FEDERAL COURT OF AUSTRALIA

Roberts-Smith v Fairfax Media Publications Pty Limited (No 35)

[2022] FCA 560

[Redacted pursuant to the orders made in these proceedings on 19 May 2022 under ss 19(3A) and 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)]

File numbers:	NSD 1485 of 2018 NSD 1486 of 2018 NSD 1487 of 2018
Judgment of:	**BESANKO J**
Date of judgment:	13 May 2022
Date of publication of reasons:	27 May 2022
Catchwords:	**PRACTICE AND PROCEDURE** — Interlocutory application by applicant for leave to issue Subpoena to give evidence to person known as Person 81 — where time within which applicant was to file and serve outlines of evidence fixed for 12 July 2019 — where no outline of evidence of Person 81 served at that time — where Person 81 was Troop Commander during 2009 rotation to Afghanistan, including on mission to compound Whiskey 108 on 12 April 2009 — where at trial, at least one of respondents' witnesses gave evidence that Person 81 present when it is alleged two Afghan males emerged from tunnel in courtyard within Whiskey 108 — where respondents accept evidence relating to Person 81 arose for first time in their case and there has been no delay by applicant in seeking leave to issue Subpoena to give evidence to Person 81 — where evidence that Person 81 unwilling to speak with applicant's legal representatives and no detailed outline of Person 81's anticipated evidence put forward by applicant — where applicant contends sufficient notice of Person 81's anticipated evidence in Sensitive IGADF Document — whether respondents have sufficient notice of Person 81's anticipated evidence — whether prejudice to respondents flowing from circumstances where respondents' witnesses have given evidence and have been released from Subpoenas and possibility Person 81 may give evidence of matters not put to respondents' witnesses in cross-examination — application granted

Legislation:	*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 19(3A), 38B
Cases cited:	*Browne v Dunn* (1893) 6 R 67 (HL) *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR 551 *R v Schneidas (No 2)* (1981) 4 A Crim R 101 *Reid v Kerr* (1974) 9 SASR 367 *Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465 *Roberts-Smith v Fairfax Media Publications Pty Limited (No 13)* [2021] FCA 549 *Roberts-Smith v Fairfax Media Publications Pty Limited (No 30)* [2022] FCA 266 *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219
Division:	General Division
Registry:	New South Wales
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	37
Date of hearing:	28 April 2022
Counsel for the Applicant:	Mr A Moses SC with Mr P Sharp
Solicitor for the Applicant:	Mark O'Brien Legal
Counsel for the Respondents:	Mr N Owens SC with Ms L Barnett and Mr C Mitchell
Solicitor for the Respondents:	MinterEllison
Counsel for the Commonwealth of Australia:	Ms K Stern SC with Mr J Edwards
Solicitor for the Commonwealth of Australia:	Australian Government Solicitor

ORDERS

NSD 1485 of 2018

BETWEEN:	**BEN ROBERTS-SMITH** Applicant
AND:	**FAIRFAX MEDIA PUBLICATIONS PTY LIMITED (ACN 003 357 720)** (and others named in the Schedule) First Respondent

NSD 1486 of 2018

BETWEEN:	**BEN ROBERTS-SMITH** Applicant
AND:	**THE AGE COMPANY PTY LIMITED (ACN 004 262 702)** (and others named in the Schedule) First Respondent

NSD 1487 of 2018

BETWEEN:	**BEN ROBERTS-SMITH** Applicant
AND:	**THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LIMITED (ACN 008 394 063)** (and others named in the Schedule) First Respondent

ORDER MADE BY:	**BESANKO J**
DATE OF ORDER:	**13 MAY 2022**

THE COURT ORDERS THAT:

1. The applicant have leave to issue a Subpoena to give evidence to Person 81.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BESANKO J:

Introduction

1 On 6 April 2022, the applicant issued an Interlocutory application in which he seeks leave to issue a Subpoena to give evidence to Person 81 and Person 100. The applicant's application is supported by an affidavit of his solicitor, Mr Paul Svilans, sworn on 6 April 2022. The application insofar as it concerned Person 100 was resolved by agreement between the parties and there is no need for me to consider that aspect of the application. The dispute between the parties concerns whether the applicant should be granted leave to issue a Subpoena to give evidence to Person 81. The respondents oppose a grant of leave to issue a Subpoena to give evidence to Person 81 on the basis that there is no outline of evidence for Person 81 and it is too late to adduce evidence from him. They rely on an affidavit sworn on 11 April 2022 by their solicitor, Mr Peter Bartlett.

The Facts

2 As part of the pre-trial orders in these proceedings, the parties were ordered by the Court to file outlines of evidence with respect to each of the witnesses they proposed to call. The respondents filed and served their outlines of evidence on 31 May 2019 and the applicant filed and served his outlines of evidence on 12 July 2019. There have been two applications by the respondents for leave to issue Subpoenas to give evidence to witnesses. In the first case, the respondents had not filed outlines of evidence with respect to the witnesses and in the second case, a signed statement of the witness (Person 56) was provided well after the date fixed for the provision of outlines of evidence (*Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465 (*Roberts-Smith (No 12)*); *Roberts-Smith v Fairfax Media Publications Pty Limited (No 30)* [2022] FCA 266).

3 On 25 May 2021, the Court made an order that at the conclusion of the respondents' case, the applicant call such other witnesses as he proposes to call with respect to the defences of justification and contextual truth (see *Roberts-Smith v Fairfax Media Publications Pty Limited (No 13)* [2021] FCA 549).

4 Person 81 was the Troop Commander of Gothic Troop and he was part of Troop Headquarters during the mission on 12 April 2009 to Whiskey 108. Before the applicant's application dated 6 April 2022, there was no suggestion that Person 81 would be called as a witness at the trial.

No outline of evidence of Person 81 was filed and served and he did not appear on the witness list of either party. It seems that neither party for whatever reason considered that Person 81 could give relevant evidence with respect to the events at Whiskey 108.

5 The applicant contends on the application that he was not aware prior to the evidence given at trial by two witnesses called by the respondents that the respondents would lead evidence that Person 81 was present when it is alleged by the respondents that one or more individuals came out of a tunnel within the Whiskey 108 compound on 12 April 2009. The applicant submits that the effect of the evidence of both Persons 40 and 43 is that the Troop Commander, namely, Person 81 was present (on the respondents' case) when at least the Afghan male with the prosthetic leg came out of the tunnel. In this respect, the applicant referred to the evidence of Person 40 at transcript pp 3263, 3276, 3324 and 3332, and the evidence of Person 43 at transcript p 3383.

6 I am not making findings of fact at this stage. Nevertheless, Person 40 did appear to give evidence that Person 81 was present when, on the respondents' case, the Afghan male with the prosthetic leg came out of the tunnel. Person 43's evidence might be construed in the same way, but that is debatable and a matter more properly dealt with in closing submissions. It is not essential to the determination of this application that I reach a view at this stage about Person 43's evidence.

7 Mr Svilans says in his affidavit that the applicant anticipates that Person 81 will be able to give evidence in reply to the evidence given by Persons 40 and 43. Presumably, the basis of that statement is that Person 81 will be able to give evidence concerning his location and observations at various times in Whiskey 108. The applicant advances an outline of evidence of Person 81, but, in material respects, the document is not an outline of evidence in any real sense because it does not give notice of the evidence Person 81 will give. It reads as follows:

> **Background**
>
> 1. Person 81 is the Commanding Officer of the Special Air Services Regiment (**SASR**).
>
> **12 April 2009**
>
> 2. Person 81 was the Troop Commander of Gothic Troop during SOTG IX.
>
> 3. Person 81 was part of Troop Headquarters during the mission on 12 April 2009.
>
> 4. Evidence will be led from Person 81 on the following topics:

a. where was Troop HQ located as the W108 compound was being cleared by the assault forces;

b. whether Person 81 remained with Troop HQ until he was informed "compound secure";

c. whether Person 81 recalls any engagements within the W108 compound either by observation or being informed;

d. whether Person 81 saw any individuals come out of a tunnel at W108; and

e. whether there was a troop commander's RV at W108, if so, what location was the RV and what did Person 81 do subsequent to that RV.

5. Whether Person 81 was aware in 2009 of any allegations that there had been unlawful activity by members of the Australian Defence Force at W108 and if so, what were those allegations.

8 The respondents submit that the contentious topics are those contained in paragraphs 4.c., d. and e. and 5. and that the outline plainly provides no indication of what Person 81 will say with respect to those topics.

9 Mr Svilans states in his affidavit that after the evidence of Person 40 and Person 43 respectively and on 30 and 31 March 2022, another of the applicant's solicitors, Ms Monica Allen, made inquiries with Person 81. On 31 March 2022, Person 81 said in a text message to Ms Allen that he wanted to speak to his legal representative and added that he was "unsure whether [his] recollection would be of any benefit to [the applicant's lawyers]". On 1 April 2022, Person 81 informed Ms Allen, in substance, that he did not wish to speak to the applicant's legal representatives.

10 In *Roberts-Smith (No 12)*, I summarised aspects of the Inspector-General's Inquiry under the *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) and explained the concept of a "PAP" Notice (at [14]–[23]). Mr Svilans states that he is prevented by the terms of the orders made by this Court pursuant to ss 19(3A) and 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), most recently amended on 7 April 2022, from setting out in his affidavit specifically what it is anticipated that Person 81 will be able to give evidence about, but that the applicant intended to take the Court to the Sensitive IGADF Documents on the hearing of this application.

11 In closed Court, both parties referred me to a relevant part of a Sensitive IGADF Document.

12 [redacted]

[redacted]

13 [redacted]

The Arguments of the Parties

14 The applicant's key submission is that the evidence of two of the respondents' witnesses, namely Persons 40 and 43, is to the effect that Person 81 was in the vicinity of a tunnel entrance in a courtyard at Whiskey 108 when (on the respondents' case) at least two persons under control (PUCs) emerged out of the tunnel and surrendered to the Force Element. He submits that whether there were any PUCs in the tunnel in the courtyard is a material issue in dispute. In his evidence in the trial, the applicant denied that two of the persons who were engaged during the mission to Whiskey 108 were PUCs who had surrendered upon emerging from the tunnel.

15 The applicant identifies the relevant evidence to be adduced from Person 81 as evidence about whether he saw any individuals come out of a tunnel at Whiskey 108 and whether he recalls any engagements within the Whiskey 108 compound, either by observation or by being informed. The applicant submits that his submissions in closed Court by reference to the PAP Notice identify circumstances that may ameliorate any asserted prejudice caused by the applicant's failure to serve a detailed outline in respect of Person 81.

16 The applicant submits that the absence of an outline of evidence of Person 81 is not fatal to his application and he refers to the fact that in similar circumstances, the Court granted leave to the respondents to issue Subpoenas to give evidence to potential witnesses in the absence of

service of an outline of evidence (*Roberts-Smith (No 12)* at [50]–[51]). The applicant submits that the Court should exercise its discretion to permit the applicant to issue a Subpoena to give evidence to Person 81 because he has been referred to by witnesses called by the respondents as a person who was present in relation to an issue which is in dispute. His "anticipated evidence" is plainly relevant to an important issue in dispute, namely, whether anyone emerged from the tunnel during the mission to Whiskey 108.

17 The applicant submits that any prejudice to the respondents by reason of the applicant being permitted to adduce evidence from Person 81 at this stage of the proceedings is limited because Person 81's evidence is anticipated to be narrow in scope. He submits that any prejudice caused by the abridged time the respondents will have to prepare for the cross-examination of Person 81 may be ameliorated by the applicant not calling Person 81 until the respondents are in a position to cross-examine him. Furthermore, this approach will enable the respondents to take any steps they wish, including seeking leave to issue Subpoenas to produce documents to the Department of Defence. He submits that such limited prejudice to the respondents as there may be is outweighed by the interests of justice in the Court receiving Person 81's evidence, which is anticipated to be relevant to a material issue in dispute.

18 The respondents accept that evidence "relating to" Person 81 (as they put it) arose for the first time in the respondents' case and that there has been no delay by the applicant in seeking leave to issue a Subpoena to give evidence to Person 81.

19 The respondents also referred to the decision in *Roberts-Smith (No 12)* and they point out that in that case, the Court drew a distinction between, on the one hand, Persons 24, 40, 41, 42 and 43 in respect of whom the applicant had the benefit of a document which was sufficiently equivalent to an outline of evidence and, on the other hand, Person 56 in respect of whom there was (at that time) no indication of the evidence he would give. The respondents submit that the position in relation to Person 81 is in effect the same as it was at that time in relation to Person 56 in that no effective outline of evidence of Person 81 has been served and there is no sufficient equivalent to an outline of evidence (see *Roberts-Smith (No 12)* at [54]).

20 The respondents submit that only Person 40 gave evidence placing Person 81 in the vicinity of the tunnel at the point in time at which, on their case, the two Afghan males emerged. Person 40 gave evidence that during the re-org/SSE phase, that is, after the compound had been declared secure, he heard a commotion or heightened interest in an area which he circled on Exhibit R137. He went over to that area and recalled seeing "a gathering of … key personnel

from the troop in amongst that area" comprised of patrol commanders, Troop Headquarters (including Person 81), Person 35 and the applicant. The patrol commanders, Troop Headquarters and the applicant were in a "bunch" of people about 10 metres away from the tunnel, in the spot Person 40 marked "D" on Exhibit R137.

21 The respondents submit that Person 43 said in his evidence that after the assault teams had cleared the compound and it was declared secure, he was called into the compound for the commanders' brief. He recalled that the commanders' meeting took place in a large open area away from the bomb damage on the eastern side of the building. He identified the people who *would have* attended the commanders' brief as including Person 81. However, he specifically indicated that he did not recall whether all attendees were present at the time when he observed Person 35 reveal the tunnel and went over to assist as he described to the Court. In particular, he stated that he did not know if Person 81 was there at that stage. After Person 43 had assisted in the manner he described to the Court, the commanders got together and had their commanders' brief. By that stage, Person 81 and the other patrol commanders were there. As I have said, I do not need to consider these aspects of Person 43's evidence in order to determine this application.

22 The respondents submit that considered in the context of the evidence of Person 40 and Person 43 summarised above, it is only Person 81's location and observations after the compound was declared secure and any knowledge he has of what occurred after that time which could be relevant, that is, whatever his evidence will be in response to questions 4.c., d. and e. (and query 5.) in the "outline of evidence" exhibited to Mr Svilans' affidavit.

23 The respondents submit that [redacted] In my opinion, a correct analysis of the situation with respect to the various topics in the "outline" is as follows:

(1) Topics 1, 2 and 3 are uncontentious.

(2) [redacted]

(3) [redacted]

(4) [redacted]

(5) As to the second of the topics in 4.e., that has assumed some significance because of the link, arguably, with the clearance of the tunnel. I note and take into account the respondents' submission that, in fact, the applicant has not put any clear and consistent case as to the location of the team commanders' rendezvous to any of the respondents' witnesses.

(6) Topic 5 [redacted] and it is difficult to see how it can be said to have arisen because of any unanticipated evidence from either Person 40 or 43. Nevertheless, restricted as it is to 2009, it seems to me to be sufficiently linked to the topics in topic 4.

24 The respondents submit that the prejudice to them as a result of not knowing what evidence Person 81 will give is further demonstrated by Person 81's text message to Ms Allen on 31 March 2022 in which he queries whether his recollection would be of any benefit to the applicant. The respondents also submit that the text message demonstrates the lack of clarity as to what Person 81's evidence will be.

25 The respondents make a further point. They submit that their witnesses have given their evidence and have been released by the Court. The respondents submit that in those circumstances, they will be deprived of the opportunity to ask their witnesses further questions about the location, movements and potential observations of Person 81, to the extent his evidence might be inconsistent with the evidence they have called. They also point to the fact that, although it was put to Person 40 in cross-examination that the patrol commanders' rendezvous was "at the southwest", and to Person 18 that it was "outside", the location of the commanders' rendezvous was not raised with any other witness called by the respondents, including, most significantly, Person 43. No other witness called by the respondents was questioned about the presence or absence of Person 81 at the time (on the respondents' case) the Afghan males emerged from the tunnel, or any other propositions relevant to whatever Person 81's evidence may be, to the extent it is inconsistent with the evidence called by the respondents.

Analysis

26 I will deal first with the submissions of the parties.

27 I start with the applicant's submissions. Whether there were two Afghan males taken out of the tunnel at Whiskey 108 is, as the applicant submitted, an important issue in the case. Person 40's evidence, and to a lesser extent Person 43's evidence, suggests that Person 81 may be able to give relevant evidence on the matter. He may contradict Person 40's evidence that two Afghan males were taken out of the tunnel, which would bear on the substantive issue, or he may say that he was not present, which may be relevant to an assessment of Person 40's reliability.

28 It is true, as the applicant submitted, that the absence of an outline of evidence is not fatal to his application for leave to issue a Subpoena to give evidence to Person 81. In *Roberts-Smith (No 12)*, I granted leave to issue Subpoenas to give evidence to a number of persons in respect of whom there were no outlines of evidence. However, there was in each case a sufficient equivalent to an outline of evidence. The difficulty for the applicant in the case of Person 81 is that there is no sufficient equivalent with respect to topic 4.d. and the second element in topic 4.e. in the "outline" served by the applicant. I note that even in the case of topics in relation to which there might be considered to be a sufficient equivalent, that is, topics 4.a., b., c. and e., the "outline" is expressed in terms of questions, rather than in a manner which reflects the sufficient equivalent.

29 It is true, as the applicant submits, that in one respect the prejudice to the respondents if leave to issue a Subpoena to give evidence to Person 81 is granted, is anticipated to be narrow in scope. That prejudice may be broadly described as the ability for the respondents to prepare adequately for the cross-examination of Person 81. Primarily, that involves sufficient time to prepare for cross-examination, to subpoena documents and to make such inquiries as they may consider necessary. This form of prejudice can be ameliorated by giving the respondents such time as they reasonably need to attend to those matters. I am prepared to grant such time, even if that means there is a break between examination-in-chief and cross-examination. The other aspect of potential prejudice to the respondents is more significant. It arises because the respondents' witnesses have finished their evidence and have been released. There is the possibility that Person 81, although limited to the topics identified, will give evidence about matters that the respondents' witnesses would be able to give evidence about, but did not and such matters were not put to them by the applicant in cross-examination. There are various ways in which this issue can be dealt with (*Browne v Dunn* (1893) 6 R 67 (HL); *Reid v Kerr* (1974) 9 SASR 367; *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219; *R v Schneidas (No 2)* (1981) 4 A Crim R 101; *Payless Superbarn (NSW) Pty Ltd v O'Gara*

(1990) 19 NSWLR 551). In the first instance at least, and subject to hearing submissions from the parties, the issue if it arises will be a matter for the applicant to address.

30 I turn now to the respondents' submissions.

31 As I have said, the respondents accept that evidence relating to Person 81 arose for the first time in the respondents' case and that there has been no delay on the applicant's part in relation to seeking to bring forward this application in relation to Person 81.

32 The respondents' submission that the circumstances of this application are materially different from those that arose in the case of Persons 24, 40, 41, 42 and 43 in *Roberts-Smith (No 12)* is correct for reasons I have already given in relation to the applicant's submission in relation to that case.

33 For reasons already given, I do not need to address the respondents' submission that it is only Person 40 and not Person 43 whose evidence raises the presence of Person 81 when the tunnel was cleared.

34 The respondents' argument that they do not know what Person 81 is likely to say on a number of key topics is correct. In fact, it is clear the applicant does not know either. The latter point is reinforced by the text message sent by Person 81 to Ms Allen. This application is unusual in that it is not entirely clear how Person 81's evidence will advance the applicant's case. The lack of notice of the evidence Person 81 will give leads to the potential prejudice to the respondents which I have already identified.

35 This application is unusual and to my mind, the outcome is finely balanced. It seems to me that it can be said that the evidence of Person 81 may well be relevant in some way even if it does no more than contradict one aspect of Person 40's evidence. It is accepted that the catalyst for the application only arose in the course of the respondents' evidence and there is no suggestion that the applicant has delayed in bringing this application. In my opinion, the potential for prejudice to the respondents is the important factor. I consider that potential prejudice can be dealt with by accommodating such reasonable requests as are made by the respondents and by application of the principles which govern the result of a case where a party adduces evidence not put to the other party's witnesses.

36 For these reasons, the applicant's application is granted.

Conclusion

37 The applicant has leave to issue a Subpoena to give evidence to Person 81.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko.

Associate: 

Dated: 27 May 2022

SCHEDULE OF PARTIES

NSD 1485 of 2018
NSD 1486 of 2018
NSD 1487 of 2018

Respondents

Second Respondent:	NICK MCKENZIE
Third Respondent:	CHRIS MASTERS
Fourth Respondent:	DAVID WROE