

NOTICE OF FILING

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Details of Filing

Document Lodged:	Submissions
File Number:	NSD1485/2018
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



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 6/05/2021 11:55:23 AM AEST

Registrar

Important Information

As required by the Court's Rules, 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.

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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 ON APPLICATION FOR WITNESSES TO GIVE
EVIDENCE BY AVL**

1. INTRODUCTION

- 1.1 By interlocutory application dated 30 April 2020 the Applicant applies for the evidence of Persons 9, 23 and 33 to be adduced by audio visual link (AVL).
- 1.2 The Applicant relies on the affidavit of Paul Victor Svilans sworn 30 April 2021 (**Svilans**).
- 1.3 Each of the three witnesses served in Afghanistan.
- 1.4 In Court on 29 April 2021 (T46 L23), Counsel for the Respondents indicated that his clients would not oppose the application provided there was no objection by the Commonwealth to the Respondents to refer to particular sensitive documents over the AVL.

2. THE RELEVANT STATUTORY FRAMEWORK PURSUANT TO WHICH THE RESPONDENTS' APPLICATION IS TO BE DETERMINED

- 2.1 Adducing evidence by way of video link in Federal Court proceedings is governed by sections 47A and 47C of the Act. Section 47A provides:

47A Testimony by video link, audio link or other appropriate means

- (1) The Court or a Judge may, for the purposes of any proceeding, direct or allow testimony to be given by video link, audio link or other appropriate means.

Note: See also section 47C.

(2) The testimony must be given on oath or affirmation unless:

(a) the person giving the testimony is in a foreign country; and

(b) either:

(i) the law in force in that country does not permit the person to give testimony on oath or affirmation for the purposes of the proceeding; or

(ii) the law in force in that country would make it inconvenient for the person to give testimony on oath or affirmation for the purposes of the proceeding; and

(c) the Court or the Judge is satisfied that it is appropriate for the testimony to be given otherwise than on oath or affirmation.

(3) If the testimony is given:

(a) otherwise than on oath or affirmation; and

(b) in proceedings where there is not a jury;

the Court or the Judge is to give the testimony such weight as the Court or the Judge thinks fit in the circumstances.

(4) The power conferred on the Court or a Judge by subsection (1) may be exercised:

(a) on the application of a party to the proceedings; or

(b) on the Court's or Judge's own initiative.

(5) This section applies whether the person giving testimony is in or outside Australia, but does not apply if the person giving testimony is in New Zealand.

2.2 Section 47C provides:

47C Conditions for use of video links, audio links or other appropriate means

Video link

(1) The Court or a Judge must not exercise the power conferred by subsection 47A(1) or section 47B in relation to a video link unless the Court or the Judge is satisfied that the following conditions are met in relation to the video link:

(a) the courtroom or other place where the Court or the Judge is sitting is equipped with facilities (for example, television monitors) that enable all eligible persons present in that courtroom or place to see and hear the person (the *remote person*) who is:

(i) giving the testimony; or

(ii) appearing; or

(iii) making the submission;

by way of the video link;

(b) the place at which the remote person is located is equipped with facilities (for example, television monitors) that enable all eligible persons present in that place to see and hear each eligible person who is present in the courtroom or other place where the Court or the Judge is sitting;

(c) such other conditions (if any) as are prescribed by the Rules of Court in relation to the video link;

(d) such other conditions (if any) as are imposed by the Court or the Judge.

(2) The conditions that may be prescribed by the Rules of Court in accordance with paragraph (1)(c) include conditions relating to:

(a) the form of the video link; and

(b) the equipment, or class of equipment, used to establish the link; and

(c) the layout of cameras; and

(d) the standard of transmission; and

(e) the speed of transmission; and

(f) the quality of communication.

...

Other appropriate means

(5) The Court or a Judge must not exercise the power conferred by subsection 47A(1) or section 47B in relation to an appropriate means other than video link or audio link unless the Court or the Judge is satisfied that the following conditions are met in relation to that means:

(a) the conditions (if any) as are prescribed by the Rules of Court in relation to that means;

(b) such other conditions (if any) as are imposed by the Court or the Judge.

3. SUBMISSIONS

The Respondents' Position

3.1 In their letter of 12 April 2021¹ the Respondents express a concern about their ability to show sensitive documents to the three witnesses in cross examination. Three examples are provided. The first two involve sections of the PAP Notice. It is quite clear from the section 38B orders (see especially Part M) that Sensitive IGADF documents (including the PAP Notice) cannot ever be shown to persons other than Authorised Persons. Those documents are simply not available for cross-examination whether via AVL or in person. The AGS on behalf of their client has recently made that expressly clear.²

3.2 The third category of documents raised by the Respondents are Sensitive Documents produced by the Department of Defence with the file names commencing 3B. The Applicant has written to the Commonwealth requesting clarification of the Commonwealth's position on these documents.³

Person 9

3.3 Person 9's Outline of Evidence covers only very limited topics, including the Applicant's qualities as a soldier and identification. The only topic covered in the Outline that is raised in the particulars of justification is an alleged mock execution during a training exercise.⁴ Person 9 is not alleged to be a witness or even a person present on the mission during any of the alleged murders or assaults. In those circumstances even if there is an inability to show

¹ Svilans p. 4 at [12(b)]

² Svilans p. 4 at [12(c)]. Paragraph 5 of the letter from the AGS to the parties of 13 April 2021.

³ See Svilans p. 4 at paragraph 12(d).

⁴ See Further Amended Defence Particular 65.

Person 9 certain sensitive documents over the AVL this could not give rise to any real prejudice.

- 3.4 Person 9 is a member of the Special Air Service Regiment (SASR) and currently on a long-term military posting to the United Kingdom. The unit he is with is on short notice to move. In the circumstance he cannot return to Australia. Person 9 believes he will be able to attend a video-link at the time required.⁵

Person 23

- 3.5 Apart from general evidence concerning the Applicant's leadership qualities, the only topic from the particulars of justification raised in the Outline of Evidence of Person 23 is the Chora Valley in 2006 and the alleged bullying of Person 1 during and after this engagement.⁶ At that time, Person 23 was a member of a five person patrol including the Applicant, Person 33, Matthew Locke (deceased) and Persons 1 and 2. As a member of the patrol including both the Applicant and Person 1 his evidence is relevant and significant to the allegations of bullying.

- 3.6 Person 23 resides in Los Angeles. At present for him to attend Australia for the trial he would need to undertake 14 days in hotel quarantine. He is unwilling to return in those circumstances. He is able to give evidence by AVL from the United States at the time required by the Court.⁷

Person 33

- 3.7 The Outline of Evidence for Person 33 indicates that he will give some general evidence about the professionalism of Person 1 and the Applicant as well as evidence concerning the Applicant's conduct relevant to his obtaining the Medal for Gallantry. As with Person 23, the only topic from the particulars of justification raised in the Outline of Evidence of Person 33 is the Chora Valley in 2006 and the alleged bullying of Person 1 during and after this engagement.⁸ At that time, Person 33 was the Patrol Commander of a five person patrol including the Applicant, Person 23 and Persons 1 and 2. As Patrol Commander of the patrol containing both the Applicant and Person 1 his evidence is again relevant and significant to the allegations of bullying.

- 3.8 Person 33 is a serving member of the Royal Marines and is on short notice to move. He is not able to divulge the details of any deployment as that information is classified. He has agreed

⁵ Svilans at [7].

⁶ See Further Amended Defence Particular 17-31.

⁷ Svilans at [8].

⁸ See Further Amended Defence Particular 17-31.

to advise the Applicant's solicitors if he is deployed and of his return date for the purpose of arranging evidence by AVL.⁹

WhyGo

3.9 The Applicant's solicitors have identified WhyGo as an appropriate commercial provider of commercial AVL facilities with premises in the UK and the USA.¹⁰ The organisation has previously been approved by use, at least provisionally, by this Court.¹¹

Conclusion

3.10 The application should be granted for these reasons:

- (a) Two of the witnesses are unavailable and for a third his compulsory attendance in Sydney at the trial would occasion very significant inconvenience and personal disruption.
- (b) The evidence that Persons 23 and 33 will give is important to the 2006 bullying allegation. If the witnesses do not attend in Sydney to give evidence the consequence will be that while Persons 1 and 2 will apparently give evidence against the Applicant, the accounts of the other members of the patrol present in the Chora Valley in 2006, being Persons 23 and 33, will not be available to the Court.
- (c) The Respondents have not as yet pointed to any prejudice save for their ability to put Sensitive IGADF documents and other Sensitive Documents (produced by Defence) to the witnesses. As to the Sensitive IGADF documents, the Section 38B orders contain an absolute prohibition on disclosure to unauthorised persons which would include these witnesses. As to the Department of Defence documents, while the Commonwealth's attitude is not yet known, the Respondents have been unable to point to any significant prejudice that will occur from their inability to put particular documents including maps or imagery in front of these witnesses via the AVL link.
- (d) While the evidence that Persons 9, 23 and 33 are anticipated to give is important, none of them will give evidence about the more serious allegations of murder and assault advanced within the particulars of justification. Given the nature of the evidence it is anticipated they will give, cross-examination of Persons 9, 23 and 33

⁹ Svilans at [9].

¹⁰ Svilans at [10]-[11].

¹¹ *Australian Competition and Consumer Commission v ACM Group Limited (No 1)* [2017] FCA 799

through an AVL facility will not cause substantial prejudice to the Respondents. If any disadvantage is occasioned to the Respondents by having to cross-examine these persons through an AVL facility, it will be outweighed by the prejudice that would be occasioned to the Applicant if these persons are unable, by reason of their circumstances, to give evidence in these proceedings in support of his case. The interests of justice favour an order permitting Persons 9, 23 and 33 to give evidence by AVL. Such an order is also consistent with the quick, inexpensive and efficient conduct of these proceedings: section 37M of the *Federal Court of Australia Act 1976*.

Bruce McClintock SC

Arthur Moses SC

Matthew Richardson

Phillip Sharp

Counsel for the Applicant

30 April 2021