

NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	29/04/2025 7:44:01 PM AEST
Date Accepted for Filing:	29/04/2025 7:44:05 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



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.

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 WAIVER OF PRIVILEGE OVER 14 MARCH 2021 LEVITAN FILE NOTE

1. INTRODUCTION

- 1.1 The Appellant has filed an interlocutory application to re-open his appeal, lead fresh evidence in the appeal and amend his notice of appeal. The application arises from the emergence of further evidence which the Appellant says demonstrates serious forensic misconduct by the Second Respondent, Mr Nick McKenzie, affecting the integrity of the trial, and alleges that a miscarriage of justice has occurred.¹ That application will be heard by the Full Court on 1 and 2 May 2025.
- 1.2 A matter has arisen in respect of a document produced in response to a Notice to Produce and subpoenas, being a handwritten and contemporaneous file note prepared by the Respondents' solicitor, Mr Dean Levitan, relating to a meeting held on 14 March 2021 at the home of Ms Emma Roberts (the Appellant's former spouse), attended by Ms Roberts, her friend Ms Danielle Scott and another friend named Melissa Groves,, Mr Levitan and fellow solicitor for the Respondents Mr Peter Bartlett, and Mr McKenzie (the **File Note**).²
- 1.3 The Respondents claim that the File Note is subject to their legal professional privilege. The Appellant contend that there has been an issue waiver of that privilege by reason of what is said in Mr McKenzie's affidavit affirmed 14 April 2025, served in response to the Appellant's interlocutory application. The Appellant accordingly seeks access to it.
- 1.4 On 29 April 2025, the presiding judge of the Full Court allocated to the appeal, Perram J, made an order that the matter be determined on the papers by a Justice of the Court other than a member of the Full Court.

¹ See Ground 17 and particulars 35 to 38 of the proposed Amended Notice of Appeal, which is annexed to the Appellant's interlocutory application dated 27 March 2025.

² Respondents' Privilege Schedule dated 28 April 2025, Item 12, being **Annexure A** to these submissions.

2. RELEVANT FACTS

- 2.1 The Appellant's application to reopen his appeal was precipitated by the emergence of an audio recording of a conversation involving Mr McKenzie, in which Mr McKenzie admitted that Emma Roberts, the Appellant's former spouse, and Danielle Scott, Ms Roberts' friend, 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**).³
- 2.2 On 14 April 2025, the Respondents served evidence in response to the application, including an affidavit of Mr McKenzie affirmed that same day. In that affidavit, Mr McKenzie gives the following evidence relevant to this matter:
- (a) In August 2020, Mr McKenzie he had at least two conversations with Ms Scott (which he recorded but did not discover in the Court below): [45], Exhibit NM-3.
 - (b) In late 2020 and early 2021, he continued to correspond with Ms Scott in principally by text using the encrypted messaging app Signal: [46].
 - (c) On around 3 March 2021, he participated in a call with Ms Scott, Messrs Levitan and Bartlett and another solicitor for the Respondents: [48].
 - (d) On 5 March 2021, he travelled to Cairns to meet Ms Scott, who showed him the contents of certain USBs which she said had been buried by the Appellant in the backyard of the house he shared with Ms Roberts: [49].
 - (e) On 10 March 2021, he received images from Ms Scott and forwarded them to Mr Levitan: [53]-[55].
 - (f) 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: [53]-[55]
 - (g) He did not believe any information he received from Ms Scott or Ms Roberts was privileged and he did not believe he was acting improperly in obtaining it, and that no one ever suggested to him that any of the material he received might be privileged: [43].

³ McKenzie Affidavit, [9].

- (h) He attended a meeting on 14 March 2021 at the home of Ms Emma Roberts, which was also attended by Mr Peter Bartlett, Mr Dean Levitan, Ms Danielle Scott, and a friend of Ms Roberts: [60].
- (i) He did not keep a file note of the 14 March 2021 meeting: [60].
- (j) He did not recall Ms Roberts sharing any communications or documents exchanged between the Appellant and his lawyers at the 14 March 2021 meeting, nor did he recall anything to suggest to him that she was sharing information she had obtained from looking at communications or documents exchanged between the Appellant and his lawyers [60]-[61].
- (k) Around March or April 2021, he engaged in the conversation recorded by the McKenzie Recording: [11].

2.3 There are several exhibits to Mr McKenzie's affidavit. Exhibit NM-1 contains, among other things, screenshots of text messages between Ms Scott and Mr McKenzie, Ms Scott and Ms Roberts, and emails between Mr McKenzie and Mr Levitan in respect of which privilege has presumably been waived.

2.4 On 15 April 2025, the day after the service of the McKenzie Affidavit, the Respondents' solicitors wrote to the Appellant's solicitors indicating that, in preparing for the current application before the Court, the Respondents had identified a document responsive to the Notice to Produce for inspection dated 15 February 2022 and served by the Appellant at trial (the **2022 NTP**), being the File Note.⁴ The 2022 NTP had been called on in Court on 16 February 2022 albeit no documents were produced in response at that time.

2.5 On 17 April 2025, the Appellant served a Notice to Produce to Court on the Respondents and, with the leave of the Full Court, subpoenas to produce documents on Messrs McKenzie and Bartlett. Paragraph 4 of the subpoenas to Messrs Levitan and Bartlett was in these terms (emphasis added):

All notes of any meeting attended by Emma Roberts or Danielle Scott, on the one hand, and Nick McKenzie and any employee or partner of Minter Ellison, as well as any counsel briefed on the matter, on the other hand in the period between 1 August 2020 and 27 July 2022, including but not limited to the meeting on 14 March 2021.

⁴ Letter from Minter Ellison to BlackBay Lawyers dated 15 April 2025, being **Annexure C** to these submissions.

- 2.6 On 23 April 2025, Perram J heard an application by the Respondents seeking to set aside the Notice to Produce and the subpoenas.
- 2.7 On 24 April 2025, Perram J made orders which, in effect, substantially narrowed the categories of documents sought by the Notice to Produce and the subpoenas. His Honour subsequently gave reasons: *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2025] FCA 414.
- 2.8 On 28 April 2025, the Respondents produced documents pursuant to the Notice to Produce dated. In addition, on 29 April 2025, Messrs Peter Bartlett and Dean Levitan, produced documents pursuant to the subpoenas. Mr Bartlett's production was accompanied by a Privilege Schedule which claimed legal professional privilege over the File Note, which the Respondents maintain in a Privilege Schedule provided in response to the Notice to Produce. (see **Annexure B** to these submissions).
- 3. THERE HAS BEEN AN IMPLIED WAIVER OF PRIVILEGE OVER THE FILE NOTE**

Principles

- 3.1 The Respondents' claim of privilege is governed by the common law: *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 2)* (2011) 283 ALR 299 at [6]–[9]. The *Evidence Act 1995* (Cth) does not address issues of inspection of documents produced in answer to a subpoena.
- 3.2 A person who would otherwise be entitled to the benefit of legal professional privilege may waive that privilege. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege: *Mann v Carnell* (1999) 201 CLR 1 at 13 [28]. There, the plurality said (at 13 [29]):

What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

- 3.3 In *AWB v Cole (No 5)* (2006) 155 FCR 30, Young J said (at 76):

[164] ...it is well established that a voluntary disclosure of privileged documents can result in a waiver of privilege over those documents and associated material. The test applied to determine the scope of any waiver of associated material is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject

matter: *Maurice* at CLR 482 and 484; ALR 35 and 36 per Gibbs CJ, CLR 488; ALR 39 per Mason and Brennan JJ, and CLR 489 9; ALR 47 per Dawson J.

[165] In *Maurice*, Gibbs CJ said at 482:

... Similarly, where a party disclosed a document which contained part only of a memorandum which dealt with a single subject-matter, and then read the document to the judge in the course of opening the case, it was held that privilege was waived as to the whole memorandum: *Great Atlantic Insurance Co v Home Insurance Co*. In that case Templeman LJ said:

... the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in court it cannot be erased.

The same test must be applied in deciding whether the use in legal proceedings of one document impliedly waives privilege in associated material. In *Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation [No 2]* Mustill J dealt with this question and suggested the following test:

... where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.

3.4 In *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, Allsop J (as the Chief Justice then was) said waiver arises when (at 519 [58]):

the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the confidential communication or which necessarily lays open the confidential communication to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication.

Application

3.5 There has been an implied waiver of any privilege claimed by the Respondents over the File Note for the following reasons.

3.6 The Respondents have placed in issue the contents of the meeting held on 14 March 2021 at the home of Ms Roberts. Mr McKenzie, in his affidavit, deposes to having attended the meeting and that, at that meeting, neither Ms Roberts nor Ms Scott disclosed any communications or documents exchanged between the Appellant and his lawyers, and that he did not receive or understand anything said to constitute privileged material. Mr McKenzie's evidence is, however, silent as to whether Ms Scott disclosed any such communications or documents at the meeting.

- 3.7 In their written submissions in response to the Appellant's application to reopen the appeal, the Respondents (at [61]) expressly rely on Mr McKenzie's affidavit, including [60], to contend that he did not knowingly obtain privileged information from Ms Roberts or Ms Scott. The Respondents are, accordingly, relying on Mr McKenzie's version of the substance and effect of the meeting as part of their answer to the Appellant's application.
- 3.8 The Respondents cannot deploy the contents of a privileged meeting in this way by adducing evidence of what occurred and asserting that no privileged information was exchanged while simultaneously asserting privilege over the contemporaneous record of the same meeting. To do so gives rise to the sort of inconsistency explained in *Mann v Carnell* at 13 [29]. That is, the Respondents' conduct is inconsistent with the maintenance of the confidentiality which the privilege is designed to protect.
- 3.9 This is a textbook case of "issue waiver" (a species of implied waiver) as described in *Intertan* at [58], where a party makes an express or implied assertion that necessarily lays open what would otherwise be a privileged communication to scrutiny. By asserting, through Mr McKenzie's affidavit at [60]-[61], that no privileged information was discussed or conveyed at the meeting, the Respondents have made the contents of the File Note directly relevant to a fact in issue on the application to reopen the appeal and have invited the Court to accept that assertion. That is enough to give rise to an inconsistency with the maintenance of privilege.
- 3.10 It is not necessary for the Respondents to have directly quoted or exhibited the File Note for waiver to arise. As explained by the Full Court in *Federal Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at [47], the question is whether the party has "*made an assertion as part of [its] case that puts the contents of the privileged document in issue, or necessarily lays them open to scrutiny*". Here, Mr McKenzie's affidavit invites the Court to accept the Respondents' narrative of the meeting – one which the File Note is uniquely positioned to confirm or contradict. To allow them to do so while withholding the File Note would "risk injustice through its real weight or meaning being misunderstood": *AWB* at [165].
- 3.11 A mere denial of the opposing party's assertion may not suffice to amount to a waiver, but the Respondents have gone further. They have positively asserted a version of the facts from Mr McKenzie, relied on it in resisting an application to reopen the appeal, and seek to shield the best evidence of what occurred. That is the paradigm of waiver.

3.12 The Appellant invites the Court to inspect the File Note in determining the question of waiver: *TerraCom Ltd v Australian Securities and Investments Commission* (2022) 401 ALR 143 at [75] (Stewart J), an approach endorsed by the Full Court on appeal in *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCAFC 151 at [22]. The judicial inspection of a document over which privilege is claimed is a recognised mechanism to resolve competing inferences about whether the document has been relied on, whether its contents are inconsistent with assertions made, or whether it contributes to a forensic position taken in litigation.

4. CONCLUSION

4.1 For the above reasons, it would be plainly “unfair” (in the *Mann v Carnell* sense) to allow the Respondents to continue to assert privilege over the File Note. The Court should find that any privilege has been impliedly waived and should order that the File Note be produced to the Appellant forthwith.

Arthur Moses SC

Nicholas Olson

Thomas Scott

Counsel for the Appellant

29 April 2025