Federal Court of Australia

Roberts-Smith v Fairfax Media Publications Pty Limited (No 7) [2020] FCA 1296

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| File numbers: | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
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| Judgment of: | **BESANKO J** |
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| Date of judgment: | 7 September 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** — fixing of a trial date — relevant considerations. |
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| Legislation: | *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) |
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| Cases cited: | *Roberts-Smith v Fairfax Media Publications Pty limited (No 4)* [2020] FCA 614 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 5 |
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| Date of hearing: | 21 August 2020 |
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| Counsel for the Applicant: | Mr B McClintock SC with Mr M Richardson |
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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 | Mr J Edwards |
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| Solicitor for the Commonwealth of Australia | Australian Government Solicitor |

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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| order made by: | besanko J |
| DATE OF ORDER: | 7 September 2020 |

THE COURT ORDERS THAT:

1. The matter be listed for hearing with an estimate of 6 to 8 weeks commencing on 7 June 2021.

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

REASONS FOR JUDGMENT

BESANKO J:

1. These three proceedings are at a point where it is appropriate to fix a trial date. The trial had previously been fixed to commence on 15 June 2020 with six weeks set aside. The respondents now say that the trial could take up to eight weeks and, although it is to be hoped the trial can be completed within a shorter period, up to eight weeks is not an unrealistic estimate.
2. My reasons for vacating the previous trial date related to the restrictions resulting from the current pandemic and the action taken by the Attorney-General for the Commonwealth under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)(NSI Act) (*Roberts-Smith v Fairfax Media Publications Pty limited (No 4)* [2020] FCA 614)*.*
3. I have indicated to the parties that the available trial dates for next year are March and April 2021 or June and July 2021. The applicant seeks the earliest possible date, whereas the respondents seek a trial in June and July 2021.
4. I have given this matter anxious consideration. In normal circumstances, I would fix the trial to start in March 2021. Clearly, the parties can be ready by then and the need for further time for preparation was not a relevant consideration in terms of fixing the trial date. The applicant relies on evidence that the respondents are continuing to publish matters containing the imputations, or similar imputations, of which he complains in these proceedings and of the harm and damage that continues to cause him. I summarised this evidence in my earlier reasons (at [17]). This is a significant consideration which I take into account without, of course, making any assessment of the merits of the respective cases of the parties. On the other hand, the likely course of the pandemic and, more importantly in the present context, the restrictions resulting from it, is entirely unknown. There is no certainty as at the date of these reasons about when restrictions which are likely to impair a substantial in person trial are likely to be lifted. If this was a three day trial which could be rearranged at relatively short notice and with minimal inconvenience, then I would fix a trial date in March 2021. However, this case is far from being a case of this nature. The nature of the issues in this case, the likely length of the trial and the application of the NIS Act means that the preparation for trial and the conduct of the trial will be a very substantial exercise. In my opinion, there is a significant risk that if a March and April date is fixed, but was abandoned shortly prior to those dates, new dates in June and July would not be possible. On balance, I think the prudent course is to fix the trial for June and July 2021. I will hear the parties as to a precise starting date in June 2021.
5. I should make one matter clear before finishing these reasons because it was a matter raised by counsel for the respondents in the course of their submissions. Counsel for the respondents are not available in March and April 2021 because of other trial commitments. I am not critical of them raising this matter, but it is not a relevant consideration in the particular circumstances of this case. In other words, I would have fixed the trial for March and April 2021, but for the particular matters I have identified. Those particular circumstances include the facts that a trial date was previously fixed, the parties have had adequate time to prepare their respective cases, there is ample time between now and March to brief alternative counsel (even acknowledging that counsel must meet certain requirements before inspecting Department of Defence documents) and the ongoing harm being suffered by the applicant.

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| I certify that the preceding five (5) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Besanko. |

Associate:

Dated: 9 September 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 |