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Details of Filing

Document Lodged:	Submissions
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File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
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A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 7/05/2021 8:31:05 AM AEST

Registrar

Important Information

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

No. NSD. 1485, 1486, 1487 of 2018

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd and others

Respondents

**APPLICANT'S SUBMISSIONS IN RESPECT OF PUBLIC INTEREST IMMUNITY
CLAIM BY THE AUSTRALIAN FEDERAL POLICE, THE IGADF AND THE
DEPARTMENT OF DEFENCE**

1. INTRODUCTION

1.1 The Applicant opposes the claim for public interest immunity made by the Commissioner of the Australian Federal Police (**AFP**) in relation to documents sought by a subpoena addressed to the AFP and issued by the Applicant on 12 December 2020 (**AFP Subpoena**), but only insofar as the AFP Subpoena seeks production of documents concerning Mohammed Hanifa, Man Gul, Shazad Aka and Bora (the **Afghan witnesses**) that is relevant to an allegation involving the Applicant on 11 September 2012. A copy of the AFP Subpoena marked up to indicate the parts of that subpoena which are pressed by the Applicant at the interlocutory hearing is annexed as "A" to these submissions.

1.2 The Applicant opposes the claim for public interest immunity made by the Inspector-General of the Australian Defence Force (**IGADF**) in relation to documents sought by a subpoena addressed to the IGADF and issued by the Applicant on 2 March 2021 and reissued on 15 March 2021 (**IGADF Subpoena**), but only insofar as the IGADF Subpoena seeks the production of documents in paragraphs 4 and 5 that relate to the

persons identified in paragraph 4(a), (b), (e) and (f). A copy of the IGADF Subpoena marked up to indicate the parts of that subpoena which are pressed by the Applicant at the interlocutory hearing is annexed as “**B**” to these submissions.

1.3 The Applicant does not oppose the IGADF’s claim for public interest immunity in respect of documents that are responsive to the subpoena to produce issued to Person 18. In relation to the Department of Defence’s claim for public interest immunity in respect of documents that are responsive to the subpoena to produce issued to Person 4, the Court does not need to resolve that issue because the Applicant does not press for the production of documents that are responsive to the subpoena issued to Person 4. In this respect, it should be noted that a matter of serious concern has come to the attention of the Applicant’s lawyers who have been informed by Person 4’s lawyers that Person 4 has never spoken to the Respondents and the outline of evidence that was represented as being an outline of evidence that he would give at the trial was not the subject of any discussion with him. The letter from Person 4’s lawyers will be tendered. A copy of this letter has been provided to the lawyers acting for the Department of Defence. This is a grave development in the matter that will be dealt with at the trial because contained in the outline of Person 4 was an assertion that Person 4 had committed a murder. The matter is more extraordinary in light of the fact that senior counsel for the Respondents asserted in open court that, *inter alia*, he expected that Person 4 would attend the trial,¹ and then, when giving evidence consistently with his outline, would be given a section 128 certificate.²

1.4 The AFP relies upon the open and confidential affidavits of Assistant Commissioner Scott Let, the AFP’s Assistant Commissioner, Counter Terrorism and Special Investigations Command, sworn 3 May 2021.

1.5 The IGADF relies upon the open and confidential affidavits of the IGADF, James Morgan Gaynor, sworn 3 May 2021. There are no objections to the Court reading the open and confidential affidavits of the IGADF James Gaynor sworn 3 May 2021. The

¹ Transcript 29 April 2021 at page 28, line 8.

² Transcript 29 April 2021 at page 29, line 16: “MR OWENS: Well, quite. But all I can say there, your Honour, is that taking person 4 as the example we expect person 4 to turn up, ask for a certificate and then give evidence once that certificate’s granted and we can, with respect, see no reason why your Honour would not grant the certificate if the witness requests it.”

Department of Defence relies upon the open and confidential affidavits of Jane Maree Spalding sworn 4 May 2021 but by reason of the Applicant's position identified in paragraph 1.3 above, it will not be necessary for those affidavits to be read.

1.6 The Applicant will tender documents in support of its submissions at the hearing.

2. LEGAL PRINCIPLES

1.7 The common law applies to the determination of the AFP's and the IGADF's claim for public interest immunity because the *Evidence Act 1995* (Cth) does not apply to pre-trial stages of proceedings: *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* [1999] HCA 67; (1999) 201 CLR 49. The court may inspect privately the confidential affidavits and/or the documents that are the subject of the claim for the purposes of determining the claim: *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at 46.

1.8 The approach to the determination of public interest immunity claims involves a three-stage analysis. In *Alister v The Queen*, Gibbs CJ said (at 412):³

... when one party to litigation seeks the production of documents, and objection is taken that it would be against the public interest to produce them, the court is required to consider two conflicting aspects of the public interest, namely whether harm would be done by the production of the documents, and whether the administration of justice would be frustrated or impaired if the documents were withheld, and to decide which of those aspects predominates. The final step in this process – the balancing exercise – can only be taken when it appears that both aspects of the public interest do require consideration – ie, when it appears, on the one hand, that damage would be done to the public interest by producing the documents sought or documents of that class, and, on the other hand, that there are or are likely to be documents which contain material evidence. The court can then consider the nature of the injury which the nation or the public service would be likely to suffer, and the evidentiary value and importance of the documents in the particular litigation.

1.9 There is a recognised public interest in protecting from disclosure documents that may undermine or compromise an ongoing police investigation or which may reveal police

³ [1984] HCA 85; (1984) 154 CLR 404.

methodology and processes used in the investigation of serious crime.⁴ The rationale for this ground of public interest immunity is to prevent frustration of the investigation by premature disclosure to the persons under investigation. In *Attorney-General v Stuart*, Hunt CJ at CL explained the rationale as follows (at 675):⁵

As another part of that broader public interest, it is essential that nothing used by police in their pursuit of criminals should be disclosed which may give any useful information concerning continuing inquiries to those who organise criminal activities: *Conway v Rimmer* (at 953-954); or which may impede or frustrate the police in that pursuit: *ibid* (at 972); or which may reveal matters to the prejudice of future police activities: *Young v Quin* (1985) 4 FCR 483 at 492; 59 ALR 225 at 234; *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 52 A Crim R 423 at 436-437; and on appeal (1991) 31 FCR 523 at 527-528; 103 ALR 167 at 172; 58 A Crim R 1 at 5. Its rationale is that, if such information were disclosed prior to charges being laid (so that criminals would know what information the police have about them), they ***will be able to tailor their stories to facts which cannot be disputed, to organise their responses to questions and to arrange alibis. Harm may come or be threatened to prospective witnesses before being interviewed by the police, particularly in relation to inquiries about crimes of violence.*** (emphasis added)

- 1.10 In *National Companies and Securities Commission v News Corp Ltd* [1984] HCA 29; (1984) 156 CLR 296 at 323-324, Mason, Wilson and Dawson JJ said that the relevant concern was ensuring that the public interest was not prejudiced by the early release of information about an investigation:

It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry. Of course there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment.

- 1.11 There is also a public interest in protecting the identity of informers. In *Stuart*, Hunt CJ at CL said (at 679):

⁴ *Woodroffe v National Crime Authority* (1999) 107 A Crim R 384; [1991] FCA 1128; *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667; *Conway v Rimmer* [1968] AC 910 at 953-954.

⁵ (1994) 34 NSWLR 667; (1994) 75 A Crim R 8.

Although the rationale for the immunity in relation to the identity of informers is expressed as being not so much the danger to the informers as the fear that police sources would dry up, the obvious reason why the sources are likely to dry up is the informers fear of violence from those upon whom they had informed if their identity were to be disclosed.

- 1.12 At the second stage of the analysis, the Court must consider the public interest in ensuring that parties to litigation have available to them all relevant evidence. It is well recognised that a court should not be denied access to relevant evidence⁶ and that the administration of justice would be impaired if relevant documents were withheld.⁷ In *Borg v Barnes*, Carruthers J said:⁸

Our adversary system of litigation is designed to elicit the truth. This necessarily involves all relevant material being accessible to both parties. It is a grave step to deny any litigant access to such material. Against this, what weight should be given to the detriment to the public interest involved in disclosure of the confidential material which is the subject of the present subpoena?

- 1.13 The third stage of the analysis requires a balancing of the two competing public interests.

Submissions

The AFP documents

- 1.14 One of the key allegations made by the Respondents relates to the alleged murder of Ali Jan (Particulars of Truth, paragraphs 102 to 117). The Respondents allege that the Applicant formed an understanding with Person 11 to kill Ali Jan who, it is alleged, was a person under confinement. The Applicant denies the allegation.⁹ It will be demonstrated at trial that this is a baseless allegation that should never have been made by the Respondents.
- 1.15 Each of the Afghan witnesses is being called by the Respondents at the hearing to give evidence in support of the Respondents' allegation. The evidence of the Afghan witnesses is directly at odds with the accounts provided by the Applicant. Further,

⁶ *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at 39.

⁷ *Alistair v The Queen* at 412.

⁸ *Borg v Barnes* (1987) 10 NSWLR 734 at 739.

⁹ Paragraphs 149 to 163 of the Applicant's Outline of Evidence dated 12 July 2019.

there are inconsistencies among the Afghan witnesses as to what occurred. They provide differing accounts of where Ali Jan was alleged to have been shot,¹⁰ which has been noted by the trial judge¹¹, as well as the number of soldiers present at the bottom of the slope, hill or cliff from which Ali Jan was alleged to have been kicked.¹² The credit of the Afghan witnesses will plainly be in issue. Further, oral submissions will be made in closed court concerning further issues of inconsistency in relation to the Afghan witnesses.

- 1.16 The legitimate forensic purpose of the documents sought is clear. Records of interview with key witnesses relating to the events at Darwan on 11 September 2012 are plainly relevant to the issues in the proceedings. The AFP and IGADF transcripts will enable the Applicant to test the prior accounts given by these witnesses against the evidence that they will give in these proceedings. Conversely, denying access to this material would materially prejudice the Applicant's ability to challenge the evidence of his accusers and thereby his right to a fair trial. It would also prevent the Court from having before it all relevant evidence, a public interest acknowledged by Gibbs ACJ (as his Honour then was) in *Sankey v Whitlam*.¹³ Indeed, it may result in the Court being misled as to material facts which would hinder its ability to get to the truth of these matters.
- 1.17 Production of the records sought will not frustrate the AFP's ongoing investigation against the Applicant. The scope of the documents sought is deliberately narrow. Transcripts of interview containing the accounts of what the Afghan witnesses claim they saw or heard in Darwan on 11 September 2012 (and correspondingly, questions from AFP investigators prompting the interviewees about what they saw and heard) are unlikely to reveal lines of inquiry or police methodology of a kind that could frustrate the investigation if disclosed to the Applicant.

¹⁰ Person 62: pulled or dragged by two soldiers short in stature from the creek bed to the cornfield and not known to Person 62 whether at the time Ali Jan was dead or alive (Outline [40]); Person 63: Ali Jan's dead body lying in the cornfield (Outline [45]); Person 64: Ali Jan's dead body found under a berry tree (Outline [20]).

¹¹ *Roberts-Smith v Fairfax Media Publications Pty Limited (No 5)* [2020] FCA 1067 at [72].

¹² Person 62: saw two soldiers at the bottom of the slope/hill (Outline [40]); Person 64: saw a big soldier run down the slope of the cliff (Outline [16]); Person 65: saw four soldiers go down a track to the bottom of the cliff (Outline [17]).

¹³ *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at 39.

- 1.18 Production of the transcripts of interviews with the Afghan witnesses will neither alert the Applicant to either the existence of the investigation (which was disclosed to the Applicant by the AFP) or to the substance of their allegations against the Applicant. The Applicant was notified by the AFP of its investigation concerning him and he agreed to participate in an interview with the AFP. The Applicant is aware of the substance of the allegations made against him by the Afghan witnesses. Outlines of anticipated evidence have been served by the Respondents on their behalf and signed statements from the Afghan witnesses have been directed by the Court to be served by not later than 14 May 2021.
- 1.19 There is no plausible reason in this case to believe that disclosure of the material will prejudice any investigation by the AFP or any other law enforcement agencies. *First*, the competing accounts, as between the Applicant on the one hand, and the Afghan witnesses on the other, are entirely inconsistent with each other. *Secondly*, the Applicant has served an outline of evidence and voluntarily provided evidence to the AFP concerning the events of 11 September 2012. *Thirdly*, the Respondents have a copy of the Applicant's transcript of interview with the AFP, which the AFP provided to the Respondents in answer to a subpoena issued at the request of the Respondents. The transcript was provided without any restriction on its use including any prohibition on the transcript or its contents being shared with the Afghan witnesses, or being used by the lawyers for the Respondents to prepare the signed statements that the Court has directed be served by 14 May 2021, or being tendered as evidence in the case.
- 1.20 Not only is there is no genuine risk that the Applicant will derive an advantage from the inspection of the documents that could prejudice the AFP's investigation, in fact it is he who will be prejudiced because the Respondents have his account of the events at Darwan as told to the AFP, which they are able to share with the Afghan witnesses before they give evidence in this matter. Further, and importantly the Applicant has already given his account to the AFP about the events at Darwan describing in detail the events that occurred on 11 September 2012, which no doubt he will be cross-examined extensively on in these proceedings.

- 1.21 The AFP's submission that disclosure of the relevant documents would prejudice the availability of reliable witness evidence is unexplained,¹⁴ in circumstances where:
- (a) the Afghan witnesses are voluntarily giving evidence in these proceedings; and
 - (b) the lawyers for the Respondents have the Applicant's record of interview with the AFP which presumably has been used by them and will be used by them when preparing the signed statements of evidence of the Afghan witnesses in these proceedings.
- 1.22 With respect, any contention that disclosure of the relevant documents would prejudice the availability of reliable witness evidence in this case cannot be justified as a basis for withholding the documents sought.
- 1.23 Further, the open affidavit of Assistant Commissioner Lee does not indicate that the information provided by witnesses to the AFP was given upon condition that their identity or evidence would not be disclosed to the Applicant. Importantly, the reason why no such contention is made no doubt is because the Afghan witnesses according to the Respondents have voluntarily provided outlines and have raised no objection to their names being disclosed in these proceedings. In fact, their names have already been disclosed.

The IGADF documents

- 1.24 For the reasons identified in paragraph 1.16 above, the legitimate forensic purpose of the IGADF documents is plain.
- 1.25 The IGADF's submissions in support of non-disclosure of the documents sought rely upon a concern:
- (a) to protect the safety of the witnesses who gave evidence to the Inquiry;¹⁵ and
 - (b) honour assurances given by the IGADF of confidentiality about the identities and evidence of witnesses.

¹⁴ AFP submissions, para [27].

¹⁵ IGADF submissions, para [40].

1.26 In relation to the protection of the safety of witnesses, the IGADF submits, correctly, that the Applicant has previously accepted that concerns about the safety of Afghan witnesses could not be excluded.¹⁶ However, to the extent that the Applicant's previously acknowledged concern is relevant, concerns about the safety of the Afghan witnesses have abated, as acknowledged by counsel for the Respondents at a hearing on 5 March 2021, who stated:¹⁷

The final point raised by my learned friends is a concern for the safety of the witnesses. Your Honour sees in Mr Bartlett's affidavit that there was, at a period in time, a concern for the safety of the witnesses.

That concern – and, certainly, your Honour sees from Mr Bartlett's affidavit that the indication about communications receiving that concern was up until December 2020; the concerns that were expressed at that time have abated. In a sense, it's difficult for me to say there's no threat to the safety of these witnesses, and I can't say that, your Honour, these are witnesses in Afghanistan. It is notorious that Afghanistan can be a dangerous place, *but your Honour does not have any evidence that there is any continuing threat or harm.* (emphasis added)

1.27 The Respondents' submission that there was no evidence, as at March 2021 of a continuing threat or harm to the Afghan witnesses was made in the context of an application for permission for the Afghan witnesses to give their evidence by audio-visual link from Kabul. The abatement of the concerns for the safety of the Afghan witnesses in the defamation proceedings was noted by the Court in its reasons published on 1 April 2021 at paragraph [59].¹⁸

1.28 In relation to assurances of confidentiality given by the IGADF, the evidence of IGADF Gaynor is that "the inquiry gave assurances to Afghan Nationals who were able to assist the inquiry but the fact of their cooperation with the inquiry and the information they gave would be treated with strict confidentiality."¹⁹ This submission, along with the submission that disclosure of the Afghan information would undermine

¹⁶ IGADF submissions, para [40].

¹⁷ Transcript 5 March 2021, page 41, lines 30 to 40.

¹⁸ *Roberts-Smith v Fairfax Media Publications Pty Limited (No 10)* [2021] FCA 317 at [59].

¹⁹ Gaynor at [42]

the section 21 direction²⁰ in relation to the Inquiry Report,²¹ are undermined by the production of the PAP Notice to the Respondents in these proceedings. The Applicant will make oral submissions in reply based on the PAP Notice which will be tendered confidentially to the Court.

- 1.29 The identity of the Afghan witnesses in these proceedings has not been suppressed and no application was made by the IGADF to have their names suppressed despite being represented in these proceedings. Their identities are now a matter of public knowledge. It is significant that the Afghan witnesses have not sought an order for suppression of their identities in the defamation proceedings.

Conclusion

- 1.30 The documents sought from the IGADF and the AFP are of critical relevance. The Applicant faces allegations of criminal conduct. It is important for the Applicant to have the opportunity to compare prior statements of evidence with the outlines of evidence of the Afghan witnesses and any evidence-in-chief that they may provide, so he has the opportunity to test their credit in relation to any discrepancies. He knows in detail the allegations made by the Afghan witnesses against him. There is no issue as to legitimate forensic purpose and the documents are critical to the Applicant's case. Neither the AFP nor the IGADF have made out their claim for public interest immunity and the Court should require production. Further, in relation to the AFP subpoena, the significance of the fact that the Applicant's record of interview was given to the Respondents without any restrictions on its use cannot be underestimated as a factor in support of the Applicant's position that these documents must be produced to ensure a fair trial.

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Phillip Sharp

6 May 2021

²⁰ Section 21 of the *Inspector-General of the Australian Defence Force Regulation 2016* (Cth).

²¹ Gaynor at [49]-[53].