

NOTICE OF FILING

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
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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



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.



Form 59
Rule 29.02(1)

Affidavit

No. NSD 689, 690 and 691 of 2023

Federal Court of Australia
District Registry: NSW
Division: General

BEN ROBERTS-SMITH

Appellant

FAIRFAX MEDIA PUBLICATIONS PTY LTD AND OTHERS

Respondents

Affidavit of: **Rebekah Giles**
Address: 135 King Street, Sydney NSW 2000
Occupation: Solicitor
Date: 1 May 2025

I Rebekah Giles, of 135 King Street, Sydney NSW 2000, say on oath:

1. I am the solicitor for Person 17 and am authorised to swear this affidavit on her behalf.
2. I make this affidavit in support of Person 17's interlocutory application for an interim and final orders pursuant to sections 37AI, 37AF and 37AG of the *Federal Court of Australia Act 1976*.
3. The facts I depose to in this affidavit are true based on my knowledge. Where statements in this affidavit are not made from my own knowledge, I depose to the subject matter of those statements to the best of my information and belief after making reasonable enquiries, and on the basis of the sources of information set out in this affidavit.
4. Person 17 seeks suppression and non-publication orders in respects of two sets of materials.

Filed on behalf of (name & role of party)	Person 17, Witness
Prepared by (name of person/lawyer)	Rebekah Giles, Lawyer for Person 17
Law firm (if applicable)	Giles George
Tel	1300 163 662
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Address for service (include state and postcode)	135 King Street Sydney NSW 2000

[Version 3 form approved 02/05/2019]

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First set of materials

5. This morning I was provided with pages 79 - 82 of Exhibit NM-1 to the affidavit of Nicholas McKenzie affirmed 14 April 2025 which also bear court book page references 812 – 815.
6. I am instructed that Person 17 believes that:
 - (a) these materials first appeared in the proceedings below as annexures:
 - i. to the outline of evidence of Danielle Scott (who was a proposed witness for the Respondents);
 - ii. to the outline of evidence of Ben Roberts-Smith, the Appellant; and
 - iii. the affidavit of Peter Bartlett sworn 22 April 2021 in support of an amended interlocutory application filed 7 April 2021(**Bartlett Affidavit**).
 - (b) The materials were only admitted as annexures to Bartlett Affidavit.
7. I have viewed the Bartlett Affidavit that I downloaded from the public file available on the Federal Court website and note Mr Bartlett at paragraph 12 of the affidavit exhibits the outline of Ms Scott as annexure PLB-7.
8. Annexure PLB-7 is redacted. Person 17 does not know if Annexure PLB-7 was redacted by order of the Court.
9. I am instructed that the fact of the existence of the materials was raised by the Appellant's counsel during the cross examination of Person 17 on 24 March 2022. Person 17, represented by Mr Matthew Lewis (now SC), made an application for orders in relation to the material but it was not ultimately pursued following the Appellant's counsel's agreement not to tender the materials. The transcript reference of this exchange is P4210 – 4212.
10. I am also instructed that the existence of the materials were also referred to by the Appellant in his evidence in chief but they were the subject of objection by the Respondents and were not tendered by the Appellant. I do not have a transcript reference at this time.
11. The fact of the existence of the materials was the subject of Justice Besanko's final judgment in the proceedings relevantly at Part 11 paragraphs 2211 to 2215 that I reproduce below:

"2211 I accept that at dinner on 5 April 2018, the applicant told Person 17 that she was like "crack" and that he would find it difficult to give her up. He also said to her that as long as they were on the same page, she had nothing to worry about. He said to her that if she did anything stupid or turned on the applicant, he would burn her house down and



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"it might not be you that gets hurt, but people you love and care about". He showed her photographs, including photographs of her diary or notebook.

2212 This behaviour was intimidatory, threatening and controlling. The evidence is supported by the following objective matters or contemporaneous, or near contemporaneous statements: (1) the threatening tone of the message from the applicant to Person 17 on 2 March 2018; (2) the fact that the applicant engaged Mr McLeod to undertake covert surveillance of Person 17 on 6 March 2018; (3) Person 17's notes on her telephone on 7 March 2018 and her statement in those notes that what the applicant had done with the Telegram messages the night before had "freaked" her out and that she wished to decide what messages she kept on her telephone; (4) the statement in the police report of 8 April 2018 that she was scared the high profile military person was "going to burn her house or access her bank account"; and (5) Person 17's text message to the applicant at 6.20 pm on 6 April 2018.

2213 The applicant's denials of engaging in this conduct are false.

2214 Furthermore, I do not accept the applicant's explanation for failing to disclose the video taken by Mr McLeod. I consider that the non-disclosure was due to an appreciation by the applicant that proof that he had had his lover followed and filmed without her knowledge would reflect poorly on him as indeed it does.

2215 I do not accept the applicant's explanation for going through Person 17's handbag after she had fallen asleep in the room at the Hotel Realm and photographing the unopened blister pack and the private notes. Even if there was a prospect of Person 17 having to go to hospital, he could have taken her handbag. I do not accept that he looked at the private notes because he was looking for a prescription schedule. The more likely inference, and the inference I draw, is that the applicant was looking to gather information which he could use to influence Person 17's behaviour should it be necessary to do so or to have a hold over her which he could use to his advantage if necessary."

12. I am instructed that, consistent with the submissions made by Person 17's counsel to the Court below:

- (a) that the materials contain information obtained by the Appellant from Person 17 unlawfully and in breach of confidence;
- (b) The materials are photographs of handwritten notes that are created by Person 17, setting out her views and intimate thoughts in relation to her relationship with the Appellant and were intended for her eyes only; and
- (c) The photographs were taken by the Appellant while Person 17 was unconscious.



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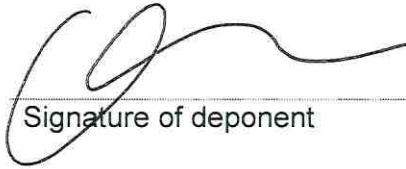
13. I am instructed that Person 17 regards the taking of the photographs in the materials as a threatening act of intimidation by the Appellant.
14. I am also instructed that if the materials were to become publicly available that they would cause Person 17 extreme mental distress and harm.

Second set of materials

15. This morning I was provided with pages 1 - 7 of Confidential Exhibit NM-2 to the affidavit of Nicholas McKenzie affirmed 14 April 2025 which also bear court book page references 957-963.
16. The materials contain highly sensitive information concerning Person 17's mental health conveyed by her husband in response to a communication from Mr McKenzie.
17. Person 17's husband instructs me that he had an expectation that the information was only to be conveyed to Respondents and their lawyers for the purpose of care and concern for Person 17's welfare as a result of her involvement in the proceedings below.
18. I am also instructed that if the materials were to become publicly available that they would cause Person 17 extreme mental distress and harm.

Sworn by the deponent
at Sydney
in New South Wales
on 1 May 2025
Before me:

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Signature of deponent



Signature of witness
Petar Strkalj, Solicitor