NOTICE OF FILING

Details of Filing

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ROBERTS-SMITH VC MG

v

FAIRFAX MEDIA PUBLICATIONS PTY LTD & ORS

APPELLANT'S OUTLINE OF SUBMISSIONS IN RELATION TO RESPONDENTS' APPLICATION TO STRIKE OUT AMENDED APPLICATION

1. INTRODUCTION

1.1 The Appellant has filed an Amended Interlocutory Application dated 28 April 2025 (**Amended Application**). In support of the Amended Application, the Appellant has filed and served:

(a) an affidavit of Monica Allen sworn 28 April 2025; and

(b) an outline of submissions dated 28 April 2025 (**Primary Submissions**), which was directed at new Particular 36A and the proposed amendment to Particular 37, both concerning what the Appellant contends were deficiencies in the Second Respondent's discovery in the Court below. These particulars relate to proposed further Ground 17 (i.e., miscarriage of justice).

1.2 While there is no requirement under the *Federal Court Rules 2011* (Cth) to seek leave before filing an amended interlocutory application, the Respondents have since filed an interlocutory application dated 29 April 2025 seeking an order striking out the Amended Application or an order removing it from the court file (**Strike Out Application**).

2. THE AMENDED APPLICATION

2.1 The Amended Application introduces five changes to the Interlocutory Application:

(a) It revises the allegation in Particular 35 of Ground 17, broadening the scope from information concerning the Appellant's legal strategy to include confidential and privileged communications with his legal representatives and information derived from such communications.

(b) It adds a new Particular 36A, asserting that the Second Respondent, Mr McKenzie, did not comply with his discovery obligations.

(c) It amends Particular 37 to contend that, but for Mr McKenzie's discovery failure, there is a real possibility that the outcome of the trial would have been different.

(d) It seeks additional relief in the form of a direction that Mr McKenzie provide further verified discovery in accordance with discovery orders made by Besanko J on 2 August 2019.

(e) It seeks leave under s 27 of the *Federal Court Act 1976* (Cth) to rely on further evidence, including affidavits and oral evidence from Mr McKenzie, Mr Bartlett, Mr Levitan, and the Third Allen Affidavit.

3. THE STRIKE OUT APPLICATION

The basis of the Strike Out Application

3.1 The Appellant apprehends from Respondents' written submissions in support of the Strike out Application dated 29 April 2025 (**RS**) that the basis of the Strike Out Application, in summary, is as follows:

(a) that the Amended Application introduces a new and different case too late, depriving the Respondents of a fair opportunity to respond (i.e., its prejudicial effect) (**Prejudice Objection**);

(b) the Amended Application lacks sufficiently particularity with respect to the alleged discovery failures (**Particularity Objection**); and

(c) that the Appellant has failed to grapple with a fundamental issue, namely that documents created after the commencement of the proceedings and protected by privilege are not required to be discovered (**Merits Objection**).

3.2 The Respondents do not oppose the amendments in Prayer [3(b) and (c)] of the Amended Interlocutory Application: RS[44].

3.3 The Appellant relies on his Primary Submissions in answering the Strike Out Application, as well as this outline of submissions which has been prepared after receipt of RS.

Response to the Prejudice Objection

3.4 The Amended Application is the product of:

(a) evidence given by Mr McKenzie in affidavits dated 14 and 24 April 2025 (including multiple exhibits to the former), received only after the Appellant filed his **Interlocutory Application** dated 27 March 2025, to which the Amended Application relates;

(b) matters that arose at the hearing before Perram J on 23 April 2025, including an articulation by the Respondents of how they understood Ground 17 and the corresponding particulars of the proposed Amended Notice of Appeal (being annexed to the Interlocutory Application);

(c) argument made in response to subpoenas being issued to Messrs Levitan and Bartlett; and

(d) documents produced by the Respondents on 28 April 2025 in response to the Notice to Produce dated 16 April 2025.

3.5 The amendments reflected in the Amended Application were necessitated by developments that occurred only after the filing of the Interlocutory Application on 27 March 2025. In particular, the Appellant was not able to formulate the discovery-related aspects of the amended case, nor to revise the articulation of Ground 17, until the relevant evidence, arguments, and productions had emerged.

3.6 The timing constraints affecting the determination of the Appellant's Interlocutory Application are not ideal. But they are not of the making of the parties. One of the judges making up the Full Court allocated to the appeal must retire in a little over a month. But for that, it is likely that there would have been a "bifurcated" process by which the Interlocutory Application would be heard and determined in advance of hearing the reopened appeal.

3.7 The Appellant accepts that the Respondents are entitled to lead evidence in response to the Amended Application and will not be able to do so before 1 May 2025 (i.e., tomorrow). In those circumstances, the Appellant consents to the Respondents being granted additional time to file and serve responsive to the Amended Application, which he says should be limited to one week. As for the impact on the current hearing dates (1 and 2 May 2025), the Appellant proposes that the hearings proceed, but that the Respondents be allowed to keep their case open on the discovery failure issue and, upon filing and serving responsive evidence, the Full Court can resume to receive that evidence and hear any argument in respect of it. He proposes that occur in the week commencing 11 May 2025.

Response to Particularity Objection

3.8 It bears noting that the Appellant has been placed in an invidious forensic position when it comes to assessing the discoverability of documents created or received by Mr McKenzie as it has become apparent that he did not take steps to preserve potentially discoverable evidence. In fact, he took steps to destroy such by use of a disappearing message feature on the Signal app, the effect of which was to destroy communications automatically and prevent their preservation.[1] In these circumstances, the Appellant cannot particularise undiscovered documents. That is within the knowledge of the Second Respondent.

3.9 The Appellant's allegations sufficiently identify the categories of material concerned — including Signal communications with Ms Roberts, Ms Scott and Person 17, and related media.

3.10 The Court is equipped with the necessary powers to address discovery defaults that impact the integrity of proceedings, whether by striking out claims or defences, granting a new trial, or drawing adverse inferences:

(a) In *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264, the plaintiff deliberately disposed of a mobile phone to avoid having to discover it. The defendant sought discovery of it to answer allegations of defamatory conduct made in the statement of claim. As a result of the plaintiff's default, the parts of the statement of claim for which discovery of the phone was sought were struck out. Allsop P found that while the defendant may still have been able to run its defence without the phone, the plaintiff's conduct created a "not insignificant risk" to the ability of the defendant to successfully propound its defence (at [95]).

(b) In *Zafiriou v Saint-Gobain* [2014] VSCA 331, an unsuccessful plaintiff was granted a new trial after his solicitor came into possession of documents after judgment which the defendant ought to have discovered but failed to do so. Osborn JA determined that the documents ought to be treated as "potentially having the evidentiary significance and weight" most favourable to the plaintiff's case (at [74]). They raised questions about the credit of the defendant's witnesses, which in

[1] See, for example, pages 159-160, 163-166, 168, 170-173, 189, 196, 199, 201-202, 205-206 of Exhibit NM-1 to Mr McKenzie's 14 April 2025 affidavit, which indicate that messages with Ms Scott were set to disappear after 1 hour. It is not clear from Mr McKenzie's affidavits how these messages were preserved.

turn raised a real possibility that the plaintiff would have succeeded if discovery was properly made at first instance, thus providing the basis for a new trial (at [75]).

3.11 By reason of the Second Respondent's discovery failures, the Appellant has been deprived of the opportunity to seek and obtain procedural remedies of the kind described above. In particular, the destruction and non-disclosure of potentially discoverable material has shut the Appellant out from being able to frame a case for striking out parts of the Respondents' defence, or for obtaining an adverse inference at trial. In these circumstances, it is neither fair nor appropriate to require the Appellant to particularise with precision material that has been deliberately withheld or destroyed.

Response to Merits Objection

3.12 The Appellant approaches this objection as if it were a conventional strike out application in respect of a pleading, in that the Court would only strike out a pleading in whole or in part if it discloses no reasonable cause of action: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128–130).

3.13 The mere fact that a case appears to be a weak one is not of itself sufficient to justify striking out of the action: *Allstate Life Insurance Co v ANZ Banking Group Ltd* [1994] FCA 636.

3.14 The Appellant's contention that the Second Respondent has given inadequate and non-compliant discovery in the Court below is sufficiently arguable so as to survive a strike out, for the reasons given in the Primary Submissions and the submissions below.

3.15 In relation to what is said at RS[31]-[40], the Appellant accepts that r 20.20(2) of the *Federal Court Rules 2011* (Cth) relieves a party from the requirement to discover documents created after the proceeding was started, if the party is entitled to claim privilege from production for the document.

3.16 The ambit of litigation privilege is contentious: *Edwards v Nine Network Australia Pty Limited (No 4)* [2022] FCA 1496 at [17] (Katzmann J). As much was discussed by Wigney J in *Australian Competition and Consumer Commission v **NSW Ports** Operations Hold Co Pty Ltd* [2020] FCA 1232 at [41]-[47].

3.17 The documents that the Appellant contends ought to have been discovered by Mr McKenzie (most likely in Part 3 of his List of Documents given his preference for disappearing messages) are documents on the category discussed by Wigney J in *NSW Ports* at [45]:

> There are two accepted categories of litigation privilege involving third party communications which are of particular relevance to the privilege claims made in this matter […]
>
> The second relevant category involves communications or documents passing between a party and a third person. That category of communications or documents will be privileged if they were made with reference to litigation, commenced or anticipated, and were made for the dominant purpose of being put before the party's solicitor with the object of obtaining the solicitor's advice or enabling the solicitor to prosecute or defend the action

3.18 That is to say, they were documents recording communications between Mr McKenzie, a party, and witnesses, in the absence of his solicitors.

3.19 As Wigney J goes on to explain in [46]-[47] of *NSW Ports*, legal professional privilege attaches only to confidential communications, it being "an essential requirement" to attract the privilege. The issue concerning the requirement of confidentiality becomes particularly acute in the case of communications between a party or the party's solicitor and a witness or potential witness. In such a case, the details of an interview with the witness "*would not … be confidential so far as the potential witness is concerned in the absence of special circumstances, because the potential witness in that situation is not a person owing any duty of confidentiality to the party or the party's solicitor*", citing *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 22)* (1988) 14 NSWLR 132 at 133-134.

3.20 The party claiming privilege bears the onus of proving the facts necessary to establish the relevant privilege, including that the communications or documents in question were made or created for the required dominant purpose: *NSW Ports* at [49]. As things stand, there is no evidence to support the contention that the documents recording communications between Mr McKenzie and witnesses, such as Person 17, Ms Roberts or Ms Scott, would have possessed the necessary quality of confidence so as to attract legal professional privilege or indeed journalist privilege, which then would have rendered the documents non-discoverable under r 20.20(2). The Appellant accepts that such may be forthcoming from the Respondents should they be granted additional time to adduce it (as proposed in 3.7 above).

3.21 The Respondents' reliance on r 20.20(2) presupposes that the relevant communications between Mr McKenzie and witnesses fall within a recognised head of privilege. However, even where litigation privilege might apply in theory, the absence of confidentiality (particularly where a communication involves third-party witnesses not owing a duty of confidence) may defeat the claim: *NSW Ports* at [47]. The Appellant's case is that, to the extent such documents ever existed, they were not subject to privilege and should have been

disclosed under r 20.17(2)(b). That is a question of fact and law, not amenable to resolution on a strike out application.

4. CONCLUSION

4.1 For the foregoing reasons, the Strike Out Application should be dismissed. The Amended Application should be heard by the Full Court on 1 and 2 May 2025, subject to the Respondents being granted a reasonable opportunity to lead evidence in response to the discovery-related aspects of the Amended Application.

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

Counsel for the Appellant

30 April 2025