

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 SUPPLEMENTARY OUTLINE OF SUBMISSIONS IN RELATION TO APPLICATION FOR LEAVE TO REOPEN APPEAL

1. INTRODUCTION

- 1.1 The Appellant has amended his interlocutory application seeking 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 (**Ground 17**), to include additional particulars at 36A concerning a serious failure by the Second Respondent, Mr McKenzie, to comply with his discovery obligations in the proceedings below.
- 1.2 The need for those additional particulars to Ground 17 arose only after the service of the affidavits of Mr McKenzie dated 14 April 2025 and 24 April 2025 (the latter being served after the Appellant's outline of submissions was filed) in response to the Appellant's interlocutory application. That evidence revealed for the first time that, from 2018 to 2021, Mr McKenzie engaged in extensive communications over the encrypted messaging application Signal with Person 17, Danielle Scott and Emma Roberts. None of these communications were discovered by the Respondents during the trial proceedings and even now, beyond the vague description in Mr McKenzie's evidence, remain undiscovered. Whether by reason of deletion, loss, or other cause, the existence of these communications indicates non-compliance with Mr McKenzie's obligations of discovery under r 20.17 of the *Federal Court Rules 2011* (Cth), in particular his obligation to disclose documents that were once within his possession, custody or control, and, if no longer held, to explain what had become of them (**Part 3 Obligation**).
- 1.3 The existence and content of these communications, which ought to have been disclosed in accordance with the discovery orders made by Besanko J, and even now remain undisclosed, materially bear upon the fairness of the trial and support the Appellant's case on miscarriage of justice.

2. RELEVANT FACTS

- 2.1 On 2 August 2019, the primary judge made orders for discovery in the proceedings below:

6. The parties exchange proposed categories of documents for discovery and proposed interrogatories by 16 August 2019.

7. The parties attempt to agree categories of documents by 30 August 2019.

8. Subject to order 10 below, the parties give verified discovery in respect of agreed categories and produce copies of discovery documents by 4 October 2019.

2.2 On 24 September 2019, the parties agreed on the categories of documents to be discovered by the Appellant. Relevantly, those categories included:

All documents relating to and / or concerning:

a. the allegations that the Applicant has engaged in war crimes, bullying conduct, domestic violence and/or any of the Applicant's other conduct particularised by the Respondents in paragraphs 17 to 138 of their Defence

b. the allegations that the Applicant has engaged in war crimes, bullying conduct, domestic violence and/or any of the Applicant's other conduct as referred to in the Respondents' Outline

...

including but not limited to notes, recordings, emails, text messages, Facebook, WhatsApp, Telegram or other social media messages, statements, photographs, reports and other documents.

2.3 No express temporal limitation was imposed upon the Respondents' discovery obligations, by the Court's orders made on 2 August 2019, the agreed categories of documents or Part 20 of the Rules. Accordingly, the Respondents were required to discover all documents falling within the agreed categories, irrespective of when they were created, including communications between 2018 and 2021.

2.4 The Second Respondent gave discovery in the proceedings below by way of the following verified Lists of Documents:

- (a) a List of Documents affirmed on 25 October 2019 (Affidavit of Allen, page 5);
- (b) an Updated List of Documents affirmed on 13 November 2019 (Affidavit of Allen, page 15);
- (c) a Supplementary List of Documents affirmed on 28 April 2021 (Affidavit of Allen, page 24);
- (d) an Updated List of Further Documents affirmed on 21 May 2021 (Affidavit of Allen, page 30); and

- (e) Supplementary List of Documents affirmed on 15 July 2021 (Affidavit of Allen, page 44).

2.5 Insofar as the Second Respondent's discovery addressed communications involving Person 17 or Danielle Scott, the following documents were disclosed:

Document	Date	Comments
List of Documents	25 October 2019	No communications disclosed involving Person 17 or Danielle Scott.
Updated List of Documents	13 November 2019	No communications disclosed involving Person 17 or Danielle Scott.
Supplementary List of Documents	28 April 2021	Screenshots of text message exchanges between Danielle Scott and Emma Roberts (various dates in 2018); emails between the Applicant and Danielle Scott (22 and 24 April 2018); photographs sent by Emma Roberts to Danielle Scott (August 2018); video of Person 17 (6 March 2018).
Updated List of Further Documents	21 May 2021	No communications disclosed involving Person 17 or Danielle Scott.
Supplementary List of Documents	15 July 2021	No communications disclosed involving Person 17 or Danielle Scott.

2.6 With respect to the Part 3 Obligation, the Second Respondent's discovery was as follows:

Document	Date	Part 3?	Comments
List of Documents	25 October 2019	Yes	Part 3 discloses “various encrypted messages periodically deleted with a date “N/A” (but nothing about Signal communications specifically).
Updated List of Documents	13 November 2019	Yes	Part 3 again discloses “various encrypted messages periodically deleted” and “some recordings deleted”.
Supplementary List of Documents	28 April 2021	No	N/A
Updated List of Further Documents	21 May 2021	Yes	Part 3 again mentions “various encrypted messages periodically deleted” – same general disclosure.
Supplementary List of Documents	15 July 2021	No	N/A

2.7 The Appellant filed his interlocutory application on 27 March 2025.

2.8 On 14 March 2025, Mr McKenzie affirmed an affidavit in response the Appellant’s interlocutory application. That affidavit confirmed:

- (a) from 2018 to 2021, Mr McKenzie communicated with Person 17 “*very frequently*”, principally via the encrypted messaging application Signal (Affidavit of McKenzie [14], [32], [34], [46], and [58]);
- (b) in around August 2020, Mr McKenzie was first contacted by Ms Scott by telephone and he recorded at least two conversations with her (Affidavit of McKenzie [44]);
- (c) from late 2020 to early 2021, Mr McKenzie continued to “*correspond*” with Ms Scott principally by text using Signal (Affidavit of McKenzie [46]);
- (d) from March 2021, Mr McKenzie continued to correspond with Ms Scott “*on occasion*” ((Affidavit of McKenzie [58]);
- (e) in late 2020, Mr McKenzie sent Ms Roberts a text message seeking to initiate communications with her which did not elicit a response (Affidavit of McKenzie [59]);
- (f) on 14 March 2021, Mr McKenzie met Ms Roberts for the first time at her house at Indooroopilly in Queensland (in the presence of Messrs Levitan and Bartlett, and Ms Scott and another of Ms Roberts’ friends) (Affidavit of McKenzie [60]);
- (g) subsequently, Mr McKenzie met Ms Roberts again at a dinner in Sydney attended by Messrs Levitan and Bartlett and Ms Scott (Affidavit of McKenzie [61]); and
- (h) in the lead up to and during the trial, Mr McKenzie and Ms Roberts corresponded “*occasionally*” by text on Signal although Mr McKenzie claims “[*Emma Robert*]/s never shared with me information or documents that I believed came from Roberts-Smith’s communications with his lawyers” (Affidavit of McKenzie [64]).

2.9 In relation to Mr McKenzie’s recordings of conversations with Ms Scott, he claims he had but had “*forgotten*” about the existence of those recordings until reminded of them during the course of preparing his affidavit in response to the Appellant’s interlocutory application. Copies of the recordings were then exhibited to his affidavit (Confidential Exhibit MN-3).

2.10 In relation to the 14 March 2021 meeting at Ms Roberts’ house at Indooroopilly, on 15 March 2025, the day after Mr McKenzie affirmed his affidavit, his solicitors sent a letter to the Appellant’s solicitors at a handwritten file note of that meeting, prepared by Mr Dean Levitan, had been located. The letter asserted that the Respondents claimed privilege over the document. On 17 April 2025, the Appellant’s solicitors responded, noting that the failure

to produce the file note in response to the 2022 Notice to Produce was unexplained and had resulted in a false representation being made to the Court about the document's existence. On 22 April 2025, MinterEllison replied, rejecting any suggestion of bad faith, describing the omission as "*regrettable*", asserting that the failure to produce the file note was not significant, contending that any forensic impact alleged by the Appellant was speculative, and denying that the file note had any relevance to the issues raised by the Appellant's interlocutory application or proposed amended appeal.

- 2.11 On 16 April 2025, the Appellant served:
- (a) a Notice to Produce to Mr McKenzie seeking production of 10 categories of documents; and
 - (b) subpoenas to produce on Mr Bartlett and Mr Levitan, as well as to Ms Scott, Ms Roberts, Person 17, and the ABC.
- 2.12 On 22 April 2025, James Beaton of MinterEllison affirmed an affidavit in support of an application to set aside a notice produce served on Mr McKenzie and subpoenas to directed to Ms Scott, Ms Roberts and Person 17 (among others). Mr Beaton estimated that responding to just some of the Appellant's categories would involve a review of approximately 15,721 documents (including emails, text messages, WhatsApp and Signal messages). Relevantly, Category 4 of the Notice to Produce, directed specifically to communications from Danielle Scott to Mr McKenzie and subsequently provided to MinterEllison, alone returned 1,113 documents on preliminary searches, exclusive of text messages (Category 4). Additional searches in relation to communications involving Ms Roberts and Person 17 returned 1,361 documents (Category 2) and 1,502 documents (Category 3).
- 2.13 On 24 April 2025, Perram J made orders in relation to the Appellant's Notice to Produce and subpoenas. His Honour set aside paragraphs 2, 3 and 5 to 10 of the Notice to Produce and limited the scope of paragraphs 1 and 4 to specific date ranges. His Honour also set aside substantial parts of the subpoenas issued to Mr Levitan and Mr Bartlett and set aside in full the subpoenas issued to the ABC, Person 17, Emma Roberts, and Danielle Scott.
- 2.14 Later that day, at 6.21 pm (after the Appellant's solicitor served his written submissions) the solicitors for the Respondents served a further affidavit of Mr McKenzie, affirmed earlier that day. Mr McKenzie corrected an error in his earlier affidavit of 14 April 2025 regarding the date on which he provided certain images and screenshots obtained from Ms Scott to Mr Levitan. Mr McKenzie clarified that, contrary to his earlier statement that he sent the images

to Mr Levitan on 10 March 2021, the images and screenshots were dated between 1 March and 18 March 2021 and thus could only have been provided after 10 March 2021. Mr McKenzie affirmed that it was his usual practice to send such material to Mr Levitan at or around the time of receipt.

3. FAILURE TO GIVE PROPER DISCOVERY

Principles

3.1 The importance of discovery should not be understated: *INPEX Operations Australia Pty Ltd v AkzoNobel NV (No 3)* [2024] FCA 1221 at [62] (Banks-Smith J). It is a fundamental obligation in this Court and its integrity must be maintained: *Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164 at [368] (Lander J). That extends to the verified List of Documents. The purpose of requiring a list to be verified by affidavit is to ensure that the Court receives a reliable and complete account of the documents within a party's possession, custody or control. As explained in *Watson v Kriticos* [2023] FCA 793 at [18] and [22] (Perram J), the verified list stands as the party's solemn assurance to the Court and the opposing party.

3.2 A failure to give proper discovery is inimical to the conduct of a fair trial and protection of the Court's processes: *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International B.V.* (2021) 389 ALR 612 at [121] (citing *Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582 at 593 (Mason J)). In *Brookfield*, Lander J said at [392]-[394]:

A trial has not been regularly conducted where a party to the litigation has not discovered documents which are relevant to the issues in the trial. That party has not complied with its obligations in the interlocutory processes and by failing to make full discovery that party has withheld evidence from its opponent...

For the reasons already given the discovery process is very important in ensuring that the parties are accorded a fair trial. Litigants will lose confidence in the courts' processes and decisions if they think that a party might avoid giving proper discovery and not be later held to account.

3.3 The decision in *Clifton (Liquidator) v Kerry J Investment Pty Ltd trading as Clenergy* (2020) 379 ALR 593 (Besanko, Markovic and Banks-Smith JJ) provides a useful example of the potential consequences of inadequate discovery, noting the discussion at [190]-[205]. The Court at [192] cited *Mango Boulevard Pty Ltd v Spencer* [2008] QCA 274, in which Muir JA (with whom Mackenzie AJA and Douglas J agreed), in considering the primary judge's findings about the deficiencies in discovery, said at [13] (emphasis added):

A party's failure to comply with its obligations under the Uniform Civil Procedure Rules, including those relating to disclosure, may constitute an abuse of process even if the failure directly affects only some of the pleaded issues. An object of the rules is to ensure that all the pleaded issues between the parties to a proceeding are tried fairly. That is also the parties' entitlement. A party cannot be permitted to gain a forensic advantage by wilfully, recklessly or negligently failing to give proper disclosure on an issue of substance. Here, the failure to disclose went to an issue central to the Mango's case and also to one of the defences pleaded by Spencer, Perovich and the appellant.

The problem confronting this Court is the appropriate disposition of the appeals and cross appeals in circumstances in which it has been revealed only on the appeals that the Liquidators have not made proper discovery and their failure to do so is ongoing.

- 3.4 The Full Court in *Clifton* recognised (at [197]-[203]) that that where it emerges only on appeal that a party has failed to give proper discovery, the appellate court faces a serious problem: whether the trial itself proceeded on a false factual basis. Unless the Court is satisfied that there is no realistic possibility that undiscovered documents might have been deployed to meet the defaulting party's case, the appeal cannot proceed on the assumed completeness of the record. It is for the defaulting party to establish the absence of any realistic possibility that undiscovered documents might have been deployed, and it is not for the appellate court to speculate or "take a chance" on that issue.
- 3.5 Rule 20.17(2)(b) of the Rules contains the Part 3 Obligation. A party must disclose documents that were, but are no longer, in its control, stating when they were last in the party's control and what became of them. This obligation has long been established, although the Chancery practice was to impose it by interrogatories. Where a party no longer retains a document, the duty to discover it persists: the party must identify the document and state when and how it parted with it: *Lacharme v Quartz Rock Gold Mining Co* (1862) 1 H & C 134 and *Lethbridge v Cronk* (1875) 23 WR 703.
- 3.6 Citing *Lacharme* and *Lethbridge*, Brennan CJ explained the rationale for the Part 3 Obligation in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at [12]:

And, if a party in litigation discloses in an affidavit of documents a material document that is no longer in the party's possession or power, the procedures of discovery enable the other party to trace the location of the document, to require the first party to state the contents of the document if the contents be known or, perhaps, to be provided with a copy if the first party can obtain access to the original.

- 3.7 More recently:

- (a) in *MG Corrosion Consultants Pty Ltd v Gilmour* [2011] FCA 1514 at [60], Barker J described the Part 3 Obligation as one “*too often forgotten in practice both by solicitors advising parties and the parties themselves*”;
- (b) in *Vitamin Co Pty Ltd v Healthy Hab Pty Ltd (Discovery)* [2020] FCA 1194 at [17]-[19], Perram J stressed that the Part 3 Obligation “*is meant to give effect to r 20.17(2)(b), that is to say, documents which were once in the party’s possession but are no longer so*”. His Honour observed that where Part 3 disclosure is deficient, the discovery process is incomplete, stating that “*it is obvious from what was said to me during argument that Part 3 is somewhat underdone*”; and
- (c) in *Transport Workers’ Union of Australia v Qantas Airways Limited* [2021] FCA 873 at [21], Lee J reiterated that where a party’s list of documents does not disclose any documents no longer in its control, the Court proceeds on the basis that all directly relevant documents that were created are extant and have been disclosed.

3.8 The obligation to discover documents is a continuing one. Rule 20.20 imposes a duty on a party to supplement their discovery if further discoverable documents are identified, save only for documents created after the commencement of the proceeding in respect of which privilege is properly claimed. No other exemption applies. In the absence of a claim for privilege, documents relevant to the agreed categories, whenever created, must be discovered if they are, or have been, within the party’s control.

Application

3.9 Three propositions concerning Mr McKenzie’s conduct are incontrovertible:

- (a) *First*, Mr McKenzie engaged in extensive communications using the encrypted messaging application Signal: with Person 17 from 2018 to 2021; with Danielle Scott principally from late 2020 to early 2021; and with Emma Roberts from March 2021 onward.
- (b) *Secondly*, none of these communications were disclosed by Mr McKenzie in the proceedings below, and even now they remain undisclosed.
- (c) *Thirdly*, at least some of the communications were discoverable by reason of their falling within the agreed categories of documents ordered for discovery, and in respect of those communications, Mr McKenzie failed to comply with his discovery

obligations, either by failing to produce communications that remained within his possession, custody or control, or, if no longer held, by failing to disclose and explain what became of them in accordance with his Part 3 Obligation.

- 3.10 The deliberate use by Mr McKenzie of the encrypted messaging application Signal is itself telling. Signal is notorious for its features that automatically delete messages either through default disappearing message settings or manual user deletion, thus frustrating discovery and record retention. The choice of such a platform supports an inference that Mr McKenzie intended to avoid the preservation and disclosure of communications relevant to the issues in the trial.
- 3.11 In all the circumstances, Mr McKenzie's failure to comply with fundamental obligations of discovery, including the Part 3 Obligation, and the misleading nature of his affirmed verification, constitute a serious irregularity that compromises the integrity of the trial and the appeal. That failure remains unremedied. The Court should not “take a chance” on the issue of whether those documents might have been deployed by the Appellant to meet the Respondents’ defences since to do so would risk determining the appeal on a hypothetical and potentially false basis (*Clifton* at [203]). The appeal should be reopened, and a new trial ordered.

Arthur Moses SC

Nicholas Olson

Thomas Scott

Counsel for the Appellant

28 April 2025