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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 APPELLANT'S PROPOSED AMENDED INTERLOCUTORY APPLICATION DATED 28 APRIL 2025

I. INTRODUCTION

1. Shortly after 3 pm yesterday, the Appellant's solicitors served on the Respondents an "Amended Interlocutory Application" (**Amended Application**) dated 28 April 2025 and accompanying affidavit of Monica Allen sworn 28 April 2025 (**Third Allen Affidavit**). The Amended Application purports to amend the Appellant's Interlocutory Application (**Interlocutory Application**) dated 25 March 2025, which is listed for hearing on 1 and 2 May 2025.

2. Having only provided notice of the proposed amendment yesterday afternoon, the Appellant served written submissions in support of the Amendment Application (**AS**) at around 11 pm last night.

3. The Amended Application differs from the Interlocutory Application in five ways:

    (a) *First*, it introduces a new and different allegation of misconduct against Mr McKenzie. The effect of the proposed amendment to Particular 35 to Ground 17 would be to remove the allegation that Mr McKenzie engaged in wilful misconduct by "improperly and unlawfully retaining and obtaining information concerning the Appellant's *legal strategy concerning the trial*" (emphasis added). That allegation would be replaced by an allegation that Mr McKenzie engaged in wilful misconduct by improperly and unlawfully "obtaining, retaining *and using* the Appellant's *confidential and privileged communications with his legal representatives*… and further, or alternatively, *information derived from*" those communications (emphasis added). In other words, the relevant information would no longer be limited to information concerning the Appellant's "legal strategy concerning the trial", and would extend to the Appellant's communications with his legal representatives at large, together with information derived from such communications. This untethers the Interlocutory Application from the audio recording upon which the Appellant's Interlocutory Application is founded. This proposed change is not addressed in the Appellant's submissions or the Third Allen Affidavit.

    (b) *Second*, the Appellant seeks to add a new Particular 36A, contending that Mr McKenzie failed to comply with his discovery obligations. There is no equivalent allegation in the Interlocutory Application at present.

    (c) *Third*, by the proposed amendment to Particular 37, the Appellant seeks to allege that without the newly asserted discovery failure there is a real possibility that the result of the trial would have been different.

    (d) *Fourth*, the Appellant seeks additional relief on the appeal. In addition to an order for a new trial, by prayer 3A of the new proposed Amended Notice of Appeal, the Appellant seeks a direction that Mr McKenzie give further verified discovery in

accordance with the orders for discovery made on 2 August 2019 by Besanko J.

(e) *Fifth*, the Appellant seeks leave under s 27 of the *Federal Court Act 1976* (Cth) to rely on additional evidence, being the two affidavits of Mr McKenzie, oral evidence given by Mr McKenzie, Mr Bartlett and Mr Levitan at the hearing on 1 and 2 May 2025, and the Third Allen Affidavit. Again, this proposed change is not addressed in the Appellant's submissions or the Third Allen Affidavit.

4. Leave to amend should be refused.

5. The proposed amendment would cause irremediable prejudice to the Respondents. Forensic decisions were made on the basis of the Appellant's case as formulated. Now, less than 72 hours before the resumption of the appeal, the Appellant seeks to advance a new and different case in circumstances where the Respondents cannot be afforded a fair opportunity to respond to it (particularly given the need for the Court to conclude the hearing of the appeal quickly).

6. Further, the lateness of the Amendment Application is unjustified by the matters upon which the Appellant relies. The Appellant contends that the genesis of the amendments are matters in Mr McKenzie's evidence (AS [1.2]), but Mr McKenzie's evidence was relevantly served on 14 April (on the date required by the Court timetable). The Appellant appears to place emphasis on the circumstance that Mr McKenzie filed a four-paragraph affidavit last Friday, but that affidavit merely corrects a matter in relation to dates in one paragraph of his first affidavit, in circumstances where that paragraph and the correction have nothing to do with the amendments the Appellant now seeks to make. The Appellant's failure to seek to amend — or even to notify his intention to amend — in the two weeks between 14 April and 28 April is wholly unexplained. That alone is sufficient to warrant refusal of leave to amend.

II. EVIDENCE

7. Having been afforded no notice of the Amendment Application, the Respondents have not had the opportunity to prepare affidavit evidence to meet it. In those circumstances, the Respondents will tender the documents referred to in these submissions as their evidence on the application.

III. BACKGROUND

8. On 25 March 2025, the Appellant filed the Interlocutory Application.

9. On 31 March 2025, the matter was listed for Case Management Hearing before Perram J. The parties proposed consent orders, requiring the Respondents to file and serve any affidavit evidence by 4 pm on 14 April 2025, with the Appellant to file and serve "any affidavit evidence *in reply*" by 4 pm on 22 April 2025 (emphasis added). It is apparent from the orders

that the timetable was predicated on the assumption that the Appellant's evidence in chief in support of the Interlocutory Application had been served.

10. On 2 April 2025, Perram J made orders in accordance with the timetable proposed by the parties on 31 March 2025.

11. On 3 April 2025, the Respondents' solicitors wrote to the Appellant's solicitors, making a number of observations as to the manner in which the Appellant's case was formulated, and observing that certain statements of the Appellant's senior counsel at the Case Management Hearing on 31 March 2025 were outside that case. The letter included the following:

> For the avoidance of doubt, we hold your client to the Application as presently formulated.

12. On 4 April 2025, the Appellant's solicitor responded to the Respondents' solicitor's letter of the previous day. While the Appellant's solicitor took issue with aspects of the letter of the Respondents' solicitor the previous day, the letter concluded:

> Finally, we have noted your comment that "we hold your client to the Application as presently formulated". In light of the matters dealt with above, there is no reason for the matter to be re-listed.

13. The Respondents' solicitor responded on 8 April 2025 in these terms:

> In our letter, we alerted you to the prejudice that would be suffered by our clients and, potentially, non-parties if your client attempts to depart from the Interlocutory Application and proposed Amended Notice of Appeal as presently formulated in the future. We take the last paragraph of your letter to confirm your understanding that the Respondents hold the Appellant to the Interlocutory Application and proposed Amended Notice of Appeal as formulated.

14. There was a further reply from the Appellant's solicitor on 9 April 2025, the tenor of which was that the Appellant did not accept that its case was limited in the manner asserted in the 4 and 8 April letters of the Respondents' solicitors. In that respect they were wrong, as the reasons of Perram J given yesterday made clear: at [33]. What is also relevant for present purposes, however, is that the Appellant was on notice since 3 April 2025 that the Respondents were holding the Appellant to his Interlocutory Application as formulated and would suffer prejudice by any late amendment.

15. The Respondents filed their evidence on 14 April 2025. That evidence comprised an affidavit of Nicholas David McKenzie dated 14 April 2025 (**McKenzie Affidavit**). As noted above, a second corrective affidavit of Mr McKenzie was filed on 24 April 2025.

16. On 23 April 2025, following an email request from the Respondents' solicitor, the Appellant's solicitor confirmed to the Respondents' solicitor that the Appellant did not

intend to serve affidavit evidence in reply.

17. Also on 23 April 2025, Perram J heard an application from the Respondents to set aside a Notice to Produce to Mr McKenzie and six subpoenas to produce documents. At the hearing, senior counsel for the Respondents observed that the Appellant's senior counsel had at times sounded like he might seek leave to amend the Interlocutory Application. Having made that observation, senior counsel for the Respondents said "we ha[ve] written to the appellant on numerous occasions as to the prejudice that would be occasioned by a late amendment. I don't need to say … anything further, but particularly when they've had Mr McKenzie's affidavit for over a week, any late amendment would be strenuously resisted" (T73.47-74.5).

18. As indicated above, the Respondents did not have notice of the Amendment Application before around 3 pm on 28 April 2025. By that time, their submissions were being finalised. The Respondents filed and served their submissions on the Interlocutory Application on the morning of 29 April 2025.

IV. NEW AND DIFFERENT CASE ON MISCONDUCT ALLEGATION

19. The Appellant should not be permitted to amend his case on the allegation of misconduct for four reasons.

20. *First*, the amendment would seriously prejudice the Respondents.

21. The Respondents have prepared their evidence to meet the case as presently formulated in the Interlocutory Application. That is a case that has its genesis in the audio recording of Mr McKenzie, and posits that Mr McKenzie's reference to "legal strategy" in that recording was a revelation that he had obtained and retained information as to the Appellant's legal strategy that was privileged. To respond to that case, the Respondents served the McKenzie Affidavit, which answers that allegations in terms because Mr McKenzie denies that he ever had information of that kind.

22. By the Amendment Application, the Appellant has indicated that he no longer wants to run a case to the effect that Mr McKenzie obtained or retained "information concerning the Appellant's legal strategy". The proposed amendment would remove the phrase "legal strategy" from Particular 35 altogether. One might infer that that is because the Appellant now realises that the presently-formulated case is hopeless in light of Mr McKenzie's evidence.

23. Be that as it may, the proposed amendment to Particular 35 would materially change the allegation in a manner prejudicial to the Respondents. By removing the reference to "legal strategy" from Particular 35, the proposed amendment would untether the Interlocutory Application from the audio recording. Moreover, it would replace the existing allegation with respect to "legal strategy" with a new allegation that Mr McKenzie improperly obtained, retained and used confidential and privileged communications of any kind

between the Appellant and his lawyers.

24. One reason the revised language is unfair is because it is devoid of particularity, and therefore of any clarity. The case as presently formulated is confined. Mr McKenzie can meet that case by addressing himself to what he meant and did not mean when he used the phrase "legal strategy" in the audio recording. By contrast, the new case does not fix upon any particular statement or even specify the particular "privileged communications" referred to. Basic considerations of procedural fairness would require the Appellant to identify those communications, but the proposed amendment does not do so.

25. What is more, the new allegation would extend to an assertion of improper and unlawful use of information *derived from* allegedly privileged communications. Again, the privileged communications are not identified. Nor is the information said to have been "derived from" those communications. There is also no identification of how such use by Mr McKenzie was improper or unlawful or constituted "wilful misconduct". This is close to an abuse of process.

26. It is to be recalled in this context that the timetabling orders made by the Court in early April contemplated the Respondents having a fair opportunity to put on evidence responsive to the Appellant's Interlocutory Application. That cannot now occur given the impending hearing date, the lack of clarity and particularisation in the proposed amendments and the timing pressures on the Court to hear and determine the appeal. On any view, it would not be fair to the Respondents to proceed to a hearing on 1 and 2 May on the basis of the changed allegations and without an opportunity to obtain proper particulars of the allegations and serve evidence directed to those allegations. It is equally untenable to adjourn the hearing date.

27. *Secondly*, there is no proper basis for the allegation insofar as the Appellant has adduced no evidence establishing the privileged nature of any communication or document, much less that any information was derived from a communication that was privileged to the Appellant. This cannot be emphasised too much. It is not enough for the Appellant to assert, without evidence, that information — particularly information found in Mr McKenzie's documents — is a privileged communication of the Appellant or derived therefrom. Any such case would require, at a minimum, that the Appellant bring forward evidence establishing that privilege. He has not done so.

28. *Thirdly*, the Appellant offers neither explanation nor excuse for the late amendment.

29. The Appellant's submissions and the Third Allen Affidavit addresses only the new case on alleged discovery failures. They say nothing about the substantial amendment to the misconduct alleged in particular 35 to the proposed Amended Notice of Appeal. Perhaps this is unsurprising, as there could be no real reason for the delay.

30. *Fourthly*, the Appellant has long been on notice that the Respondents would hold the

Appellant to the Interlocutory Application as formulated. The Court would infer that the Appellant made a forensic decision not to seek to amend in a timely manner. That was his prerogative but such forensic decisions have consequences.

IV. NEW CASE ON ASSERTED DISCOVERY FAILURES

31. For substantially the same reasons, the Appellant should not be allowed to run a new case on alleged discovery failures. Taking each alleged failure identified in Particular 36A in turn:

    (a) **Communications with sources including Ms Scott, Ms Roberts and Person 17, including using Signal**: The source of this complaint must be the McKenzie Affidavit, which was filed more than two weeks ago. The Appellant does not explain his delay.

    (b) Communications and documents relating to the receipt and transmission of screenshots, images and other media files obtained from Ms Scott, Ms Roberts and Person 17: Likewise, the source of this complaint must be the McKenzie Affidavit.

    (c) File notes or records of the meeting held with Ms Roberts and Ms Scott on 14 March 2021: The parties' solicitors exchanged correspondence on this topic on 15, 17 and 22 April 2025: Annexure MHA-5 to the Third Allen Affidavit. The Appellant's Senior Counsel raised the matter at the hearing on 23 April 2025. The relevance to the Appellant's case appeared to be that the file note would disclose what Ms Roberts told Mr McKenzie on that date, including whether it was privileged (T43.1-37). No separate case seeking a retrial on the basis of discovery failures was foreshadowed. No explanation is volunteered for the late amendment.

    (d) Verifying by affidavit that his List of Documents were complete and accurate: This complaint is predicated on the preceding three points, which again indicates it was a claim that should have been brought forward shortly after the McKenzie's affidavit was served.

32. The prejudice in having to meet a new case two days before a hearing is self-evident. Answering the new ground properly would require some detail and evidence in circumstances where time is tight between now and the resumption of the hearing, and the Respondents are preparing to meet the extant case.

33. A fundamental issue that the Appellant does not grapple with is that there is no obligation to discover a privileged document created after the proceedings started: Rule 20.20(2) of the *Federal Court Rules 2011* (Cth). The exception applies to privilege of any kind.

34. There is therefore a question as to whether the communications the subject of new Particular 36A are privileged.

35. As for Ms Roberts and Ms Scott, there were no communications with either Ms Roberts or Ms Scott until *after* the first verified lists of discovery had been given. All communications with Ms Roberts and Ms Scott (which all occurred after discovery was given) were privileged because they were (a) communications passing between the party or his lawyers (Mr McKenzie) and a third person; (b) they were made with reference to litigation already commenced; and (c) they were made for the purpose of being put before the solicitor with the object of enabling him to defend an action (that is, the proceedings below): *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246. Insofar as a lawyer for the Respondents was present, communications and documents passing between the lawyer and a third person (such as Ms Roberts and Ms Scott) made with reference to the litigation and for purposes of enabling the defence of the proceedings would also be privileged: *Sterling* at 246.

36. As to Person 17, the same considerations and principles apply. There may also be a need to consider the trial judge's conclusion in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 27)* [2022] FCA 79 that documents tending to prove whether a person is a confidential journalist source (if such documents existed) did not need to be produced.

37. Particular 36A is deficient insofar as it alleges discovery failures because the Appellant has made no attempt to grapple with these matters. The communications described in subparagraph (a) are not self-evidently discoverable and there has been no attempt to articulate some subcategory of those documents that were discoverable but not discovered. Subparagraph (b) are documents that are almost certainly privileged and which did not need to be discovered pursuant to Rule 20.20(2). Subparagraph (c) are again documents that are privileged and which did not need to be discovered by reason of Rule 20.20(2). Subparagraph (d), being dependent on the preceding subparagraphs, falls away if the other subparagraphs are not established.

38. It follows that the Particular 36A is deficient insofar as it asserts discovery failures without identifying *any* documents that ought to have been discovered and which were not discovered. Again, the Respondents are entitled to know the case they have to meet.

39. If the Appellant had brought this application in a timely manner, these matters could have been addressed by the Respondents in their evidence and written submissions. To do so properly, the Respondents would again need to be informed with precision as to the nature of the asserted discovery failures. The Respondents have been denied that opportunity by reason of the lateness of the proposed amendment. That is real prejudice.

40. There is a further reason the Respondents would be prejudiced by this late amendment. The Appellant seeks to draw an analogy with the case of ***Clifton*** *v Kerry J Investment t/as Clernergy* (2020) 379 ALR 593 to argue that the onus is on the Respondents to prove the there is no "realistic possibility" the result of the trial would have been different if the alleged discovery failures had not occurred. Of course, the usual position is that the moving party bears the onus. The unusual result in *Clifton* was only reached because the discovery failures in that case were ongoing. If (which is denied) there were any discovery failures, the Respondents

would need an opportunity to adduce evidence of the undiscovered material, in order for the Court to assess its possible impact on the trial.

V. FURTHER EVIDENCE ON THE APPEAL

41. No explanation is given for the late amendment on the s 27 application.

42. In respect of the oral evidence of Mr Bartlett and Mr Levitan, the Appellant's intention to rely on that evidence on the appeal points up the illegitimacy of the subpoenas to Mr Bartlett and Mr Levitan. It is not a legitimate forensic purpose on an interlocutory application seeking leave to rely on further evidence under s 27 to use that interlocutory application as an opportunity to obtain the further evidence itself. That is to use an application under s 27 as a means of, in effect, preliminary discovery. Were the Court to permit subpoenas to be used on s 27 applications in this way, parties to an appeal would have the means to exploit that provision to, in effect, conduct ancillary fact finding investigations in the course of an appeal and in respect of arguments not run at trial. Such an approach is an abuse of process.

43. The Third Allen Affidavit is relevant only to the alleged discovery failures. Given that case should not allowed to be introduced, nor should that evidence.

44. The Respondents accept that Mr McKenzie's affidavit evidence on the Interlocutory Application would be admitted as evidence on the appeal if the Appellant obtains leave to rely on further evidence. For this reason, the Respondents do not oppose the amendments in Prayer [3(b) and (c)] of the Amended Interlocutory Application.

VI. CONCLUSION

45. For the foregoing reasons, the Court should rejected the Amended Application for filing (save for the proposed amendment to Prayer 3(b) and (c)). The Appellant should be held to his case.

46. The Respondents seek their costs of the Amendment Application.

Robert Yezerski Hannah Ryan

Counsel for the Respondents

29 April 2025