NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	24/04/2025 4:07:10 PM AEST
Date Accepted for Filing:	24/04/2025 4:07:14 PM AEST
File Number:	NSD689/2023
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

ROBERTS-SMITH VC MG

v

FAIRFAX MEDIA PUBLICATIONS PTY LTD & ORS

APPELLANT'S OUTLINE OF SUBMISSIONS IN RELATION TO APPLICATION FOR LEAVE TO REOPEN APPEAL

1. INTRODUCTION

1.1 The Appellant seeks leave to re-open his case on the appeal to adduce fresh evidence and introduce a new ground of appeal alleging a miscarriage of justice and denial of a fair trial to the Appellant by reason of misconduct by the Second Respondent, Mr McKenzie.

1.2 This application was precipitated by the emergence of an audio recording of a conversation between Mr McKenzie and Person 17, in which Mr McKenzie admitted that Emma Roberts and Danielle Scott were "actively like briefing us on his [i.e. the Appellant's] legal strategy", that the Respondents had thereby learned things which were "helpful", and that he had "just breached my fucking ethics in doing that" (**the McKenzie Recording**). The authenticity of the McKenzie Recording is admitted, although it is evidently part of a longer conversation.

1.3 The McKenzie Recording is evidence of an admission by Mr McKenzie that he had access to the Appellant's privileged information through Ms Roberts and Ms Scott, and that the Respondents used it in the proceedings below for forensic advantage. Considering the recording in light of evidence which was before Bromwich J in related proceedings (NSD 511/2021) and Mr McKenzie's own evidence on this application, the Court would find that improper access to and use of the Appellant's privileged information did occur.

1.4 The extent to which this occurred is not presently knowable, but the Court would be satisfied that there is a real likelihood that this conduct had some or all of the forensic consequences outlined in paragraph 37 of the particulars of the Amended Notice of Appeal.

2. RELEVANT FACTS

2.1 From late 2018 until around 20 April 2021, the Appellant mainly corresponded with his legal representatives, including his relation to these proceedings, through the email address ben@rsgroupaustralia.com: Ex MHA-1 page 12-13. That address was associated with the company RS Group Australia Pty Ltd, of which his ex-wife Emma Roberts was one of three directors. As a director, Ms Roberts could and did log into email accounts hosted on the RS Group domain, including the Appellant's: Ex MHA-1 pages 12-14.

2.2 On 20 January 2020, the Appellant and Ms Roberts separated: Ex MHA-1 page 14. In chief, Ms Roberts said that she did not access the Appellant's RS Group email after their separation, except to produce documents in response to a subpoena: Ex MHA-1 page 516 (T 1946.30). In cross-examination, however, she accepted that she had in fact accessed it subsequently, during their Family Court proceedings: Ex MHA-1 page 539 (T 1969.22).

2.3 Ms Roberts's close friend, Danielle Scott, accessed the Appellant's RS Group email account no less than 101 times between 20 January 2020 and 27 April 2021: Ex MHA-1 pages 412-414, 516 (T 1946.42). Ms Roberts knew that this was occurring, because she and Ms Scott discussed it occasionally: Ex MHA-1 pages 611 (T 2041.37-46), 613 (T 2043.16). She knew that Ms Scott continued to access the Appellant's emails after both she and Ms Scott had agreed to give evidence for the Respondents: Ex MHA-1 page 619 (T 2049.14-26). Ms Roberts knew that neither she nor Ms Scott had the Appellant's authorisation to be accessing his email account in this way: Ex MHA-1 page 614 (T 2044.23-39).

2.4 On 5 August 2020, Mr McKenzie phoned Ms Roberts, and on 8 August 2020, he texted her: Ex MHA-1 pages 353, 546 (T 1976.38), 622 (T 2052.45). In August 2020, Mr McKenzie also had at least two conversations with Ms Scott, which he recorded but failed to discover in the Court below: Affidavit of McKenzie at [45].

2.5 On 16 December 2020, at Ms Roberts' insistence, the RS Group domain registration was renewed, even though the company had been inactive for over 2 years: Ex MHA-1 pages 13-14. The renewal fee was paid on Ms Roberts' credit card, but Ms Scott was logged into the account when the payment details were changed on that date: Ex MHA-1 page 414.

2.6 On 10 March 2021, Mr McKenzie received images from Ms Scott and forwarded them to Mr Levitan: Affidavit of McKenzie at [53]-[55]. He further states that on 12 March 2021, he sent an email to Mr Levitan and Mr Bartlett referencing the contents of those images, which included a privileged email from Mark O'Brien Legal (**MOBL**) (discussed below). This is significant. It demonstrates that Mr McKenzie and the Respondents' lawyers were aware of the existence and content of the MOBL email prior to the meeting with Ms Roberts and Ms Scott on 14 March 2021. It follows that either Ms Roberts or Ms Scott had already accessed that privileged material and passed it on to Mr McKenzie. That context highlights the significance of the Respondents' ongoing refusal to produce the 14 March 2021 file note prepared by Mr Levitan, a document that the Appellant and the primary judge were told <u>did not exist</u> and only now, since the Appellant made this application, is now being withheld under a claim of privilege.

2.7 On 22 March 2021, Mr McKenzie sent a long email to Minter Ellison solicitors Peter Bartlett and Dean Levitan summarising and analysing evidence from a range of sources: Affidavit of McKenzie

at [56]. The email included the following reference to a privileged communication from the Appellant's former solicitors to the Appellant (Ex NM-1 page 215):

> D [Ms Scott] believes that RS [the Appellant] buried the USBs in mid 2019 fearing they would be discovered if the AFP raided his house. (It was around the 27th of July when he copied the financial files onto the USB, **on 31 July MOB [Mark O'Brien Legal] sent RS an email about the Mick Keelty issue and that authorities wish to speak to him about misconduct involving a senior AFP officer)**.

2.8 In late March 2021, according to Ms Roberts (14 March 2021, according to Mr McKenzie), Mr McKenzie visited her at home. With him were Ms Scott, another friend, and Messrs Bartlett and Levitan: Ex MHA-1 pages 546-548 (T 1976.47-1978.1). The meeting was arranged by Ms Scott, who had already met Mr McKenzie some time in February 2021: Ex MHA-1 pages 621-622 (T 2051.20-2052.11).

2.9 According to Mr McKenzie, the McKenzie Recording dates from around March or April 2021: Affidavit of McKenzie at [11].

2.10 In April 2021, according to Ms Roberts, she met Mr McKenzie again. This meeting was attended by "most of the lawyers", including at least Mr Owens SC (as his Honour then was) and Mr Levitan: Ex MHA-1 pages 548 (T 1978.11), 625 (T 2055.1-40). Ms Roberts said that she only ever met with Mr McKenzie in person in the presence of the lawyers: Ex MHA-1 page 638 (T 2068.41).

2.11 Mr McKenzie did not recall meeting Ms Roberts again after March, except for a dinner in Sydney with Mr Levitan and Ms Scott. He also did not recall any of the Respondents' counsel ever participating in any discussion with Ms Roberts or Ms Scott: Affidavit of McKenzie at [52], [61]-[62]. The Court would prefer the evidence of Ms Roberts on this issue. Mr McKenzie no doubt had many such meetings during the litigation, whereas for a layperson such as Ms Roberts, the experience of meeting with a prominent journalist and numerous lawyers, including Senior Counsel (whom she specifically remembered), would have been something exceptional which she is unlikely to have forgotten.

2.12 On 19 April 2021, the Respondents served a Notice to Produce on the Appellant calling for the production of draft chapters of the Appellant's autobiography; email correspondence between the Appellant and Person 5, Person 29, Person 32 or Person 35 relating to the Whiskey 108 Mission; a statement in support of the Appellant provided by Person 36 in 2013 and/or July 2017 to the Department of Defence; the Appellant's request to Person 36 for the statement and communications between them in relation to it; and correspondence between the Appellant or his lawyers and the SAS Association in relation to the proceedings.

2.13 On 20 April 2021, the Appellant opened his email account and observed that an email he had received from his Senior Counsel the day before had been "flagged". The Appellant did not flag this email himself: Ex MHA-1 page 16.

2.14 The dates in the access logs for the Appellant's email account (Ex MHA-1 pages 412-414) should be compared with the chronology summarised above. The logs show that the account was accessed regularly until April 2020. It was then not accessed again until 11 August 2020, when it was accessed twice. This was shortly after Mr McKenzie phoned and texted Ms Roberts on 5 and 8 August 2020. There was another pause until 16 December 2020, when the registration was renewed. No further access occurred until 28, 29 and 30 March 2021, which is around the time that Ms Roberts says she first met in person with Mr McKenzie and the Minter Ellison lawyers. There was further access on 22 and 27 April 2021, around the time of Ms Roberts' second meeting with Mr McKenzie and the lawyers. On each of those occasions, it was Ms Scott – not Ms Roberts – who accessed the Appellant's email account. Ms Scott had no legitimate interest in the Appellant's personal legal correspondence. Her continued access at precisely those times strongly supports the inference that it was undertaken for the purpose of forensic misuse of privileged material.

3. MISCARRIAGE OF JUSTICE

Principles

3.1 Miscarriages of justice may occur in many circumstances and can take many forms, but in broad terms, a miscarriage of justice occurs when there is a substantial error or irregularity in the trial process, and the appellate court cannot be satisfied that it made no difference to the outcome of the trial: *Baini v The Queen* (2012) 246 CLR 469 at [25]-[26].

3.2 Legal professional privilege is a substantive right based on the public interest. The privilege is integral to the administration of justice because it facilitates the representation of clients by legal advisers: ***Glencore*** *International AG v Commissioner of Taxation* (2019) 265 CLR 646 at [21]-[27]; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487. Because it is integral to the administration of justice, unlawful access to a party's privileged information may compromise the fairness of the trial process and result in a miscarriage of justice.

3.3 It has been held that when a denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially whether the evidence of a particular witness should be accepted, an appellate court cannot easily be satisfied that compliance with the requirements of natural justice would have made no difference to the outcome: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145. This commonly arises in cases where, due to procedural unfairness, a party has been denied the opportunity to adduce evidence, cross-examine, or make submissions about an issue. In principle, however, there is no reason why the same reasoning should

not apply to cases where a party's misconduct has put it in a position to make forensic decisions or submissions which it may not have been in a position to make, but for the misconduct.

3.4 It is well-recognised that legal professional privilege has a significant effect on the conduct of litigation, because it forecloses accesses to information which may assist the opposing party's case: *Glencore* at [30]. Correspondingly, the possible consequences of interference with a party's privileged information are multifaceted. For example, it may put the infringing party on a chain of inquiry, leading to the production of evidence which would not otherwise have been available, or it may provide the basis for an attack on a witness's credit which the cross-examiner would not otherwise have had a basis to make.

3.5 Given the range of ways in which the disclosure of privileged information may potentially affect the course of litigation, particularly in a complex case, an appellate court should not attempt to "parse" the potential impact of the misconduct. Unless the Court can be satisfied that there is no realistic possibility that the breach of privilege made any difference to the outcome, the Court should not "take a chance" on the issue: cf. ***Clifton*** *v Kerry J Investment Pty Ltd t/as Clenergy* (2020) 379 ALR 593 at [203] (Besanko, Markovic, Banks-Smith JJ).

Application

3.6 Four matters are established with reasonable clarity by the evidence before the Court on this application, and should form the starting point for the Court's analysis.

3.7 First, Ms Roberts and Ms Scott certainly accessed the Appellant's RS Group email account on a large number of occasions, including after they had both agreed to give evidence for the Respondents, knowing they did not have his permission to do so. Data produced by Telstra proved the repeated access to the Appellant's email account by a username associated with Ms Scott: Ex MHA-1 pages 412-414. Ms Roberts made numerous admissions as to this conduct in the court below: Ex MHA-1 pages 516 (T 1946.42), 611 (T 2041.37-46), 613 (T 2043.16), 614 (T 2044.23-39), 619 (T 2049.14-26). Ms Scott did not give evidence, but that is because the Respondents, having served an outline of evidence for her, elected not to call her. It should be inferred that any evidence she might have given about this matter would not have assisted the Respondents.

3.8 Second, Ms Roberts and Ms Scott gave information to Mr McKenzie, and Mr McKenzie channelled that information to his legal representatives: Affidavit of McKenzie at [43]. The lawyers also met with Ms Roberts and Ms Scott: Affidavit of McKenzie at [48], [60], [61].

3.9 Third, information provided to Mr McKenzie by Ms Roberts and Ms Scott provided a basis for the Respondents' forensic decision-making. That is the plain inference from the fact that Mr McKenzie passed all such information on to his lawyers, but moreover, pages 209-221 of Ex NM-1 show him

giving his lawyers instructions about conferencing with witnesses and issuing subpoenas on the basis of information provided by Ms Roberts and Ms Scott.

3.10 Fourth, the information provided to Mr McKenzie by Ms Roberts and Ms Scott was not limited to the domestic violence allegations or Person 17 but included information relevant to the war crimes allegations.

3.11 The issue which remains is whether any of the information Ms Roberts or Ms Scott provided to Mr McKenzie, and which he in turn provided to his legal representatives, included privileged information. The Court would find on the balance of probabilities that it did.

3.12 Precise identification of the information disclosed to Mr McKenzie would be important, in order to establish its privileged quality, but it is the Respondents, not the Appellant, who are best placed to identify what information was obtained from Ms Roberts and Ms Scott and how it was used in the litigation. Rather than disclosing exactly what was received from Ms Roberts and Ms Scott, they have relied on assertions by Mr McKenzie, in a conclusory form, that he "never" had information about the Appellant's confidential legal advice (at [41], [60]-[61]), that he did not believe that any of the information he received was privileged, and that nobody ever suggested to him that it was or might be privileged (at [43]). They have resisted disclosure of the entirety of the information actually obtained from Ms Roberts and Ms Scott, have not called Ms Roberts or Ms Scott as witnesses, and have not called Messrs Bartlett or Levitan, despite the fact that Mr McKenzie relies at [43] on their advice that none of the information he obtained was privileged. The weight to be accorded to the evidence on which they rely to deny access to and use of privileged information is to be assessed in this light: *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970; *Ho v Powell* (2001) 51 NSWLR 572 at [14]-[16]; *Coshott v Prentice* (2014) 221 FCR 450 at [81]-[82]. The Respondents' failure to call Person 17, despite Mr McKenzie's admission that he had numerous conversations with her, including about the Appellant's legal strategy, reinforces the inference that those conversations did occur and that she may have been placated by insights into privileged information.

3.13 In that context, the Court is entitled to draw the inference that any evidence Person 17 might have given would not have assisted the Respondents. Much the same may be said of their refusal to disclose the 14 March 2021 file note recording the conference with Ms Roberts and Ms Scott, a document they previously denied existed, and which is now being withheld on the basis of privilege. That refusal is telling, given that Person 17 was evidently concerned not merely with the Appellant's general conduct, but with his legal strategy specifically. It is implausible that her concerns could have been placated by anything other than discussion of privileged legal advice or forensic decisions.

3.14 Notwithstanding his forensic disadvantage, the Appellant can give some examples of the kinds of privileged information likely to have been made available to Mr McKenzie.

3.15 The Appellant's RS Group email was the account he primarily used to correspond with his lawyers in 2018-2021: Ex MHA-1 page 12-13. That is, it was the account through which he received legal advice and provided instructions during three years of the litigation, in which he attended IGADF interviews and served outlines of evidence, and the Respondents served their Defences and Amended Defences.

3.16 There is evidence that an email to the Appellant from his Senior Counsel in relation to the defamation proceedings dated 19 April 2021 was "flagged", indicating that someone had marked it for future reference. As the Appellant did not flag it himself (Ex MHA-1 page 16), the inference is that Ms Roberts or Ms Scott is likely to have done so.

3.17 Moreover, in 2021, Ms Roberts produced in response to a subpoena a confidential file note prepared by Mark O'Brien Legal, the Appellant's former solicitors, about his attendance at an IGADF interview: Ex MHA-1 page 179.

3.18 The fact that the email from Senior Counsel was flagged and Ms Roberts was in possession of the IGADF file note does not in itself demonstrate that these documents were provided to Mr McKenzie. Ms Roberts's evidence, however, was that she accessed the Appellant's email account in the context of her Family Court proceedings: Ex MHA-1 page 539 (T 1969.24). If this was her reason for accessing his private emails, it is not apparent what personal interest she would have had in an email from Senior Counsel about the defamation proceedings, or a file note about an IGADF interview.

3.19 Mr McKenzie's evidence on this application provides at least one clear example that he had knowledge of or access to the Appellant's privileged information. In an email to Messrs Bartlett and Levitan on 22 March 2021 (Ex NM-1 page 215), excerpted above at paragraph 2.6, he plainly disclosed knowledge of the content of an email from Mark O'Brien Legal to the Appellant in relation to a matter ("the Mick Keelty issue") about which the firm was providing legal advice and representation. It was inescapably a privileged communication.

3.20 The Respondents contend that the information summarised by Mr McKenzie in this excerpt came from a text message he received from Ms Scott (Ex NM-1 pages 200-202), rather than by direct access to the email. This is not an explanation given in his affidavit, although he purports to identify the non-privileged sources of other information: Affidavit of McKenzie at [54]-[56]. Even if the text message was the source, however, the simple fact is that Ms Scott disclosed the contents of an obviously privileged communication to Mr McKenzie, and he passed it on to his lawyers. There is no evidence before the Court of what Messrs Bartlett and Levitan made of Mr McKenzie's reference to the contents of that obviously privileged communication, because the Respondents have not called them and they have resisted the subpoenas served on them to appear. There is no evidence that they warned Mr McKenzie that he should not be receiving that kind of information. To the contrary, Mr McKenzie asserts that he was never told that "any" of the material he obtained from Ms Scott was,

or even "might", be privileged: Affidavit of McKenzie at [43]. Nor is there evidence that Mr McKenzie told Ms Scott not to give him that kind of information. Indeed, the Respondents' evidence opposing the Appellant's subpoenas, which attempted to test what information was obtained from Ms Scott, pointed to the very large number of communications between her and Mr McKenzie: Affidavit of Beaton at [32]-[34].

3.21 Mr McKenzie also gives evidence of conversations with Ms Scott in August 2020, in which Ms Scott disclosed to him a "tactic" that either Bruce McWilliam or the Appellant's Senior Counsel devised in relation to the domestic violence allegations, as well as the Appellant's strategy in relation to the IGADF inquiry: Affidavit of McKenzie at [44]-[45]; Ex NM-3 (first recording at 00:12-00:14). Knowledge of a "tactic" allegedly devised by Senior Counsel implies knowledge of legal advice provided to the Appellant. The Court would be the more prepared to draw inferences adverse to the Respondents on this issue, because the recordings were not disclosed below, and Mr McKenzie's only explanation for the failure to do so is that he forgot about them. This is not a satisfactory explanation, because he also deposes that he gave the recordings to Mr Levitan at the time they were made.

3.22 Aside from these specific examples of knowledge of privileged information, the Court has the plain words used by Mr McKenzie in the Recording, "briefing us on his legal strategy", which in their natural and ordinary meaning imply knowledge of confidential and privileged legal advice. The inference that he is referring to illicit access to confidential privileged information is reinforced by the words "I've just briefed my fucking ethics in doing that", which suggest a consciousness of wrongdoing.

3.23 The Court also has the fact that Mr McKenzie has gone into evidence to attempt to explain the content of the Recording. The Court would reject his explanation. If the Court does reject Mr McKenzie's evidence, the fact he has given a false explanation to this Court of his own recorded words can be treated as an implied admission that he did have improper access to the Appellant's legal strategy, and as evidence of consciousness of guilt: *Kuhl v Zurich Financial Services Australia Ltd* (2010) 243 CLR 361 at [64]; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [78]-[88].

3.24 The extent of the impact which the Respondents' access to privileged information had on the course of the trial cannot now by fully ascertained both because the Respondents have resisted full disclosure of the information they obtained from Ms Roberts and Ms Scott, and because of the multiplicity of ways in which forensic decisions may have been informed or influenced by different pieces of information. In all of the circumstances, however, the Court could not be satisfied that there is no realistic prospect that any privileged information obtained by Mr McKenzie and provided to his lawyers made no difference to the outcome.

3.25 Consider, for example, Mr McKenzie's knowledge of the contents of the privileged email about "the Mick Keelty issue". At trial, a significant aspect of the Respondents' attack on the Appellant's credit was the allegation that he had concealed relevant evidence, in particular, the buried USBs: Judgment [2468], [2472]-[2473]. An integer of their case was that the Appellant had buried the USBs at a time when he knew that he was the subject of an investigation by the Australian Federal Police: Judgment [2494]. The Judge found that the Appellant did deliberately fail to discover the USBs, and that he lied about burying them: Judgment [2541]. The reference at Ex NM-1 page 215 demonstrates that Mr McKenzie, in a communication to his lawyers, referred to the contents of a privileged email from Mark O'Brien Legal in order to develop an argument that the Appellant buried the USBs because he knew that he might be raided by the AFP, given he had been told by his lawyers at about that time that "authorities wish to speak to him". This argument was relevant to a major credit attack by the Respondents against the Appellant which ultimately succeeded, and which affected the Judge's findings on all issues in the proceedings.

3.26 A suggestion made by Mr McKenzie is that his reference to "legal strategy" was limited to the Appellant's strategy in relation to Person 17. This should not be accepted, given the evidence summarised about that Mr McKenzie received information about the contents of privileged advice in relation to the IGADF, and because the Respondents have resisted disclosure of the totality of the information provided by Ms Roberts and Ms Scott. Even if it were true, however, it could not be argued that any access by the Respondents to confidential and privileged information about the Appellant's strategy in relation to Person 17 made no difference to other issues in the case. The serious adverse credit findings which the Judge made against the Appellant in relation to Person 17 (Judgment [2208]-[2220]) affected his Honour's findings in relation to all of the Appellant's other evidence, including in relation to the war crimes allegations. The Respondents expressly invited his Honour to adopt that approach (RCS Section XII [2]-[5]), and his Honour stated expressly that he took into account all of his findings in assessing the Appellant's credit, including those in Part 12 of the Judgment: Judgment [276], [873]. And on the appeal, the Respondents defend that approach including by reference to the findings in respect of Person 17: RS [89], [99], [106]-[112].

3.27 The test to be applied is whether there is a real possibility – not a certainty – that improper access to privileged information made a difference to the outcome. Given the importance of legal professional privilege, the evidence which is available that privileged information was obtained about issues which substantially affected the Judge's ultimate credit findings, and the lack of any adequate or fully frank explanation from the Respondents, the Court would be satisfied that there is a real possibility that the outcome was affected.

4. LEAVE TO RE-OPEN APPEAL AND ADDUCE FURTHER EVIDENCE

Principles

4.1 This Court has the power to re-open an appeal, including after judgment is reserved, in order to receive further evidence: *Federal Court of Australia Act 1976*, s 27. An applicant must generally establish that it was unaware of the further evidence sought to be adduced, and that it could not, by exercising reasonable diligence, have become aware of the evidence. The applicant must also establish that the evidence is credible and probative of an issue in dispute, and that it is reasonably clear that if the evidence had been available at trial, the opposite result would have been produced: *Watson v Australian Community Pharmacy Authority* (2012) 206 FCR 365 at [109]-[114]; *Northern Land Council v Quall (No. 3)* [2021] FCAFC 2 at [16]; *District Council of Streaky Bay v Wilson* (2021) 287 FCR 538 at [149]; *Australia Bay Seafoods Pty Ltd v Northern Territory of Australia* (2022) 295 FCR 443 at [118].

4.2 The general principle that a court will not set aside a verdict on the basis of further evidence unless it is reasonably clear that the result would have been different is not, however, directed to cases where the trial miscarried due to "surprise, malpractice or fraud": *Greater Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444; *Commonwealth Bank of Australia v* ***Quade*** (1991) 178 CLR 134 at 140-141. Many of the cases (including *Quade*) have concerned the failure of the successful party to comply with its discovery obligations, but this is because courts have treated this as a kind of "malpractice", particularly when the failure to discover material is deliberate or unexplained: *Quade* at 141. Conduct which may constitute "malpractice" is not limited to non-compliance with discovery obligations.

4.3 In a case involving "surprise, malpractice or fraud", the competing factors to be taken into consideration by the Court include general considerations relating to the administration of justice, the degree of culpability of the successful party, any lack of diligence on the part of the unsuccessful party, and the extent of any likelihood that the result would have been different if the misconduct had come to light at trial. It is not necessary in such a case for the appellate court to be persuaded that it is almost certain or reasonably clear that the result would have been different, but the applicant must at least establish that there is a real possibility that the result would have been different: *Quade* at 142-143.

Application

4.4 For the reasons given above, the Court would be satisfied that malpractice has relevantly occurred – namely, by Mr McKenzie gaining access to, and by the Respondents using, the Appellant's privileged information for forensic advantage in the proceedings. The Court would also be satisfied that there

is at least a real possibility that it made a difference to the outcome. The Court could certainly not be satisfied that there is no realistic possibility that it made a difference to the outcome.

4.5 The McKenzie Recording – which the Court would accept as evidence of an admission by Mr McKenzie as to that course of conduct – was not available to the Appellant until after judgment below, and after this Court reserved judgment: Affidavit of Allen at [7], [15]. The production of the recording, in turn, elicited an affidavit and exhibits from Mr McKenzie attempting to explain its contents, which, for the reasons given above, furnish further evidence of access to and use of the Appellant's privileged information in the proceedings.

4.6 There can be no suggestion that any of this evidence could have been obtained sooner, given that the recording embodied a private conversation between Mr McKenzie and Person 17 about which the Appellant could not have had any knowledge. The Appellant did suspect in the Court below that his private emails were being accessed by Ms Roberts and Ms Scott and used by the Respondents (see Ex MHA-1 pages 13, 15), but his application for interlocutory relief against Ms Roberts to enable him to investigate the matter further was dismissed: *Roberts-Smith v Roberts* [2022] FCA 18. He could not reasonably have done more at that time to pursue the matter and uncover the truth. The production of the McKenzie Recording, and Mr McKenzie's evidence attempting to explain it, fill the evidentiary lacuna which prevented the Appellant from further investigating the matter at trial.

Conclusion

4.7 The misconduct in this case strikes at the heart of the trial's integrity. Legal professional privilege is a substantive right essential to the fairness of adversarial litigation. That protection was subverted when the Second Respondent, through Ms Roberts and Ms Scott, deliberately gained covert access to the Appellant's privileged legal strategy. The forensic advantage so obtained infected cross-examination, subpoena decisions, and credit attacks in ways that cannot now be disentangled.

4.8 Where the integrity of a trial has been compromised by such misconduct, it is not for an appellate court to speculate that the outcome would have been the same. It is sufficient that there has been a loss of a possibility of a successful outcome (*Stead* at 147). In circumstances where the Respondents' own conduct has undermined the reliability of the trial process, the onus lies with them to establish the absence of a realistic possibility of success for the Appellant (*Clifton* at [203]). That onus has not been discharged.

4.9 The only way to vindicate the Appellant's right to a fair hearing is to re-open the appeal, admit the further evidence, and order a new trial.

Arthur Moses SC **Nicholas Olson** **Thomas Scott**

Counsel for the Appellant