently for that purpose, the case to be met. These are matters which concern the conduct of the hearing rather than the sufficiency of the complaint. The latter cannot validate a complaint at the initiating stage.

67 I disagree with the position argued on behalf of Stillman that the identification of 'accessing' or 'access' as distinguished from disclosing or using any police information was sufficient identification and particularisation of the essential facts or elements of the offence.

Is it necessary to identify the nature of the duty the subject of the charge and circumstances which gave rise to that duty?

68 Wells argued that the learned Magistrate seemed to accept that it was necessary to identify the duty that was the subject of the charge but held that the charge did identify the duty saying:

> In the present matter, while not determinative as to whether a duty existed, for the purpose of the validity of the charge I accept that the identification of the nature of the duties contained within the charge. That is a duty not, without reasonable excuse, to access police information.[35]

69 By holding that the duty is identified within the charge, and articulating it as 'a duty not, without reasonable excuse, to access police information' it was submitted that the learned Magistrate misconceived the nature of the offence.

70 My determination that the charge is invalid because it lacks the particulars with respect to 'police information' that are necessary to give reasonable information as to the nature of the charge is sufficient to dispose of the proceeding. However, I will make comment as to my reasoning with respect of the arguments put in relation to identification of the nature of the duty and the circumstances which give rise to that duty.

71 I am of the view that if sufficient particulars had been given of the 'police information' there would be no room for debate on this issue of particularisation of the duty at all. There would be no reason to further particularise the 'duty' the subject of the charge or the circumstances that gave rise to that duty once the 'police information' subject of the offence is particularised. In this way, the nature of the accessed 'police information' gives colour to an officer's relevant duties.[36]

72 With sufficient articulation of the police information, it would be made clear that there is a case to meet in respect of a breach of duty by reason of accessing that particular information. If a police officer has a reasonable excuse, they will able to articulate a defence. The extent of the duty, and whether it has been breached would no doubt

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35 CB 67.

36 See *Zierk* (n 26) 590-591 [34], [41].

be the subject of debate at the trial. Thus, the consequence of specifying the nature of the information alleged to have been wrongly accessed makes the argument relating to the alleged lack of particularisation as to duty fall away.

73 The argument put on behalf of Wells in effect concedes this is the correct outcome. It was submitted on behalf of Wells that, at the very least the police information the subject of the charge needs to be identified. This is further articulated by reference to the transcript with the interplay between the identification of police information and the question of whether there is a duty not to disclose is discussed in the context of Warren CJ's reasoning in *Zierk* as follows

> Some information will be entirely anodyne. Some information will be of great significance to one of the duties of office. And as her Honour says at paragraph 41, second sentence 'It is not necessary, nor appropriate, to define where the line is to be drawn in determining the existence of a duty, as it must depend on the nature of the information and the circumstances of its disclosure.'
>
> So for that reason, it follows that when one looks to what is required to validly commence a criminal charge for this offence, one must articulate the information because it is the information and the circumstances of its disclosure which lead inexorably to the identification of whether there is a duty not to disclose. Without such articulation of the information, one cannot have any idea whether there was a duty not to disclose.[37]

74 And later:

> So for all of those reasons, my submission, at the very least, the police information the subject of the charge needed to be identified.[38]

Conclusion

75 It would not be realistic, with the charge as currently framed, for a police officer to know what is the material and particular information which forms the subject of the offence. A police officer no doubt accesses various forms of police information in his or her daily duties. Access to police information is not an offence. The offence is accessing the police information without reasonable excuse contrary to his duty not

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37 Transcript of Proceedings, *Wells v Stillman & Anor* (Supreme Court of Victoria, S ECI 2018 02999, Quigley J, 5 December 2019) 25.1-25.17 (C Carr).

38 Ibid 25.28-25.30 (C Carr).

to do so.

76 It is agreed that information that will disclose the nature or substance of the charge or initiation or filing is not the same as information which may be required to particularise prior to the contest or trial. However, particularisation cannot cure a charge which is invalid on its face. The lack of particularisation of the 'police information' beyond reference to the statutory term 'police information' whilst sufficient for validity of the charge pursuant to sch 1 cl 1(a) is not sufficient for the purposes of cl 1(b).

77 I find that the charge insofar as it does not adequately particularise the 'police information' alleged to have been wrongly accessed invalidates the current form of the charge. I find that the charge in proceeding J10992024 in the Magistrates' Court of Victoria is invalid and I will quash the order made by the Magistrates' Court of Victoria on 25 October 2018 dismissing the application to strike out the charge.