

## NOTICE OF FILING

### Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)  
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)  
Date of Lodgment: 27/03/2025 4:03:11 PM AEDT  
Date Accepted for Filing: 27/03/2025 4:03:22 PM AEDT  
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 of 2023

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Ben Roberts-Smith VC MG**

Appellant

**Fairfax Media Publications Pty Limited** and others named in the schedule

Respondents

Affidavit of: **Monica Helen Allen**  
Address: Level 17, 20 Martin Place, Sydney, New South Wales  
Occupation: Solicitor  
Date: 27 March 2025

#### Contents

No.	Details	Paragraph	Page
	Affidavit of Monica Helen Allen and Exhibit MHA-1	1-17	1-6
<b>Exhibit MHA-1</b>			
1.	Email from ellroyferris@proton.me to Mark O'Brien Legal dated 15 March 2025 together with a USB of attached audio file	7	1
2.	Sky News article by Sharri Markson dated 24 March 2024 together with a USB of the Sky News broadcast	8	2-9
3.	Affidavit of the Appellant dated 10 June 2021	13(a)	10-163

Filed on behalf of (name & role of party) Ben Roberts-Smith VC MG, Appellant  
 Prepared by (name of person/lawyer) Monica Allen  
 Law firm (if applicable) BlackBay Lawyers  
 Tel +61 2 8005 3077 Fax -  
 Email monica.allen@blackbaylawyers.com  
**Address for service** Level 17, 20 Martin Place, Sydney, New South Wales, 2000  
 (include state and postcode)

No.	Details	Paragraph	Page
4.	Affidavit of Ms Roberts dated 10 June 2021	13(b)	164-175
5.	Affidavit of Paul Svilans dated 18 June 2021	13(c)	176-384
6.	Affidavit of Ms Roberts dated 9 July 2021	13(d)	385-400
7.	Affidavit of Ms Roberts dated 19 August 2021	13(e)	401-408
8.	Affidavit of the Appellant dated 25 August 2021	13(f)	409-462
9.	Affidavit of Adam Veale dated 26 August 2021	13(g)	463-470
10.	Affidavit of the Appellant dated 31 May 2022	13(h)	471-473
11.	Affidavit of Mr Svilans dated 31 May 2022 (without the annexed transcript)	13(i)	474-476
12.	Transcript of evidence of Ms Roberts on 14 and 15 February 2022	14	477-657

I Monica Helen Allen, of Level 17, 20 Martin Place, Sydney, solicitor, say on oath:

1. I am a Special Counsel at BlackBay Group Pty Ltd trading as BlackBay Lawyers (**BlackBay**), the solicitors for the Appellant.
2. The facts I depose to in this affidavit are true based on my knowledge. Where statements 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.
3. In making this affidavit, I do not intend to waive privilege in, and the Appellant does not consent to the disclosure of, any privileged or confidential communications or documents relating to the subject matter of this proceeding other than, and only to the extent, expressly set out in this affidavit.
4. Up until December 2024, I was employed as a Special Counsel at Mark O'Brien Legal and subject to the supervision of Mark O'Brien and Paul Svilans, I had the day-to-day conduct of this matter.
5. In January 2025, I commenced employment with BlackBay in the role of Special Counsel.




6. Shown to me at the time of making this Affidavit is a bundle of documents marked **Exhibit MHA-1**. In this Affidavit, I identify documents by reference to the number of the first page on which they appear in Exhibit MHA-1.

#### **Audio recording of the Second Respondent**

7. I am informed by Paul Svilans, Principal, at Mark O'Brien Legal, that on 15 March 2025 at 2.54am he received an email from 'ellroyferris@proton.me' entitled 'Paul: secret McKenzie recording' which attached an audio recording. A copy of the email is at **page 1 of Exhibit MHA-1**.
8. At or about 8pm on 24 March 2025, Sky News broadcast a segment presented by Sharri Markson of and concerning the recording. Sky News also published on its website [www.skynews.com.au](http://www.skynews.com.au) an article entitled '*Explosive confessions from star Nine reporter caught on secret tapes expose tricks against Ben Roberts-Smith war crimes trial*' by Ms Markson. A copy of that article is at **pages 2 to 9 of Exhibit MHA-1**.
9. I have listened to the recording. Having been the solicitor with day-to-day carriage of this matter on behalf of the Appellant for over five years and having attended each day of the trial, I believe that the male voice on the recording is the Second Respondent, Nick McKenzie and that the female voice is the witness known as Person 17.
10. I also note that the Sky News article referred to in paragraph 8 above includes the following statement from Nine Entertainment:

*"Having reviewed the audio clip, with support from external counsel, we can confirm there is no breach of legal privilege or ethical concerns. Nine has full confidence in the reporting and actions of Nick McKenzie, an award-winning reporter who enjoys the respect and admiration of his editors and colleagues in the newsroom."*

11. This application arises from an admission by the Second Respondent in the recorded conversation between him and the witness known as Person 17, in which he says the following:

Nick McKenzie	You've got that um Danielle and Emma like trying to tell you yet again I know you won't burn me so you can't tell Dean please or Monique or anyone that I've told you this.
Nick McKenzie	You know the fact they've actively like briefing us on his legal strategy in respect of you like yeah we... yeah we're not learning like we anticipated most of it. One or two things now we know, it's just how it was. The reason I told you that





	was to say like we've got this, and they're not hostile to you despite your worst fears. They're not. I've told you that so many times now as well. And I had to tell you that extra bit to sort of prove in your mind.
Person 17	Maybe that's what has to happen like so –
Nick McKenzie	(voice raised) I shouldn't - I shouldn't tell you. I've just breached my fucking ethics in doing that like this is where like, this has put me in a shit position now like. If Dean knew that and then you know I'd get my arse fucking handed to me on a platter like
Person 17	Well that's where I say you know you've got to trust me as well and I've not done anything –
Nick McKenzie	(NM talks over) I know I know that's why I'm telling you
Person 17	I know I know so -
Nick McKenzie	I wouldn't tell anyone else, I haven't told anyone like no one else I tell is, no one knows about the police investigation. It's a sensitive ongoing police investigation. Phone taps, task force, there's a new - there's a whole new task force is being set up in Brisbane, an entire new task force. There's police living in his apartment block under assumed identities as we speak. Like the guy is fucked.

12. The Appellant seeks to have evidence of that admission received by the Full Court together with evidence which was before Bromwich J in proceedings NSD 511 of 2021. In that matter, Bromwich J dismissed an application by the Appellant seeking third party discovery from his ex-wife, Emma Roberts, in relation to her alleged misuse of confidential information from the Appellant's email account: *Roberts-Smith v Roberts* [2022] FCA 18.

#### **Evidence in proceedings NSD 511 of 2021**

13. The affidavit evidence filed in proceedings NSD 511 of 2021 which the Appellant seeks to have received by the Full Court is as follows:
- (a) Affidavit of the Appellant dated 10 June 2021 (**pages 10 to 163 of Exhibit MHA-1**);
  - (b) Affidavit of Ms Roberts dated 10 June 2021 (**pages 164 to 175 of Exhibit MHA-1**);
  - (c) Affidavit of Mr Svilans dated 18 June 2021 (**pages 176 to 384 of Exhibit MHA-1**);
  - (d) Affidavit of Ms Roberts dated 9 July 2021 (**pages 385 to 400 of Exhibit MHA-1**);




- (e) Affidavit of Ms Roberts dated 19 August 2021 (**pages 401 to 408 of Exhibit MHA-1**);
- (f) Affidavit of the Appellant dated 25 August 2021 (**pages 409 to 462 of Exhibit MHA-1**);
- (g) Affidavit of Adam Veale dated 26 August 2021 (**pages 463 to 470 of Exhibit MHA-1**);
- (h) Affidavit of the Appellant dated 31 May 2022 (**pages 471 to 473 of Exhibit MHA-1**);
- (i) Affidavit of Mr Svilans dated 31 May 2022 (**pages 474 to 476 of Exhibit MHA-1**).

#### **Ms Roberts' evidence before Besanko J**

- 14. On 14 and 15 February 2022, Ms Roberts gave evidence before Besanko J in the proceedings below (being NSD 1485, 1486 and 1487 of 2018). A copy of the transcript of her evidence is at **pages 477 to 657 of Exhibit MHA-1**.

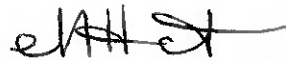
#### **This Application**

- 15. I am informed by the Appellant and I believe, that he was not aware of the existence of the recording or the admissions by the Second Respondent until it was produced to his then-solicitor, Mr Svilans, on 15 March 2025.
- 16. This evidence is relevant to a new ground of appeal which the Appellant seeks leave to raise. The relevant new ground of appeal is found in paragraph 17 of the Proposed Amended Notice of Appeal.
- 17. The Appellant commenced the third-party discovery application heard by Bromwich J because, as deposed to in his affidavit sworn 10 June 2021, he suspected that the Respondents had access to his confidential and privileged email communications through Ms Roberts or Ms Scott. Justice Bromwich was ultimately not persuaded on the evidence before his Honour that such unauthorised access had occurred. In the Court below, Ms Roberts gave evidence about these matters, including evidence about Ms Scott access of the Appellant's email account.
- 18. The new evidence comprising the recording of the Second Respondent's admission concerning this conduct ought to be considered together with and in the context of the evidence before Bromwich J and the evidence of Ms Roberts to Besanko J.



Sworn by the deponent  
at Sydney  
in the state of New South Wales  
on 27 March 2025  
Before me

)  
)  
)  
)  
)



Signature of deponent



Signature of witness  
Isabella Orlic  
Solicitor

Form 59  
Rule 29.02(1)

## Exhibit Certificate

No. NSD 689 of 2023

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Ben Roberts-Smith VC MG**

Appellant

**Fairfax Media Publications Pty Limited** and others named in the schedule

Respondents

This and the following pages are **Exhibit MHA-1** to the affidavit of **Monica Helen Allen** sworn in Sydney on 27 March 2025, before me:



Isabella Orlic

Solicitor

---

Filed on behalf of (name & role of party) Ben Roberts-Smith VC MG, Appellant

---

Prepared by (name of person/lawyer) Monica Allen

---

Law firm (if applicable) BlackBay Lawyers

---

Tel +61 2 8005 3077 Fax -

---

Email monica.allen@blackbaylawyers.com

---

**Address for service** Level 17, 20 Martin Place, Sydney, New South Wales, 2000  
(include state and postcode)