FEDERAL COURT OF AUSTRALIA

Roberts-Smith v Fairfax Media Publications Pty Limited (No 4) [2020] FCA 614

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| File numbers: | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018  NSD 1826 of 2018 |
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| Judge: | **BESANKO J** |
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| Date of judgment: | 9 April 2020 |
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| Date of publication of reasons: | 8 May 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** — whether trial date should be vacated — where *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) invoked by the Commonwealth Attorney-General — where feasibility of an in-person trial impacted by COVID-19 pandemic and associated restrictions |
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| Legislation: | *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 3, 6A, 8,17, 38B, 38D, 38F, 38G, 38H  *Public Health Act 2010* (NSW) s 10  *Public Health (COVID‑19 Air Transportation Quarantine) Order 2020* (NSW)  *Public Health (COVID‑19 Restrictions on Gathering and Movement) Order 2020* (NSW) |
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| Date of hearing: | 9 April 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 26 |
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| Counsel for the Applicant: | Mr B McClintock SC with Mr M Richardson and Mr P Sharpe |
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| Solicitor for the Applicant: | Mark O’Brien Legal |
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| Counsel for the Respondents: | Mr A Dawson SC with Ms L Barnett and Mr C Mitchell |
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| Solicitor for the Respondents: | MinterEllison |
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| Counsel for the Commonwealth of Australia: | Ms A Mitchelmore SC with Mr J Edwards |
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| Solicitor for the Commonwealth of Australia: | Australian Government Solicitor |
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| **Table of Corrections** |  |
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| 29 October 2021 | In paragraph 17, line 1, “20 April 2020” has been replaced with “3 April 2020”. |

ORDERS

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|  | | NSD 1485 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | FAIRFAX MEDIA PUBLICATIONS PTY LIMITED ACN 003 357 720 (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1486 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE AGE COMPANY PTY LIMITED ACN 004 262 702 (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1487 of 2018 |
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| 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 | |

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|  | | NSD 1826 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | JOHNATHAN PEARLMAN  Respondent | |

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| JUDGE: | Besanko j |
| DATE OF ORDER: | 9 april 2020 |

THE COURT ORDERS THAT:

1. The trial commencing on Monday, 15 June 2020 be vacated.
2. The Case Management Hearing be adjourned to Thursday, 14 May 2020 at 9.30 am (Adelaide time).

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

REASONS FOR JUDGMENT

BESANKO J:

1. There are four defamation proceedings in the Court in which Mr Ben Roberts-Smith is the applicant. In three of the proceedings, different media companies and the same journalists are the respondents. In the fourth, Mr Johnathan Pearlman is the respondent. As the allegations in each proceeding are broadly similar to the other proceedings, they have travelled together and similar orders have been made in each proceeding.
2. On 9 August 2019, I made an order in each proceeding that the proceeding be listed for a trial commencing on Monday, 15 June 2020 with six weeks set aside. It was envisaged (although not yet embodied in an order) that the proceedings would be heard together and that, subject to any areas where there was no overlap, evidence in one proceeding would be evidence in the other proceedings. As the pandemic involving COVID-19 escalated, I became concerned as to whether the trial would be able to proceed on that date. On 26 March 2020, my associate wrote to the parties advising them that I would hold a case management hearing and in due course the hearing took place on 9 April 2020.
3. On 31 March 2020, the Attorney-General for the Commonwealth gave notice in writing in each proceeding to the Court and the parties and their legal representatives that the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act) applied to the proceeding. At the case management hearing on 9 April 2020, the Commonwealth appeared by senior and junior counsel in relation to matters arising under the NSI Act. The parties in each of the four proceedings were represented by senior and junior counsel.
4. I should also mention that the parties have filed outlines of evidence pursuant to orders made by the Court on 13 February 2019. The applicant was ordered to file and serve any outlines of evidence upon which he proposed to rely in respect of his case in chief by 27 March 2019. The respondents were ordered to file and serve any outlines of evidence upon which they proposed to rely in respect of their defences, and any matters in answer to the applicant’s evidence, by 8 May 2019. The applicant was ordered to file and serve any outlines of evidence upon which he proposed to rely in reply to the respondents’ evidence by 19 June 2019. On my calculations, the applicant has filed some 23 of outlines of evidence and 11 affidavits, and the respondents have filed some 18 outlines of evidence. The respondents’ outlines of evidence include four outlines in relation to witnesses who permanently reside in Afghanistan. Those outlines of evidence were filed between December 2019 and 1 April 2020. They were filed and served outside the time limits fixed by the orders of the Court and no application has been made by the respondents to extend those time limits.
5. After hearing submissions on 9 April 2020, I decided to vacate the trial date and I made an order accordingly. I adjourned the case management hearing to Thursday, 14 May 2020 at 9.30 am. I said that I would deliver reasons for my decision and these are my reasons.
6. It is convenient to commence with the NSI Act and the implications it has for these proceedings.
7. Counsel for the Commonwealth advised me during the hearing on 9 April 2020 that the notices were prompted by a subpoena which had been issued with leave by the respondents seeking documents from the Secretary of the Department of Defence. The subpoena identifies a broad range of documents and the Commonwealth’s position is that information in the documents relates to matters of “national security”, that is to say, “Australia’s defence, security, international relations or law enforcement interests” (s 8 of the NSI Act). However, the Commonwealth’s concern does not stop there. Matters disclosed in the outlines of evidence which have been filed and served, and evidence given by witnesses at the trial, both in chief and under cross-examination, may also involve matters of national security.
8. The Attorney-General is not a party to these proceedings. As I have said, he has now given notice under s 6A that the NSI Act applies to each of the proceedings and, by virtue of s 6A, the NSI Act applies to each proceeding. By reason of s 6A(5), the NSI Act applies only to those parts of the proceeding that occurs after the notice is given.
9. The object of the NSI Act is described in s 3(1) of the Act. It is as follows:

The object of this Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.

1. I have already identified the meaning of national security. Section 17 of the NSI Act provides that something is likely to prejudice national security if there is a real, and not merely a remote, possibility that it will prejudice national security.
2. The Commonwealth referred me to s 38B of the NSI Act which provides for arrangements to be made in civil proceedings about the disclosure of national security information. Section 38B provides as follows:

(1) At any time during a civil proceeding:

(a) the Attorney-General, on the Commonwealth’s behalf; and

(b) the parties to the proceeding, or their legal representatives on their behalf;

may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.

(2) The Court may make such order (if any) as it considers appropriate to give effect to the arrangement.

1. I was told that the parties in these proceedings are in discussions as to whether or not they can agree on an arrangement about the disclosure, protection, storage, handling or destruction, in the proceedings, of national security information of the type envisaged by s 38B(1). If they are able to reach such an arrangement, they propose to make an application to the Court under s 38B(2) for an order to give effect to the arrangement.
2. There is a more detailed and lengthy procedure in the NSI Act for protecting the disclosure of national security information. Under s 38D and the sections which follow, the parties are required to give the Attorney-General notice if they know or believe that they will disclose national security information and that, in turn, can lead to the issuing of non‑disclosure certificates by the Attorney-General under ss 38F, 38G and 38H and closed hearings under Division 3 of Part 3A of the Act. There is no need for me to describe all of the steps in this procedure.
3. As I understand it, the parties are hoping that they can make an arrangement which avoids the more detailed and longer procedure (see s 38D(2)(a)(ii), (b)(ii)) at least as to the documents to be produced under the subpoena.
4. It seems to me that the notice under the NSI Act in each proceeding has two consequences for the hearing of the trial in these proceedings. They are as follows:
5. If an arrangement between the parties and the Commonwealth under s 38B is not reached, or there is delay in reaching such an arrangement, then that has the real potential to affect the commencement date of the trial;
6. As I understood the submission of counsel for the Commonwealth, the prospect of the trial involving national security information means that the hearing could not take place other than in open court with the parties and their witnesses physically present. For convenience only, I will call such a mode of trial an “in-person” trial. Counsel for the Commonwealth said that this was the position because, as she was instructed, Microsoft Teams, which is the software the Court has been using, is not a suitable platform for communicating national security information. She also told me that the Commonwealth is not aware of any other similar platform that would be suitable for conducting a substantive hearing in this type of matter involving the information in question.
7. Counsel for the applicant submitted that it was premature at this point for the Court to conclude that it was not feasible to go ahead with the trial in mid-June. He reminded me that the imputations said to arise from the matters complained of are very serious. The imputations involve statements that the applicant has committed two murders and acts of domestic violence.
8. The applicant relied on an affidavit of Ms Monica Helen Allen sworn on 3 April 2020 who is a solicitor at the firm acting for the applicant in each of the four proceedings. Her evidence establishes that since the matters complained of, the respondents have published, or caused to be published, numerous articles naming the applicant and repeating in substance, at least part of the allegations which are the subject of these proceedings. A number of those articles are produced by Ms Allen. She states that she is instructed that the ongoing impacts of the publication of the matters complained of on the applicant and his family have been considerably exacerbated by the respondents re-publishing the allegations every few months. The online versions of those new articles often contain links to the matters complained of. Ms Allen is also instructed that over the last 12 months, the suffering of the applicant and his family has increased significantly as a result of the respondents’ continuing conduct. Ms Allen provides six examples. First, Ms Allen is instructed that following publication of a 60 Minutes broadcast and subsequent articles by the respondents in September 2019, one of the applicant’s daughters was told by another student that “Your dad’s a murderer”. Secondly, Ms Allen is instructed that in November 2019, while standing outside the Channel Seven offices in Martin Place, the applicant had a car pull up next to him and the driver point his fingers in a gun shape at the applicant and making shooting sounds — indicating that he was shooting the applicant. Thirdly, Ms Allen is instructed that the applicant has received no public speaking requests at all, whether paid or voluntary, in the past 12 months. Fourthly, Ms Allen is instructed that the applicant has developed severe insomnia. Fifthly, Ms Allen is instructed that each morning the applicant feels anxious and has a sense of dread about what allegations will be made about him by the respondents. Finally, Ms Allen is instructed that until this year, the applicant has always received numerous invitations to attend ANZAC Day services and/or events. Despite being Australia’s most decorated soldier, the applicant, during the period prior to the cancellation of ANZAC Day events this year, did not receive any requests to attend any ANZAC Day services or events for ANZAC Day 2020. There would need to be good reasons for the trial not to proceed as planned. However, as I will explain, there are good reasons.
9. Having made these points, the applicant nevertheless submitted that it would be very difficult to have a trial other than an in-person trial. The applicant made it clear that he considered that the trial should take place in court with the parties and their representatives present. He tempered that somewhat a little later when he said, quite properly, that there is no reason why some of the witnesses, and he gave the example of reputation witnesses, could not give evidence by way of audio-visual link. However, as to the evidence of the applicant himself, counsel for the applicant said:

I would not be willing to have him give evidence, putting aside the national security issues, by audio visual link.

1. The respondents also submitted that the trial needed to be an in-person trial. They submitted that that followed from the fact that the NSI Act was relevant. I pressed counsel for the respondents to articulate the respondents’ position as to whether the trial needed to be an in‑person trial aside from the NSI Act. Counsel said the following in response:

It is a very serious case for both sides, and much will turn on your Honour’s assessment of the witnesses once they give their evidence and once they are cross-examined, and, in my respectful submission, it’s in the interests of both parties, both sides, to have the matter dealt with in person. But that, in my submission, has really been overtaken by the invocation of the NSI Act, because putting aside the video link element and the absence of any appropriate security to enable that to occur, there is also the practical problem of access to documents, and, as your Honour knows, we’ve issued a subpoena to Defence.

1. During the course of their submissions, the respondents sought to tender an unsworn affidavit of Mr Dougal Victor Allan Hurley, who is a solicitor employed by the firm which acts for the respondents. That affidavit deals with the four outlines of evidence of Afghan witnesses which had been filed and served outside the time limits fixed by the orders. That affidavit addresses the apparent substantial difficulties in those witnesses travelling to Australia to give evidence. I refused to receive the affidavit and it was marked for identification. I indicated that I was able to reach my decision aside from the affidavit and I did not want to be distracted in dealing with the difficulties raised by the fact that the outlines were filed outside the time limits fixed by the Court.
2. In terms of my decision to vacate the trial date, there were two issues. They were whether an in-person trial is necessary and, if so, whether an in-person trial commencing on 15 June 2020 is possible.
3. In my opinion, an in-person trial is necessary for two independent reasons. The first reason is that such a trial is necessary to deal with the issues relating to, or arising from, the disclosure of national security information. I accept the Commonwealth’s submission about that matter. The second reason is that this is a trial where the credibility or reliability of the key witnesses may well be crucial in circumstances where the alleged imputations arising from the matters complained of are, as I have said, very serious indeed. I have no doubt that some of the witnesses could give their evidence by audio-visual link, but I consider from my own knowledge of the issues that the position of both of the parties to the proceedings that the key witnesses should give evidence in person in order that the parties have a proper and fair opportunity to present their respective cases is reasonable.
4. In my opinion, as best as one can tell, an in-person trial commencing on 15 June 2020 will not be possible. There are the social distancing requirements caused by the current pandemic. Just as important are the travel restrictions and self-isolation requirements associated therewith in a case where there are potentially a large number of witnesses from outside New South Wales and some from outside Australia (see *Public Health Act 2010* (NSW) s 10; *Public Health (COVID‑19 Restrictions on Gathering and Movement) Order 2020* (NSW) 30 March 2020; Amendment 3 April 2020; Amendment 30 April 2020; *Public Health (COVID‑19 Air Transportation Quarantine) Order 2020* (NSW) 28 March 2020; Amendment 29 March 2020, Amendment 3 April 2020). No doubt a number could give evidence by audio-visual link, but not all.
5. Had the decision about vacating the trial date been more finely balanced, I might have deferred it for a time. However, it is not and, in any event, the logistical challenges of a six week trial involving a large number of witnesses and the potential increase in such challenges caused by the application of the NSI Act, suggested to me that it was appropriate to deal with the issue on 9 April 2020.
6. At the time I made my order vacating the trial date, I indicated that at the case management hearing on 14 May 2020, I would consider again the question of when this trial might get underway. I indicated that if I could facilitate a trial date this year, then I would endeavour to do so. Further, I indicated that if it was clear at the next case management hearing that the trial could not proceed this year, then I would fix a date for the trial in the first part of next year.
7. It was for these reasons that I vacated the trial date of 15 June 2020.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko. |

Associate:

Dated: 8 May 2020

SCHEDULE OF PARTIES

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|  | 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 |