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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



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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Ben Roberts-Smith v Fairfax Media Publications Pty Ltd & Ors

NSD 689/2023

**RESPONDENTS' OBJECTIONS TO EVIDENCE ON
APPELLANT'S INTERLOCTORY APPLICATION AND PROPOSED AMENDED NOTICE OF APPEAL**

A. Affidavit of Monica Helen Allen sworn 27 March 2025 and Exhibit MHA-1

Paragraph	Portion	Objection	Proposed Ruling
7	Whole and email at page 1 of Exhibit MHA-1 and USB of audio file	<p><u>On the interlocutory application:</u></p> <p>Evidence Act 1995 (Cth) (EA), ss 135 and 138.</p> <p>The Court would infer that the audio recording was communicated, or initially recorded, unlawfully. The conversation was recorded without Mr McKenzie's knowledge or consent: McKenzie Affidavit, [7]. The only counterparty to the call was Person 17, who lives in Queensland: McKenzie Affidavit, [6]-[7]. In Queensland, it is an offence for a party to a private conversation who records that conversation to communicate or publish the recording to any other person: <i>Invasion of Privacy Act 1971</i> (Qld), s 45(1). Whether Person 17 shared the recording with the</p>	<p><u>On the interlocutory application:</u></p> <p>Reject</p> <p><u>On the appeal:</u></p> <p>Reject</p>

Paragraph	Portion	Objection	Proposed Ruling
		<p>Appellant's lawyers directly, or to some other person first, there is likely illegality, or at least impropriety, in the chain.</p> <p>Once that conclusion is reached, EA s 138 means that the audio recording (and derivative evidence of it contents, such as the transcript in the email) must not be admitted unless the Appellant can establish that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that was obtained in the way in which the evidence was obtained.</p> <p>Its probative value is low. It is a fragment of a conversation, shorn of context. Far from a clear admission of the quite specific misconduct of which the Appellant now accuses him, Mr McKenzie's language is ambiguous, and its meaning contested.</p> <p>In any event, the Court should exclude the recording under s 135 of the Evidence Act. There is a real danger that the recording would be unfairly prejudicial to the Respondents and be misleading. The recording is an 85-second snippet of a longer telephone call. It is undated. The Respondents do not know if it has been edited to omit portions within the snippet, or if the balance of the call would cast Mr McKenzie's words in a different light. The circumstances in which the Audio Recording has come to light – anonymously emailed to the Appellant's lawyer while this Court is reserved, then distributed to the media – suggest that its release was calculated to harm and embarrass Mr McKenzie and the Respondents. The risk that it has been edited to cast him in the worst possible light is real. Four</p>	

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		<p>years later, Mr McKenzie does not independently recall the phone call. This places the Respondents at a forensic disadvantage, because they cannot rely on his recollection to offset the danger that the snippet is misleading. These dangers substantially outweigh its probative value.</p> <p><u>On the appeal:</u></p> <p>In addition to the matters above, the contents of the email and audio recording are hearsay. Notably, nothing in the recording could be admissible as an admission against any respondent other than Mr McKenzie (s 87).</p>	
8	Whole and website article at pages 2 to 9 of Exhibit MHA-1 and USB of broadcast	<p><u>On the interlocutory application:</u></p> <p>Relevance</p> <p><u>On the appeal:</u></p> <p>Relevance; Hearsay</p>	<p><u>On the interlocutory application:</u></p> <p>Reject</p> <p><u>On the appeal:</u></p> <p>Reject</p>
10	Whole	<p><u>On the interlocutory application:</u></p> <p>Relevance</p> <p><u>On the appeal:</u></p> <p>Relevance; Hearsay</p>	<p><u>On the interlocutory application:</u></p> <p>Reject</p> <p><u>On the appeal:</u></p> <p>Reject</p>

Paragraph	Portion	Objection	Proposed Ruling
11	Whole	<p><u>On the interlocutory application:</u></p> <p>See objection to [7] above. In addition, Ms Allen's assertion that the recording contains an "admission" is inadmissible opinion evidence.</p> <p><u>On the appeal:</u></p> <p>See objection to [7] above.</p>	<p><u>On the interlocutory application:</u></p> <p>Reject</p> <p><u>On the appeal:</u></p> <p>Reject</p>

13	Whole including the affidavits listed at (a) to (i) (pages 10 to 476 of Exhibit MHA-1)	<p><u>On the interlocutory application:</u></p> <p>EA s 135</p> <p>By Paragraph 3 of the Appellant's Interlocutory Application, the Appellant seeks to have leave to rely on all of Exhibit MHA-1 as evidence on the appeal. That includes the 9 affidavits referred to in this paragraph.</p> <p>The Appellant then seeks to rely on that evidence in support of his new ground of appeal (which was not run at trial).</p> <p>There would be real unfair prejudice in admitting the evidence in circumstances where each of the affidavits was sworn in separate proceedings to which the Respondents were not a party. None of the deponents has sworn an affidavit in respect of the Appellant's Interlocutory Application and the Respondents therefore do not have any opportunity to cross-examine.</p> <p>It is particularly notable that the Appellant seeks to rely on his own affidavit in earlier proceedings but has not been willing to swear an affidavit on the present application. It is to be inferred that he did not wish to expose himself to the risk of cross-examination.</p> <p>Further, all of these affidavits (and the information contained therein) were available to the Respondent at the time of trial.</p> <p><u>On the appeal:</u></p> <p>Hearsay; s 135</p>	<p><u>On the interlocutory application:</u></p> <p>Reject</p> <p><u>On the appeal:</u></p> <p>Reject</p>
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Paragraph	Portion	Objection	Proposed Ruling
15	Second line, "the admissions"	On the interlocutory application <u>EA, s 76</u> <u>See objection to [11] above.</u>	On the interlocutory application <u>Reject</u>

B. Affidavit of Monica Helen Allen sworn 30 March 2025

Paragraph	Portion	Objection	Proposed Ruling
3	Whole and email at page 1 of Exhibit MHA-1	On the interlocutory application: See objection to [7] of 27 March 2025 affidavit. On the appeal: See objection to [7] of 27 March 2025 affidavit.	On the interlocutory application: Reject On the appeal: Reject