

## NOTICE OF FILING

### Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	30/04/2025 11:36:42 AM AEST
Date Accepted for Filing:	30/04/2025 11:36:47 AM 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



*Sia Lagos*

Registrar

### Important Information

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No. NSD 689, 690 and 691 of 2023

Federal Court of Australia

District Registry: New South Wales

Division: General

On appeal from the Federal Court of Australia

**BEN ROBERTS-SMITH**

Appellant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD ACN 003 357 720 and Ors**

Respondents

**RESPONDENTS' SUBMISSIONS**

**ON THE ISSUE OF WAIVER OF PRIVILEGE OVER 14 MARCH 2021 FILE NOTE**

## **I. INTRODUCTION**

1. The Appellant seeks access to a file note dated 14 March 2021 prepared by the Respondents' solicitor, Dean Levitan of MinterEllison (**File Note**). The File Note was produced in response to a notice to produce issued to Mr McKenzie, as well as subpoenas issued to Mr Levitan and Mr Bartlett.
2. The Appellant accepts that the File Note is privileged. That concession is properly made. The File Note records a meeting attended by a client, his lawyers, and a potential witness in litigation. It is a confidential document created by a lawyer for the dominant purpose of use in relation to litigation which was then on foot. However, the Appellant contends that there has been an issue waiver of the Respondents' privilege by the affidavit of the Second Respondent, Mr McKenzie, affirmed 14 April 2025 (**McKenzie Affidavit**). These submissions explain why that is not so, and respond to the Appellant's submission on this topic filed on 29 April 2025 (**AS**).

## **II. BACKGROUND**

3. By an interlocutory application filed on 25 March 2025, the Appellant seeks leave to reopen his appeal to adduce further evidence and amend his Notice of Appeal (**Appellant's Interlocutory Application**). The proposed Amended Notice of Appeal claims there has been a miscarriage of justice and denial of fair trial due to alleged misconduct by Mr McKenzie, the Second Respondent, and seeks a retrial.
4. The misconduct alleged is particularised in the particulars to the proposed Amended Notice of Appeal. The allegation is that Mr McKenzie "engaged in wilful misconduct in the proceedings below by improperly and unlawfully obtaining and retaining information concerning the Appellant's legal strategy concerning the trial that was confidential and privileged to the Appellant" (Particular 35). As Perram J put it in *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2025] FCA 414 at [2]:

The appellant contends that Ms Roberts had access to one of the appellant's email accounts and his suggestion will be that Ms Roberts and/or Ms Scott were passing the appellant's privileged communications to Mr McKenzie who was then utilising them against the appellant in the conduct of the respondents' defence of the appellant's defamation proceedings.

5. One of the pieces of further evidence the Appellant seeks to adduce is a snippet of an audio recording of a telephone conversation between Mr McKenzie and a witness in the trial known as Person 17 (**Audio Recording**), recorded without Mr McKenzie's consent and provided anonymously to the Appellant's former lawyer last month. In the Audio Recording, Mr McKenzie says that Emma Roberts, the Appellant's ex-wife, and her friend Danielle Scott are "actively ... briefing us on [Mr Roberts-Smith]'s legal strategy in respect of you." The audio recording is from March or April 2021: McKenzie Affidavit, [11].

6. Mr McKenzie denies the allegation of misconduct. In the McKenzie Affidavit, Mr McKenzie explains what he believes he meant in the Audio Recording. He deposes to his dealings with Ms Scott and Ms Roberts.
7. The File Note was made at a meeting held at the Indooroopilly house of the Appellant's ex-wife, Emma Roberts on 14 March 2021. Also in attendance were the Second Respondent, Mr McKenzie, MinterEllison partner Peter Bartlett, Ms Roberts' friend Danielle Scott, and another friend: McKenzie Affidavit, [60]. At the time, Ms Roberts was a potential witness for the Respondents. The Respondents ultimately called her to give evidence.
8. Mr McKenzie addresses his dealings with Ms Roberts at [59]-[61] of the McKenzie Affidavit. At [59], he says:

59. In the case of Emma, I sent Emma a text message in late 2020 seeking to initiate communications with her but she had never responded to that message.

9. The meeting of 14 March 2021 is mentioned at [60]. That paragraph reads:

60. My first interaction with Emma was when I met with her at her house at Indooroopilly in Queensland on 14 March 2021. Dean and Peter were also present, together with Danielle and another of Emma's friends. I did not keep a note of this meeting. I do not recall Emma then, or at any other time, sharing any communications or documents exchanged between Roberts-Smith and his lawyers. Nor do I recall her saying anything to me that suggested she was sharing information she had obtained from looking at communications or documents exchanged between Roberts-Smith and his lawyers.

10. Mr McKenzie deposes to the balance of his dealings with Ms Roberts in the following paragraph:

61. After the meeting at Indooroopilly on 14 March 2021, I cannot remember meeting Emma again, other than one occasion when I met her in Sydney and Emma, Danielle, Dean Levitan and I had dinner. That dinner was not for the purpose of Emma or Danielle sharing any information or material relevant to the case and I do not recall them doing so. Emma and I corresponded occasionally by text on Signal in the lead up to trial, and during the trial, but Emma never shared with me information or documents that I believed came from Roberts-Smith's communications with his lawyers.

### III. PRINCIPLES

11. Waiver arises where a party has engaged in conduct which is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. The authorities concerning issue waiver were considered by the Full Court in *Commissioner of Taxation v Rio*

*Tinto Ltd* (2006) 151 FCR 341 at [47]-[61]. At [54], the Court stated:

...waiver comes about because the privilege holder's conduct is inconsistent with the continued confidentiality of the communication because he or she has put in issue the character or contents of the communication in pursuing. Right or claim, or has created a situation where another party must reasonably do so by way of a defence.

12. In *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, Allsop J observed at [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.

13. Privilege is not waived merely by a denial of assertions put against a party. In *DSE*, Allsop J observed at [115]:

The act of mere denial by the respondents of an assertion by the applicants is not an act by the respondents which expressly or impliedly makes an assertion about the contents of any privileged communication or which necessarily lays any such communication open to scrutiny. There is no act of the respondents inconsistent with the maintenance of the confidentiality. There is a joinder of issue on a question of fact to which the privileged communication can be seen as relevant. That is insufficient in my view for it to be concluded that there exists the necessary inconsistency enunciated by *Mann v Carnell*.

14. Questions of waiver are matters of fact and degree: *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [49].
15. The Appellant bears the onus in establishing waiver: *New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543 at [54].

#### IV. ANALYSIS

16. The Respondents have not waived privilege over the File Note. As the Appellant puts his case, the precise issue for determination is whether a relevant inconsistency arises due to [60] of the McKenzie Affidavit (AS [3.6]-[3.10]). It does not. Contrary to AS [3.6], he has not put the contents of the 14 March 2021 meeting in issue. That is primarily for two reasons.
17. *First*, on a proper construction of the affidavit, Mr McKenzie makes a blanket denial of the allegation against him rather than putting the contents of the meeting in issue: cf AS [3.1]]. The allegation against him in respect of Ms Roberts is that she passed him privileged and

confidential information. His evidence at [60] is a blanket denial of that allegation, across the entire course of dealings: “I do not recall Emma then, or at any other time, sharing communications or documents exchanged between Roberts-Smith and his lawyers” (emphasis added). In context, the following sentence is necessarily also a blanket denial: “Nor do I recall her saying anything me to” (i.e. then or at any other time) “that suggested she was sharing information she had obtained from looking at communications or documents exchanged between Roberts-Smith and his lawyers.” The mere fact that he refers to one particular dealing, before denying that Ms Roberts ever gave him privileged information in *any* of their dealings, does not place the contents of that dealing in issue. Consistently with Allsop J’s comments in *DSE*, Mr McKenzie joins issue on a question of fact to which the File Note can be seen as relevant, but that does not lay the File Note open to scrutiny.

18. Put shortly, a party cannot, by asserting an unconfined allegation of disclosure of privileged or confidential information, compel the other party either not to deny that on any occasion there was such disclosure, or to deny it and thereby waive any privilege attaching to a record of any such occasion.
19. Even if the relevant portion of [60] should be read as directed specifically to the meeting, Mr McKenzie does not put in issue what was actually said at the meeting. It is wrong to say, as the Appellant does at AS [3.1], that the Respondents “have positively asserted a version of the facts from Mr McKenzie”. Mr McKenzie does not positively assert that Ms Roberts said nothing relevant to the allegation that he obtained privileged communication from her. Instead, he says that he *cannot recall* her saying anything that *made him think* she was sharing the Appellant’s privileged communications. Because the central allegation is of wilful misconduct, the issue raised by the proposed Amended Notice of Appeal is Mr McKenzie’s perceptions. Mr McKenzie’s evidence is directed to that question, not truly to the contents of the meeting.
20. The Court need not inspect the File Note to determine this application: cf AS [3.12]. The party alleging waiver must establish that the contents of the document might be relevant to the question of waiver, in order for the Court to be able to inspect the document: *TerraCom Ltd v Australian Securities and Investments Commission* (2022) 401 ALR 143 at [75]-[79]. The Appellant has made no attempt to do so.

## V. CONCLUSION

21. For the foregoing reasons, the Appellant should be denied access to the File Note.

John Sheahan Hannah Ryan

Counsel for the Respondents

30 April 2025