

NOTICE OF FILING

Details of Filing

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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



A handwritten signature in blue ink, reading "Sia Lagos".

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.

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ROBERTS-SMITH VC MG

v

FAIRFAX MEDIA PUBLICATIONS PTY LTD & ORS

APPELLANT'S OUTLINE OF SUBMISSIONS IN RELATION TO SUBPOENAS TO GIVE EVIDENCE

1. INTRODUCTION

- 1.1 The Appellant has, with the Full Court's leave, caused subpoenas to give evidence to issue to Messrs Bartlett and Levitan of MinterEllison, that firm acting for the Respondents in both the proceedings below and in this appeal. The subpoenas are in aid of the Appellant's interlocutory application seeking to reopen the appeal and introduce a new ground of appeal (Ground 17) alleging serious forensic misconduct by the Second Respondent, Mr McKenzie and, for the avoidance of doubt, also in aid of the newly pleaded Ground 17, noting that the Full Court is hearing the matter as if such a new ground was being heard.
- 1.2 Messrs Bartlett and Levitan have applied to set aside the subpoenas. The Appellant resists their application. The subpoenas were issued for a legitimate forensic purpose, as identified in the Appellant's Requests for Leave to Issue Subpoena, and are necessary for the fair and just determination of serious allegations that are contained in the draft amended notice of appeal.

2. THE SUBPOENAS TO GIVE EVIDENCE SHOULD STAND

- 2.1 Messrs Bartlett and Levitan, in summary, contend that the subpoenas should be set aside because they allegedly lack a legitimate forensic purpose, are speculative, amount to an abuse of process, are unnecessary given the document production sought, and are contrary to case management principles.
- 2.2 Those contentions should be rejected.
- 2.3 First, the subpoenas serve a legitimate forensic purpose, consistent with the test articulated in *Comcare v John Holland Rail Pty Ltd (No 5)* (2011) 194 FCR 43 at [28]-[41] (Bromberg J): namely, they seek evidence that is of apparent relevance because it can reasonably be expected to throw light on serious forensic misconduct issues directly in contest under Ground 17 of the draft amended Notice of Appeal.

- 2.4 As identified in the Appellant's Requests for Leave to Issue Subpoena, the subpoenas are directed to obtaining evidence arising from Mr McKenzie's affidavit affirmed on 14 April 2025. That affidavit makes numerous assertions concerning:
- (a) documents and information allegedly provided to Mr McKenzie by Ms Danielle Scott;
 - (b) Mr McKenzie's communications and interactions with the Respondents' solicitors, including Messrs Levitan and Bartlett. In particular, Mr McKenzie alleges that he sent to Messrs Levitan and Bartlett the material he obtained from Ms Scott and asserts that he did not believe that any of the material was confidential or privileged, implicitly suggesting that he was ever told by Messrs Levitan or Bartlett that it might be.
- 2.5 Mr McKenzie asserts that he received materials and information from Ms Scott and Ms Roberts. His affidavit purports to deny any improper use of privileged material, but:
- (a) Mr McKenzie does not identify the precise documents to which his belief related;
 - (b) in Appellant's submission, his belief is vague, unsubstantiated, and unsupported by reference to legal advice or any steps of reasonable inquiry;
 - (c) Mr McKenzie describes meetings with Messrs Levitan and Bartlett, including a meeting on 14 March 2021 at Ms Roberts' home and a later dinner in Sydney, where issues of privilege and the treatment of materials may have arisen
- 2.6 Secondly, the subpoenas meet the required standard that the anticipated evidence is reasonably likely to assist in resolving a fact in issue (*Comcare at [29]*).
- 2.7 Messrs Levitan and Bartlett are therefore in a position to give direct evidence about:
- (a) whether documents or information provided to Mr McKenzie were understood to be confidential or privileged;
 - (b) what was said at the 14 March 2021 meeting and the subsequent dinner (which Mr Levitan attended);
 - (c) their knowledge and conduct regarding the treatment and disclosure of privileged material.

- 2.8 The importance of their evidence is s brought into sharp focus by subsequent events. On 15 April 2025, MinterEllison disclosed, for the first time, the existence of a contemporaneous file note authored by Mr Levitan recording the 14 March 2021 meeting. That file note:
- (a) was not produced in response to a Notice to Produce issued in February 2022;
 - (b) was only disclosed in response to the Appellant’s recent interlocutory application; and
 - (c) is now the subject of a privilege claim by the Respondents.
- 2.9 The existence of the file note, its belated disclosure, and the privilege claim now asserted over it reinforce the necessity for oral evidence from Messrs Levitan and Bartlett. It is not sufficient for the Respondents to rely on assertions of privilege or partial explanations. The Court must hear from those directly involved to properly determine what occurred at the 14 March 2021 meeting, what was said and understood regarding the use of confidential and privileged information, and the circumstances giving rise to any waiver of privilege.
- 2.10 At [9(b)] and [43] of Mr Levitan’s submissions, a point is made that it is not presently possible for the Appellant to seek leave under s 27 of the Federal Court of Australia Act 1976 (Cth) to adduce evidence from Mr Levitan, because the Appellant does not yet know the substance of the evidence and therefore cannot demonstrate that “*very probably the result [below] would have been different*”.
- 2.11 That is accepted. However, the Appellant’s position is that, once the subpoenas are complied with and the evidence given, the Interlocutory Application will be amended to seek leave to adduce that evidence in the appeal. The subpoenas are thus an essential procedural step to enable the Court to properly assess the miscarriage of justice alleged under Ground 17.
- 2.12 Moreover, having regard to the serious nature of the allegations and the need to ensure a fair trial, the enforcement of the subpoenas is consistent with the overarching purpose under section 37M of the *Federal Court of Australia Act 1976* (Cth) (including “*the just resolution of disputes according to law” and “*the just determination of all proceedings before the Court*”).*
- 2.13 The subpoenas are a proper invocation of the Court’s compulsory processes to enable the fair and just determination of matters relating to serious forensic misconduct. Mr Levitan and Mr Bartlett are both witnesses who can shed a light on the conduct of the Second

Respondent and the assertions made by him concerning their role in relation to either material provided to them and/or meetings which they attended which he refers to in his affidavit evidence.

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Nicholas Olson

Thomas Scott

28 April 2025