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

Ben Roberts-Smith
Applicant

Fairfax Media Publications Pty Ltd and others
Respondents

APPLICANT'S SUBMISSIONS

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SECTION I: INTRODUCTION

1. The Respondents allege that Mr Roberts-Smith engaged in the murder (or complicity in the murder) of six persons and violent assaults against fighting aged males in Afghanistan. These extremely grave allegations assert that Mr Roberts-Smith contravened Article 3 of the Third and Fourth Geneva Conventions. The Respondents allege very serious criminality to the highest end of objective seriousness against a long serving member of the Australian Defence Force who had an exemplary service record.
2. Mr Roberts-Smith served as a member of the Australian Defence Force during the period 1996-2013. As part of his distinguished military service to Australia, Mr Roberts-Smith deployed to Afghanistan as a member of the Special Air Service Regiment in 2006, 2007, 2009, 2010 and 2012.¹ During deployments, he was involved in at least 50 missions.² Members of the Australian Defence Force who served with him during these missions, including witnesses called by the Respondents, have variously described him as a good man,³ a brave soldier⁴ and a soldier who on their observations complied with the Rules of Engagement (**ROE**)⁵. The contemporaneous records of the Australian Defence Force demonstrate that Mr Roberts-Smith was a professional soldier who upheld the highest standards of what was required of a member of the Special Air Services Regiment during his deployments to Afghanistan.⁶
3. The Respondents have advanced no plausible motive as to why Mr Roberts-Smith would be involved in six acts of murder in Afghanistan during missions on 12 April 2009, 11 September 2012, 12 October 2012, 18-20 October 2012, 5 November 2012. The Respondents' case appears to be that for some unknown reason Mr Roberts-Smith on 12 April 2009 engaged in the execution of a person under confinement. There is no suggestion that prior to 2009 Mr Roberts-Smith had acted in such a manner, or that he had engaged in unlawful killings during his missions to Afghanistan in the period 2010 to 2011. However, it is also alleged by the Respondents that after Mr Roberts-Smith had been awarded the Victoria Cross for his brave actions during the battle of Tizak on 11 June 2010, that for some inexplicable reason he engaged or participated in four murders in 2012, during his last deployment to Afghanistan as a member of the Special Air Services Regiment.
4. The Respondents' case advances no probative evidence or plausible suggestion as to any motive for Mr Roberts-Smith to be involved in the six murders. As Lord Atkinson noted in *R v Ball* [1911] AC 47 at 68:

“Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his ‘malice aforethought’, inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not.”
5. Indeed, a cursory review of the history of the pleadings of the Respondents' truth defence demonstrates why their allegations of murder need to be carefully scrutinised by the Court. For instance, in relation to the alleged murder of Ali Jan on 11 September 2012 which has occupied a substantial part of this trial, the Respondents initially pleaded in 2018 that Ali Jan had been murdered in the presence of Mr Roberts-Smith by Person 12, a member of the Afghan Partner Force.⁷ When it

¹ T122 L8-14 (BRS).

² T212 L45-46 (BRS)

³ T2900 L16 (P4)

⁴ T2900 L13-14 (94).

⁵ T5883 L16-19, L21-22 (P32).

⁶ Ex. A1, Tabs 6, 11 and 24.

⁷ Defences filed 9 October 2018.

became apparent that Person 12 was not on that mission, the Respondents then alleged that Ali Jan was murdered by Person 11, a member of the Australian Defence Force and that Mr Roberts-Smith was complicit in that murder.

6. The allegations of murder or complicity in murder which have been made by the Respondents, have as their origin, historical rumours and innuendo with no contemporaneous records of the versions of events which are now sought to be advanced before this Court. Mr Roberts-Smith was a polarising figure in the Special Air Service Regiment. He was often the subject of discussion between members of the Special Air Service Regiment for a number of reasons including his entitlement to the Victoria Cross. It is not surprising in a case such as this involving historical allegations, that many of the witnesses called by the Respondents have had suspicions which they have discussed amongst themselves, which some have come to believe as fact, which have in the instances of some witnesses, in turn escalated to recollection of events which occurred over a decade ago. In these circumstances, the quality of the evidence has deteriorated which in turn has an impact on the ability of the Court to ascertain the truth of events.⁸ In those circumstances, corroborating evidence from contemporaneous records and physical evidence assume significant importance.
7. The vice in the Respondents' truth defence both in their pleading, and in this trial more generally, is the opacity and lack of precision in the factual case the Respondents seek to prove in respect of the six murders which they pleaded. The vice, a sliding factual substratum, which the Respondents impermissibly seek to adapt to whichever argument might advance the Respondents' case without proper regard to the need to have precise particulars of the facts or allegations that are said to be true. An example of this relates to the murder allegations which are pleaded in relation to the mission on 12 April 2009. It is alleged in the Third Further Amended Defence, that Person 5 in the presence of Mr Roberts-Smith ordered Person 4 to execute an Afghan male.⁹ It is now alleged by the Respondents in their submissions that Mr Roberts-Smith ordered Person 4 to execute an Afghan male.¹⁰
8. A feature of the manner in which the Respondents have propounded their grave allegations of murder in these proceedings, is that they seemingly will not make any concessions as to their case even when confronted with evidentiary difficulties which contradict their allegations of murder. This case is not about "a path home to victory"¹¹ as the Respondents have at one time described their case, but rather it is about Respondents using the processes of this Court to make allegations of murder which will have both national and international repercussions for the Applicant and other members of the Australian Defence Force.
9. A troubling feature of the Respondents' Third Further Amended Defence and their submissions, is that they have not advanced any submission concerning the allegations of murder which are pleaded at paragraphs 122A-122H of their Third Further Amended Defence. This allegation is not withdrawn and remains pleaded as a murder which Mr Roberts-Smith was complicit in and responsible for in 2012. This allegation of murder was put to Mr Roberts-Smith and was the subject of evidence led from Mr Andrew Hastie. The evidence of Mr Hastie on this allegation was lacking in any reliability and could never be used to prove the allegation. Rather than withdraw this allegation, or indicate to the Court that it is not being pressed, it remains sitting on the Court record as an allegation of murder against Mr Roberts-Smith. It is not clear what the Respondents want the Court to do with that allegation.

⁸ See for example *Heron v McGregor* (1986) 6 NSWLR 246 at 254 per McHugh JA.

⁹ Third Further Amended Defences filed 1 April 2022 (**Defences**) at [46].

¹⁰ RS [129], [144] and [145].

¹¹ T4482 L14-15 (Owens).

10. The Respondents also allege that Mr Roberts-Smith engaged in the bullying of two members of the Australian Defence Force whilst serving as a member of the Australian Defence Force. These allegations are propounded in circumstances where no attempt has been made by the Respondents to explain what legal test is to be used by the Court to conclude that Mr Roberts-Smith bullied two members of the Australian Defence Force. The allegations concerning Mr Roberts-Smith bullying Person 10 following the incident on 15 July 2012 involving Person 10 shooting at a woman and child during a mission in the Chora Valley, contradicts the case of the Respondents that Mr Roberts-Smith was someone who did not have any regard to the ROE. Mr Roberts-Smith's reaction to the conduct of Person 10 was one of fury that Person 10 could have endangered the lives of Afghanistan civilians contrary to the ROE.
11. The allegation that Mr Roberts-Smith in his personal life engaged in an act of domestic violence towards Person 17 is an equally serious and grave allegation. This allegation was baseless and should never have been pursued in these proceedings by the Respondents. It is relied upon by the Respondents as part of a misconceived attempt to undermine the credibility of Mr Roberts-Smith and to invite the Court to not accept Mr Roberts-Smith as a witness of truth when determining the war crimes allegation.
12. This case, of course, will not be determined in a vacuum. It must be determined by reference to each of the pleaded allegations of criminality alleged by the Respondents which must be construed as if they were criminal indictments. The approach to fact finding in a civil case of criminal allegations assumes critical importance in this matter in light of the nature of the allegations which the Respondents seek to propound.

SECTION II: PLEADING AND EVIDENTIARY PRINCIPLES

13. Section 25 of the *Defamation Act 2005* (NSW) provides that it is a defence to the publication of a defamatory matter “if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true”. Substantially true means “true in substance or not materially different from the truth”.¹²
14. The Respondents must prove the “truth of each main element of each imputation it seeks to justify”. The Respondents must prove the substantial truth of that very imputation, and the whole of that very imputation,¹³ as well as the truth of the defamatory sting (being the meaning or meanings found to have been conveyed by the publication).¹⁴
15. For example, one of the elements of the following imputations concern the commission by Mr Roberts-Smith of criminal offences (**Criminal Imputations**):
 - (a) the *murder* of an unarmed and defenceless Afghan civilian (paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim (Imputation 1));
 - (b) the *murder* of a man with a prosthetic leg (paragraphs 9(b) and 11(b) of the Statement of Claim (Imputation 5)); and
 - (c) *domestic violence* against a woman in the Hotel Realm (paragraphs 13(a) and 15(a) of the Statement of Claim (Imputation 7)).
16. Proof of the substantial truth of the above elements of the Criminal Imputations requires proof – on the balance of probabilities¹⁵ – by reference to the *elements of the relevant criminal offence*. The Respondents do not discharge their onerous burden of proving the above elements of the Criminal Imputations (and the defamatory sting) by simply proving matters that are peripheral to, or not directed towards, proof of the elements of the criminal offence that constitutes one of the elements of the Criminal Imputations. This is for the following reasons.
17. *First*, “substantial truth” is not an excuse to prove that the defendant “almost got it right” or to prove the truth of parts only of the imputation.¹⁶ The Criminal Imputations conveyed that Mr Roberts-Smith committed the criminal offences. Thus, proof of its substantial truth necessarily requires proof of the facts that make up the elements of the criminal offences. The Respondents’ Particulars of Truth (**PoT**) assert, for example, that Mr Roberts-Smith’s conduct constituted:
 - (a) “*murder*” with respect to Ali Jan (or complicity in and responsibility for his murder) (particulars 116 and 117), relating to Imputation 1;
 - (b) complicity in and responsibility for the “*murder*” of Afghan Male 1 (particular 48), relating to Imputation 4;
 - (c) complicity and responsibility for the “*murder*” of Afghan Male 7 or 8 (particular 122G), relating to Imputation 4;

¹² *Defamation Act 2005* (NSW) s 4.

¹³ *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510 at [170] (Levine J).

¹⁴ *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [224] (Wigney J).

¹⁵ *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [226] (Wigney J), citing *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 (Mason CJ, Brennan, Deane and Gordon JJ).

¹⁶ *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510 at [170] (Levine J); *Howden v “Truth” & “Sportsman” Ltd* (1937) 58 CLR 416 at 420-421 (Dixon J).

- (d) “murder” with respect to Afghan Male 2 (particular 52), relating to Imputation 5; and
- (e) “assault” (particulars 130 to 138), relating to Imputation 7.
18. *Secondly*, the authorities have distinguished between imputations conveying that a person has engaged in criminal conduct (that is, guilt) from ones that convey that there are reasonable grounds for suspecting that the plaintiff has engaged in such conduct. Further, the authorities have held that an imputation of guilt will always be more serious than one of suspicion on reasonable grounds.¹⁷ The facts required to prove a plea of justification of an imputation that a plaintiff has engaged in criminal conduct are *not* the same as those required to prove a plea of justification of an imputation that there are reasonable grounds for suspicion that a plaintiff engaged in that criminal conduct.¹⁸ Put another way, where the imputation conveys guilt, it is insufficient for a defendant to prove that the plaintiff was suspected or believed (however reasonably or strongly) of being guilty.¹⁹ This is because “a justification defence that fails to establish guilt, and rises no higher than reasonable grounds to suspect, may fail because necessary elements of proof are absent”.²⁰
19. The above distinction between imputations that convey guilt and those that merely convey reasonable grounds for suspicion (and the difference in proof attendant between the two imputations) underscores the proposition that, where an imputation conveys guilt, proof of the substantial truth requires proof by reference to the elements of the relevant offence.
20. *Thirdly*, proof by reference to the elements of the relevant offence is a corollary to the purpose of pleadings and particulars, particularly in the context of defamatory proceedings. In such a proceeding, particulars provided in support of a defence of justification must generally, *inter alia*, be “sufficiently specific and precise to enable a claimant to know the case they are required to meet”.²¹ Consistent with this, any particulars of justification must descend to specific facts on which the defendant will rely and “in the case of serious conduct including criminal offences, a plaintiff should have fair notice of the case to the same degree as a criminal indictment”.²² For that reason, Wigney J – in *Rush v Nationwide News Pty Ltd* (2018) 359 ALR 473 – held (at [53]):²³

Like an accused in a criminal proceeding, who is entitled to be put on notice of the particulars of the Crown case in respect of each element of the offence with which he or she is charged, a plaintiff in a defamation action is entitled to be put on notice of the precise particulars of the facts or allegations that are said to be true. Indeed, the need for precision in a defamation case is perhaps even more acute, given that ordinarily the plaintiff gives evidence first...

(emphasis added)

¹⁷ *West Australian Newspapers Ltd v Elliott* (2008) 37 WAR 387 at [49] (Steytler P), approved in *Australian Broadcasting Corporation v Wing* (2019) 271 FCR 632 at [77] (Besanko, Bromwich and Wheelehan JJ); *Gumick v Dow Jones & Company Inc (No 4)* (2004) 9 VR 369 at [8]-[12] (Bongiorno J); *Shah v Standard Chartered Bank* [1999] QB 241 at 266 (May LJ); *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 260 (Lord Reid) and 275 (Lord Hodson).

¹⁸ *Australian Broadcasting Corporation v Wing* (2019) 271 FCR 632 at [80] (Besanko, Bromwich and Wheelehan JJ) *cf.* *West Australian Newspapers Ltd v Elliott* (2008) 37 WAR 387 at [49] (Steytler P).

¹⁹ *Wing v The Australian Broadcasting Corporation* [2018] FCA 1340 at [52] (Rares J); *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 302 (Mason J); *Australian Broadcasting Corporation v Wing* (2019) 271 FCR 632 at [82] (Besanko, Bromwich and Wheelehan JJ).

²⁰ *Australian Broadcasting Corporation v Wing* (2019) 271 FCR 632 at [80] (Besanko, Bromwich and Wheelehan JJ).

²¹ *Rush v Nationwide News Pty Ltd* (2018) 359 ALR 473 at [44] (Wigney J), citing *Khan v Fairfax Media Publications Pty Ltd (No 3)* [2015] WASC 400 at [21] (Le Miere J) and *Lord Ashcroft v Foley* [2012] EWCA Civ 423 at [49]-[50] (Pill LJ and Sharp J).

²² *Nationwide News Pty Ltd v Rush* [2018] FCAFC 70 at [146] (Besanko, Bromwich and Wheelehan JJ).

²³ See too: *Domican v Pan Macmillan Australia Pty Ltd* [2019] FCA 1384 at [70] (Wigney J).

21. In circumstances where particulars are required to give notice to the “same degree as a criminal indictment” where serious conduct such as criminal offences are alleged, it follows that facts required to prove justification of an imputation conveying commission of an offence (that is, guilt) must be directed to proof of the elements of that offence.
22. Therefore, for the offence of murder, the Respondents must prove both the *actus reus* and *mens rea* of the offence – that is, at the time Mr Roberts-Smith allegedly committed a deliberate act that caused the death of the relevant deceased, he had an intention to kill the deceased (or inflict grievous bodily harm), or the act that caused death was done with reckless indifference to human life.²⁴

A. THE ELEMENTS OF THE WAR CRIMES WHICH ARE ALLEGED AGAINST THE APPLICANT

23. The Respondents have pleaded eight allegations in the Third Further Amended Defence which are said to constitute war crimes:
- (a) “*Blooding the rookie murder*” on 12 April 2009 ([40]ff).
 - (b) “*Murder of Afghan male 2*” on 12 April 2009 ([49]ff).
 - (c) “*Assault of unarmed Afghan male on or about 15 March 2010*” ([56]ff).
 - (d) “*Assault of unarmed Afghan male civilian*” on 29 August 2012 ([86]ff).
 - (e) “*Murder of Ali Jan on 11 September 2012*” ([107A]ff).
 - (f) “*Execution of unarmed Afghan in October 2012*” ([118]ff).
 - (g) “*Blooding*” of Person 66 in or about 18-20 October 2012 ([122A]ff)
 - (h) “*Execution of unarmed Afghan male on or about 5 November 2012*” ([123]ff).
24. Each of the particulars allege the commission by Mr Roberts-Smith of war crimes constituting serious violations of Article 3 common to the Geneva Conventions.
25. These allegations will each be analysed in separate sections of these submissions when assessing the evidence. However, it is useful at this stage to analyse the elements of these criminal offences which have been alleged by the Respondents against Mr Roberts-Smith.
26. The war crimes for which Mr Roberts-Smith is said to be responsible are offences under Australian law, namely under Subdivision F of Volume 2, Schedule, Chapter 8, Division 268 of the *Criminal Code Act 1995* (Cth) (the **Code**). The Respondents’ pleading alleges the commission by Mr Roberts-Smith of numerous offences of murder, contrary to s 268.70 of the Code. The Respondents also allege offences of “cruel treatment” contrary to s 268.72 of the Code.

The elements of the war crime of murder per Section 268.70

27. The elements of the war crime of murder under s 268.70 of the Code, are as follows:
- (a) The accused intentionally or recklessly causes the death of one or more persons (ss 268.70(1)(a) with s 5.6(2)).

²⁴ *Crimes Act 1900* (NSW) s 18(1).

- (b) The person or persons are neither taking an active part in the hostilities nor are members of an organised armed group (s 268.70(1)(b)).
 - (c) The accused knows of, or is reckless as to, the factual circumstances establishing that the person or persons are neither taking an active part in the hostilities nor are members of an organised armed group (s 268.70(1)(c)).
 - (d) The accused's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict, and the accused is reckless as to this fact (ss 268.70(1)(d) and 5.6(2)).
28. All of the above elements in a criminal trial must be established to the criminal standard, i.e., beyond reasonable doubt. Elements (i) and (iv) above are composite elements which bring in the general provision concerning fault elements contained in s 5.6 of the Code. Recklessness is a sufficient mental state for the purposes of these elements.
29. Subsection (1A) of s 268.70 of the Code refers to circumstances in which subsection (1) does not apply. Subsection (2) provides in substance that a person who is not taking an active part in hostilities includes a person that is *hors de combat*. Subsection (3) provides that the expression "members of an organised armed group" in subsection (1) does not include such members that are *hors de combat*.
30. According to the Dictionary to the Code, a person is *hors de combat* if:
- (a) the person is in the power of an adverse party; and
 - (b) the person:
 - (i) clearly expresses an intention to surrender; or
 - (ii) has been rendered unconscious or is otherwise incapacitated by wounds or sickness and is therefore incapable of defending himself or herself; and
 - (c) the person abstains from any hostile act and does not attempt to escape.

The elements of the war crime of cruel treatment per section 268.72

31. The elements of the war crime of cruel treatment under s 268.72 of the Code, are as follows:
- (d) The accused intentionally or recklessly inflicts severe physical or mental pain or suffering upon one or more persons (ss 268.72(1)(a) with s 5.6(2)).
 - (e) The person or persons are neither taking an active part in the hostilities nor are members of an organised armed group (s 268.72(1)(b)).
 - (f) The accused knows of, or is reckless as to, the factual circumstances establishing that the person or persons are neither taking an active part in the hostilities nor are members of an organised armed group (s 268.72(1)(c)).
 - (g) The accused's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict, and the accused is reckless as to this fact (ss 268.72(1)(d) and 5.6(2)).

32. All of the above elements in a criminal trial must be established to the criminal standard, i.e., beyond reasonable doubt. Elements (i) and (iv) above are composite elements which bring in the general provision concerning fault elements contained in s 5.6 of the Code. Recklessness is a sufficient mental state for the purposes of these elements.
33. Like s 268.70(1A) of the Code, subsection (1A) of s 268.72 of the Code refers to circumstances in which s 268.72 subsection (1) does not apply. Further, subsection (2) provides in substance that a person who is not taking an active part in hostilities includes a person that is *hors de combat*. Subsection (3) provides that the expression “members of an organised armed group” in subsection (1) does not include such members that are *hors de combat*.
34. When considering the allegations of war crimes by the Respondents, aspects of their pleadings will need to be carefully scrutinised in order to ascertain whether what has been pleaded could constitute a criminal offence. These matters will be dealt with when considering each of the pleaded allegations.

B. APPROACH TO FACT FINDING

The assessment of testimonial evidence about historical matters

35. The Respondents’ defence of justification requires them to positively prove, to the requisite standard, the PoT pleaded. The particulars allege the commission by the Applicant of war crimes constituting serious violations of Article 3 common to the Geneva Conventions: Third Further Amended Defence dated 1 April 2022 (“**the Respondents’ pleading**”) at [47]-[48], [51]-[52], [62]-[63], [91]-[92], [114], [116]-[117], [121]-[122], [122F]-[122G] and [128]-[129]. The Respondents’ case rests almost exclusively on the oral evidence of a number of witnesses in relation to events which took place more than nine years ago, in the case of allegations concerning missions in 2012, and approximately 12 years ago, in the case of allegations concerning the mission involving Whiskey 108 in 2009. That oral evidence is unsupported by any contemporaneous records of the accounts lately provided to this Court.
36. The Respondents’ fail to grapple with the unreliability of the oral evidence of their witnesses, caused by the circulation of rumours and consistent discussion about events, over a period of years, including in some circumstances, matters being suggested to witnesses by others including the Second and Third Respondents, Mr McKenzie and Mr Masters.²⁵ This brings into sharp focus the caution required to be exercised in making any positive findings of fact given the unreliability of human memory, the capacity for ex post facto rationalisation and the phenomenon of false memories honestly believed, in circumstances in which rumours abounded, consistent media speculation, suspicion changed to belief and with the prospect of reconstruction itself escalating to asserted recollection.
37. In *Gautam v Health Care Complaints Commission* [2021] NSWCA 85, Leeming JA said at [25]:

“Usually the resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation: Camden v McKenzie [2008] 1 Qd R 39; [2007] QCA 136 at [34] New South Wales v Hunt (2014) 86 NSWLR 226; [2014] NSWCA 47 at [56]. That approach reflects the acknowledged limits upon judges’ ability to distinguish truth from falsehood accurately on the basis of the witnesses’ appearance, and the appropriateness of reasoning, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events: Fox v Percy (2003) 214 CLR 118; [2003] HCA 22 at [31].”

²⁵ See for example Person 16’s evidence of discussions with Mr McKenzie in 2018 at T1892 L35-T1894 L21.

38. The limitations of testimonial evidence about historical matters, based upon the fragility and malleability of human memory, is well known: see for example *Coote v Kelly* [2013] NSWCA 357 at [51] per Leeming JA.

39. Justice Leeming’s observations about the unreliability of memory were further developed in *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102, where his Honour said at [77]:

“By way of contrast, the impoverishment of evidence will be more acute where a trial is exclusively or heavily dependent on oral evidence and the quality of witnesses’ memory and recollection. The fallibility of human memory and the capacity of the human mind for ex post rationalisation of events long since passed are the subject of the frequently cited observations of McLelland CJ in Eq in Watson v Foxman (1995) 49 NSWLR 315 at 318–319. See also McFee v Reilly [2018] NSWCA 322 at [42] and the discussion of the phenomenon of false memories honestly believed by Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), noted by Davies J in Nominal Defendant v Cordin [2017] NSWCA 6; 79 MVR 210 at [169].”

40. The observations of McHugh JA (as his Honour then was) in *Herron v McGregor* (1986) 6 NSWLR 246 are most relevant to the approach to fact finding which the Court will be required to undertake in this case. There, McHugh JA said (at 254):

“Memories fade. Relevant evidence becomes lost. Even when written records are kept, long delay will frequently create prejudice which can never be proved affirmatively. As the United States Supreme Court said in Barker v Wingo (at 532) “what has been forgotten can rarely be shown”. In some cases delay makes it simply impossible for justice to be done: Birkett v James (at 317-318, 327). In R v Lawrence [1982] AC 510 at 517, Lord Hailsham LC pointed out that: “Where there is delay the whole quality of justice deteriorates.” The difficulties in ascertaining the truth about a matter after time has done its work were vividly portrayed by Street CJ in the Report of the Royal Commission of Inquiry into Certain Committal Proceedings Against K E Humphreys (July 1983). His Honour said (at 9-10):

“In the intervening five or six years, rumours waxed and waned. In some cases suspicion underwent subtle change to belief, which itself progressed to reconstruction, which in turn escalated to recollection. No presently stated recollection could be safely assumed not to have progressed upwards and not to be the product of one of these earlier stages. The sheer frailty of human memory of necessity required a most anxious and critical appraisal of the evidence of the witnesses, no matter how credit-worthy they might be.

It became apparent that in the years since August 1977 the recollections even of those with undoubted first-hand knowledge have in some instances faded, in some instances fermented, and in some instances expanded. Moreover, in many cases the realisation of the significance – indeed, the enormity – of what had occurred has tended to transmute into a more or less cynical acceptance of what had, or was believed or rumoured to have, taken place.””

41. In *Longman v The Queen* (1989) 169 CLR 79; [1989] HCA 60, McHugh J said at 107-108.

“The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to ‘remember’ is well documented. The longer the period between an ‘event’ and its recall, the greater the margin for error. Interference with a person’s ability to

'remember' may also arise from talking or reading about or experiencing other events of a similar nature or from the person's own thinking or recalling. ...

... Experience derived from forensic contests, experimental psychology and autobiography demonstrates only too clearly how utterly false the recollections of honest witnesses can be."

42. Justice McHugh's observations are applicable to the oral evidence called by the Respondents in support of the serious allegations they propound.

The vacuum in the evidence before the Court

43. Most of the witnesses called by the Respondents conceded that the first time that they heard of or discussed any allegation that the Applicant had engaged in war crimes occurred at least 5 to 7 years after the alleged event.²⁶ This occurred in circumstances where they were giving evidence under compulsion during an Inquiry by an Assistant Inspector General of the Australian Defence Force into rumours associated with the service of Australian Defence Force members in Afghanistan. The Applicant and the Court were precluded from having access to the transcript of the interviews of some of the Respondents' witnesses because of the operation of, amongst other things, s21 *Inspector General of the Australian Defence Force Regulations 2016*. Accordingly, the Court does not have before it, the entirety of evidentiary material upon which it could otherwise assess the reliability of the oral testimony of these witnesses. The Court must proceed with caution in respect of these witnesses in circumstances where it is not known:
- (a) what was suggested to them about alleged events during the course of that Inquiry;
 - (b) what was shown to them during the course of that Inquiry; and
 - (c) what was promised to them in return for providing any information in relation to alleged events.
44. To use the observations of Street CJ in the Report of the Royal Commission of Inquiry into Certain Committal Proceedings against *KE Humphreys* as cited by McHugh JA in *Herron v McGregor* (1986) 6 NSWLR 246 at 254, there must be a most anxious and critical appraisal of these witnesses. In some cases, suspicion of some of the Respondents' witnesses underwent a change to belief that unlawful acts occurred.²⁷

Standard of proof

45. The standard of proof in these proceedings is the civil standard, that is, on the balance of probabilities. This requires reasonable satisfaction. However, because of the seriousness of the findings which the Respondents seek to agitate in this Court, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

"...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

²⁶ For example, P40 at T3271 L35-29 and T3273 L11-13, P4 at T2753 L13, T2757 L2, T2880 L1, P41 at T1254 L28 and T1264 L40 – T1265 L5, P42 at T2110 L45 – T2111 L1, P43 at T3424 L36 – T3425 L11, P 24 at T3487 L5-13, T3487 L46-47, T3491 L13 and Closed Court Transcript 1503 2022 T25 and T27, P14 at T1507 L20-32, P16 at T1873 L24-25.

²⁷ See for example Closed Court transcript 11 April 2022 (Person 24)

In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

46. The requirement of "reasonable satisfaction" was also referred to by Dixon CJ in *Jones v Dunkel* (1959) 101 CLR 298 at 304-305, adopted by Stephen, Mason, Aickin and Wilson JJ in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66 and see also, *Jones v Sutherland Shire Council* (1979) 2 NSWLR 206 at 227, per Mahoney JA.

47. The resolution of allegations involving criminal conduct in accordance with the civil standard of proof was described by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; [1992] HCA 66, where Mason CJ, Brennan, Deane and Gaudron JJ said (at 449-450):

"The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."

48. The Respondents in this case ignore this fundamental proposition. The Respondents invite this Court to lightly make findings that the Applicant engaged in spontaneous acts of criminality without any probative explanation or motive. This is all the more serious in circumstances where the Applicant was a long serving member of the Australian Defence Force, with an exemplary record of service on multiple tours of duty in a number of countries without any such complaints being raised whilst he was a serving member of the Australian Defence Force. In fact, the evidence is to the contrary. The Applicant took very seriously his obligations as a member of the Australian Defence Force and was upset when the lives of civilians in Afghanistan were potentially put at risk by the Australian Defence Force.

49. Section 140 of the *Evidence Act 1995* (Cth) is also relevant. The approach to be adopted in relation to this section was described by Emmett J (as his Honour then was) in *Warner v Hung, in the matter of Bellpac Pty Ltd (Receivers and Managers appointed) (In liquidation) (No 2)* (2011) 297 ALR 56; [2011] FCA 1123 at [48]:

[48] Under s 140(2) of the Evidence Act 1995 (Cth), the Court must, in deciding whether it is satisfied that a case has been proved to the requisite standard, take into account:

- *the nature of the cause of action or defence;*
- *the nature of the subject matter of the proceeding; and*
- *the gravity of the matters alleged.*

50. In this case, the allegations of war crimes in the Respondents' pleading are the most serious allegations to be pleaded in a civil case before this Court. The gravity of the consequences flowing from findings which the Respondents agitate in this matter are self-evident. Indeed, the Respondents

assert if adverse findings are made by this Court, it is more likely that the Applicant will be charged with war crimes.²⁸

Expert evidence

51. The weight of the authorities is against making a finding on probabilities which are themselves based on inappropriately vague or general assertions. This is illustrated by the High Court cases in *TNT Management Pty Ltd v Brooks* (1979) 53 ALJR 267 and *West v Government Insurance Office of NSW* (1981) 148 CLR 62. In this case, the Respondents invite the Court to make findings based on inferences to be drawn from photos of a number of EKIA's unaided by any assistance from an expert in forensic medicine or ballistics.²⁹ The failure of the Respondents to provide any such evidence to the Court and at the same time invite the Court to draw inferences about gunshot wounds or blood stains from photos of deceased individuals ignores the fact that this is not a matter about which the Court would be able to form a sound judgment without expert assistance: see *HG v R* (1999) 197 CLR 414 at [58].

52. Finkelstein J of this Court observed in *Quick v Stoland* (1998) 157 ALR 615 at 625:

“The function of the expert is to provide the trier of fact, judge or jury, with an inference which the judge or jury, due to the technical nature of the facts, is unable to formulate.”

53. Also, in *Hawkesbury District Health Service Ltd v Chaker* [2010] NSWCA 320 Hoeben J (Allsop P, Beazley JA agreeing) discussed the importance of expert evidence. Relevantly at [134]-[135] his Honour explained that “[t]he courts can only engage in appropriate decision making if they have the assistance of professionals who are prepared to act as experts” and the primary purpose of the scientific discourse that usually occurs in court is “to provide the judge with relevant expert material to enable him or her to appropriately decide a case”.

54. In relation to photographic evidence more generally, courts have frequently observed the need exercise caution when considering such evidence: see *Blacktown City Council v Hocking* [2008] NSWCA 144 at [169] (Tobias JA, Giles JA agreeing); *Goode v Angland* (2017) 96 NSWLR 503 at [89]-[96] (Beazley P, Leeming and Meagher JJA agreeing). In addition, the use of photographs can be deceptive, particularly in relation to perspective and measurements: *Taitoko v R* [2020] NSWCCA 43 at [80]-[81] (Leeming JA, Hoeben CJ at CL and Lonergan J agreeing); *Goode* at [93].

55. The observations by the Court in *Blacktown City Council v Hocking* [2008] NSWCA 144 at [169] and [172], while in a very different context to the present, are apposite with regard to the lack of expert evidence:

[169] It should be noted that the use by a trial judge of photographs is nothing new. They can, as the authorities to which I have referred confirm, be descriptive of what a witness says he or she saw, being a representation of the witness' knowledge and observations. But they should not be used by a judge to make findings of fact which are otherwise unsupported by the evidence and are therefore no more than conjectural: Schmidt v Schmidt [1969] QWN 3 at 6; Beaton v McDivitt (1985) 13 NSWLR 134 at 142.

...

²⁸See for example RS p11 at [55], p87 at [231] and p151 at [240].

²⁹ RS p 128-129 at [133]-[137], RS p 61 at [152(c)], RS p65 at [162].

[172] In my view it required the evidence of an expert to so interpret the relevant photographs. In the absence of any such evidence, it was not open to her Honour to substitute her own view as a lay observer over the evidence of an expert. This being so, the consequence is that there was no evidence capable of supporting her Honour's finding that the work carried out to the pit at the time the footpath was constructed left the pit without adequate support for its lid.

Circumstantial evidence

56. The circumstantial nature of the case presented by the Respondents in relation to some of the allegations of war crimes made against the Applicant, requires the Court to have regard to the following principles relating to circumstantial evidence.
57. The approach to be taken in a civil case was described in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 (Dixon, Williams, Webb, Fullagar and Kitto JJ) as follows:

“The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypothesis consistence with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture [citations omitted]. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise.”

58. The question of whether an inference is open and can be drawn as a matter of probability is to be determined by considering the combined weight of all the relevant established facts, rather than by considering each fact sequentially and in isolation: *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; (2019) 271 FCR 632 at [134] referring to the leading authority of *Shepherd v The Queen* (1990) 170 CLR 573 per Dawson J.
59. However, the Court, in evaluating circumstantial evidence must be careful to only rely on reasonable and definitive inferences and not on conjecture, speculation and guesswork: *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 211 citing *Luxton v Vines* (1952) 85 CLR 352.
60. As stated in the often quoted passage by Lord Wright in *Caswell v Powell Duffryn Associates Collieries Ltd* (1940) AC 152 at 169-170:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proof facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

61. While it is often difficult to distinguish between permissible inference and conjecture the distinction exists: *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 at [84].
62. Chief Justice Spigelman in *Seltsam* went on to refer to the following explanation of that distinction in *Carr v Baker* (1936) 36 SR (NSW) 301 at 306:

“The existence of a fact may be inferred from other facts when those facts make it reasonably probable that it exists; if they go no further than to show that it is possible that it may exist, then its existence does not go beyond mere conjecture. Conjecture may range from the barely possible to the quite possible.”

Overview

63. The Respondents rely solely on inconsistent and unreliable oral evidence to support their war crimes allegations that has been tainted over a number of years before it was sought to be adduced in this Court. Such evidence is not corroborated by any official records of the Australian Defence Force, including contemporaneous records, and is unsupported by required expert evidence. The Respondents’ circumstantial case rises no higher than conjecture.
64. In light of the settled authorities, this Court cannot be satisfied to the requisite standard that the serious matters alleged by the Respondents’ occurred in Afghanistan. Accordingly, the Respondents’ defence of justification fails.

SECTION III: DEFAMATION PRINCIPLES AND APPLICATION

1. The Applicant does not dispute the legal principles outlined at RS Section II [1]-[11], save to observe that in the case of murder and assault, the distinction between the legal and the ordinary sense of the concepts is not material. Whilst one can readily see that community views on the meaning of a concept like sexual harassment might depart from the relevant legislation, that problem should not trouble a Court determining allegations in the nature of murder and physical assaults. Accordingly, the murders and assaults should be assessed according to the established criminal law, bearing in mind the distinct issues with the burden of proof discussed in Section II above.

SECTION IV: WHISKEY 108 – 12 APRIL 2009

A. INTRODUCTION

1. The Respondents allege that on 12 April 2009, during a mission to a compound known as Whiskey 108 (**W108**), two insurgents were found hiding in a tunnel, placed under the control of Australian soldiers when they emerged from the tunnel and then executed. They allege that one man was shot by Person 4, in circumstances making Mr Roberts-Smith complicit in his murder (EKIA 56) and one man was shot by Mr Roberts-Smith himself (EKIA 57). The allegations are set out at paragraphs 40 to 55 of the PoT.
2. The ultimate issue is whether Mr Roberts-Smith is guilty of the war crime of murder pursuant to s.268.70 of the Code, in respect of the death of EKIA 57, and pursuant to s.11.2 of the Code, by aiding, abetting, counselling or procuring the murder of EKIA 56 by Person 4.
3. For the reasons set out in this section, the Respondents have failed to establish the allegation on the balance of probabilities. The Court should find that:
 - (h) EKIA 56 and EKIA 57 were not found hiding in the tunnel at W108 and then rendered *hors de combat*; and
 - (i) EKIA 56 and EKIA 57 were engaged lawfully, in each case outside the northwest corner of the compound.

B. THE RESPONDENTS' ALLEGATIONS CONCERNING THE "BLOODING" OF PERSON 4

The pleaded allegation

4. The Respondents allege that the motivation for the execution of EKIA 56 was Person 5's desire to "blood" Person 4 (RS Section IV [27]). The allegation has its source in paragraph 46 of the PoT, which provides:

In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be blooded. The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.

5. This pleaded allegation relies upon Mr Roberts-Smith being guilty of the war crime of murder in accordance with s 268.70 of the Code. The particulars of this allegation do not satisfy an essential element of that offence.
6. The "blooding the rookie murder" pleading relates to events which took place on or about 12 April 2009. A summary of this pleaded allegation is as follows.
7. In April 2009, Mr Roberts-Smith held the position within his patrol of Second in Command ([37]). Person 4 was a member of Person 5's patrol. Person 4 was on his first deployment ([42]). At various times, it is alleged that Mr Roberts-Smith and his patrol commander, Person 5, made statements, referring to Person 4, in substance, that they needed to "blood the rookie".

8. On or about 12 April 2009, there was a mission targeting a compound known as W108. During that mission, an Afghan male 1 was detained.
9. In Mr Roberts-Smith's presence it is pleaded that Person 5 ordered Person 4 to execute Afghan male 1, which Person 4 then did. It is alleged that this order was made so that Person 4 could be "blooded". It is further alleged that Mr Roberts-Smith neither said nor did anything to encourage Person 5 to withdraw the order or to stop Person 4 from following it ([41]-[46]).
10. It is alleged (at [46]-[47]) that it may be inferred based on the circumstances that Mr Roberts-Smith was complicit in and approved of the order given to Person 4. The Respondents allege that Mr Roberts-Smith in this respect was complicit in and responsible for the murder of Afghan male 1.
11. With respect to the first element of the war crime of murder, i.e., that the accused intentionally or recklessly caused the death of the deceased, the particulars do not satisfy this element. The particulars do not state that Mr Roberts-Smith caused the deceased's death, and do not particularise the basis for his complicity. It is clear, based on the particulars, that the Respondents allege that Person 4 caused the death of Afghan male 1 by shooting him.
12. If the matter were proceeding by way of indictment, based on the particulars of this allegation in the Respondents' pleading, the prosecutor would not have a case that is capable of establishing the essential elements and therefore Mr Roberts-Smith guilt of the offence. The particular problem arises in relation to Mr Roberts-Smith's responsibility for the alleged crime, in circumstances where another person, that is Person 4, is said to have directly caused the death of Afghan male 1.
13. The Respondents' particulars are not adequate to show or explain how Mr Roberts-Smith is legally complicit. The Respondents' pleading fails to particularise the basis for Mr Roberts-Smith's alleged complicity for the war crime of murder under s 268.70 of the Code.
14. At [43] of the Respondents' pleading, it is said that Mr Roberts-Smith and Person 5 made statements, referring to Person 4, that they needed to "blood the rookie". Based on the particulars, the Respondents seemingly rely upon these statements, among other things, to prove that Mr Roberts-Smith was complicit.
15. If the matter were proceeding by way of indictment and the prosecutor relied upon these alleged statements by Mr Roberts-Smith and Person 5 as some kind of understanding amounting to an agreement, that would not suffice for the purposes of establishing Mr Roberts-Smith's liability for the offence. That is because as at April 2009, the Code did not provide for joint criminal enterprise as a basis for liability. It was not until an amendment in February 2010, in which s 11.2A was inserted, that it became possible to prosecute offences under the Code on the basis of joint criminal enterprise.³⁰ The new section 11.2A does not apply retrospectively.
16. The hypothetical prosecutor in a criminal trial of this allegation would have to rely on some form of complicity to prove guilt, since Mr Roberts-Smith was not the person who caused the deceased's death. The prosecutor would need to rely upon some form of complicity other than joint criminal enterprise liability, since there was no such liability under the Code at the relevant time. The particulars of this alleged offence state that Mr Roberts-Smith was present and neither said nor did anything to encourage Person 5 to withdraw the order or to stop Person 4 from following it. The particulars do not invoke any form of "command responsibility" as a basis for liability, e.g., per s 268.115 of the Code.

³⁰ See *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

17. Liability on the basis that an accused person aided, abetted, counselled or procured the offence charged is, and was in April 2009, a recognised basis of liability under the Code. The terms “aiding”, “abetting” etc., are not defined in the Code but they are interpreted based on the meaning of the terms at common law.³¹
18. To be liable as an aider or abettor at common law, there must be intentional assistance or encouragement of the principal offender.³² The particulars state that Mr Roberts-Smith did not encourage Person 5 to withdraw the order or stop Person 4 from following it. What they convey is that Mr Roberts-Smith did nothing to discourage or prevent the commission of the offence. There is a difference between failing to discourage or prevent the commission of an offence and actually intentionally assisting or encouraging the commission of an offence.
19. The Respondents’ particulars do not state that Mr Roberts-Smith intentionally encouraged or assisted the principal offender in the commission of the offence, and they do not adequately explain or disclose how he may be said to have done this. Mr Roberts-Smith’s liability based on principles of complicity, if the matter were proceeding by way of indictment, would be an essential element requiring proof. The particulars do not demonstrate how Mr Roberts-Smith was complicit in and responsible for the offence of murder, as alleged in relation to the “blooding the rookie” incident.
20. Accordingly, the Court should hold the Respondents to their pleaded allegation and find that it does not make out the alleged offence which has been pleaded.

The new allegation

21. The Respondents’ submissions concerning the allegation that Mr Roberts-Smith was complicit in the murder of Afghan male 1/EKIA 56 differs from the pleaded allegation in paragraph [46] of the PoT. The Respondents’ now contend that Mr Roberts-Smith *directed* Person 4 to execute Afghan male 1/EKIA 56 (RS Section IV [249(b)]). The submissions of the Respondents do not grapple with the fundamental proposition that in a case such as this where they have sought to assert a serious criminal offence, Mr Roberts-Smith should have fair notice of the case to the same degree as a criminal indictment³³. Like an accused in a criminal proceeding, Mr Roberts-Smith was entitled to be put on notice of the precise particulars of the facts or allegations that are said to be true in relation to this grave allegation of his alleged complicity in a murder said to have been committed by Person 4.³⁴ The Respondents should not be permitted to advance this allegation of murder based on the different factual basis than what was pleaded.
22. The Respondents describe “blooding” as initiating a person in the practise of killing, or giving them the taste for killing (PoT [44]). They assert that at various times throughout the 2009 rotation, Mr Roberts-Smith and Person 5, made statements, in substance that they needed to “blood the rookie” (referring to Person 4) (PoT [43]).
23. The practise of blooding as defined in the Respondents’ PoT does not presuppose the commission of an unlawful act of killing by the initiate. Members of the SASR were authorised to use lethal force under the ROE that governed their activities in Afghanistan. The definition of blooding propounded by the Respondents does not necessarily involve a breach of the ROE or the commission of a criminal

³¹ See *Handlen v R* [2011] HCA 51 at [6], see also *The Queen v LK* [2010] HCA 17.

³² *Stokes and Difford v R* (1992) 51 A Crim R 25 at 37-38 per Hunt J.

³³ *Nationwide News Pty Ltd v Rush* [2018] FCAFC 70 at [146] (Besanko, Bromwich and Wheelehan JJ).

³⁴ *Domican v Pan MacMillan Australia Pty Limited* [2019] FCA 1384 at [70] (Wigney J).

offence. Indeed this was consistent with the evidence of some of the witnesses, including Person 14³⁵ and Person 24.³⁶

Was Person 4 known as the rookie and to whom was he known by this label?

24. There are a number of critical aspects of the chain in the reasoning of the Respondents in relation to this allegation. One aspect in establishing that Person 5 said in 2009 that he wanted to “blood the rookie” is for the Respondents to establish that Person 4 was described by Person 5 as the “rookie”. Another aspect is for the Respondents to establish that “blood the rookie” was a reference to Person 5 wanting Person 4 to kill an insurgent regardless of whether it was lawful or unlawful. The Respondents have failed in both respects.
25. The Respondents ask the Court to find that Person 4 was known as “the rookie” (RS Section IV [7]-[13]). The Applicant does not challenge the evidence of Person 14, Person 24 and Person 18 that Person 4 was understood by them as a “rookie”. Indeed, it is not surprising that each of them, being junior soldiers at the time, may have referred to one another as rookies. Their understanding, however, is of limited probative value. It does not establish that Person 4 was universally known as “the rookie” within the entire Troop. Nor does it establish that the “rookie” label was universally applied by the Troop to all newcomers across each of the patrols. Nor does it establish that that Person 4 was known to Person 5 as “the rookie”. These matters, the Applicant submits, have not been established on the balance of probabilities on the basis of the evidence of Person 14, Person 24 and Person 18.
26. In this respect, it is relevant that Person 5, Person 27, Person 29, Person 35 and Person 38 each denied hearing that any member of the SASR was referred to as the rookie. The Court should not dismiss these denials as false evidence. Their evidence is entirely consistent with the existence, in 2009, of a small group of junior members of the Troop who knew Person 4 as the rookie. Person 18’s evidence is particularly relevant. The following exchange occurred in his evidence-in-chief:³⁷

Had you heard the term “rookie” used before with reference to any person in particular?---Yes, that was a joke between myself and Person 4. He had come to the – to the troop a year prior, and it was a running joke between the two of us, because he was a good 20 years older than I was, that he’s a – is a relatively older person in the unit and I was one of the youngest. And it was a running joke we used from the movie Super Troopers that he was the – he was the rookie fuck, and I would constantly just pull the piss at him about that.

27. It is plain that Person 18’s evidence about the use of the term “rookie fuck” was a private joke between him and Person 4. Person 18, who was a member of Person 5’s patrol in 2009, did not suggest that Person 5 was included in the joke. Person 18 did not suggest that “rookie fuck” was used by Person 5 or indeed anyone else to describe Person 4. In those circumstances, the Court should not infer that Person 4 was known to Person 5 as “the rookie” or the “rookie fuck”.
28. Person 4, who was the most obvious person to give evidence about whether Person 5 referred to him as the “rookie” in 2009 and who was called by the Respondents, was not asked whether Person 5 described him as “the rookie” in 2009. The Court should draw an adverse inference from the Respondents’ failure to adduce that particular evidence. It is submitted that Person 4’s evidence on this topic, if adduced, would not have assisted the Respondents’ case.

³⁵ T1519, L40-43 (P14).

³⁶ T3573, L22-31 (P24).

³⁷ T3020, L36-42 (P18).

29. The Respondents rely upon Ex R210, which is a photograph taken in 2010 of a white board outside Person 5's patrol room identifying each member of the patrol by name but in the place of Person 8's name appeared the words "rookie fuck". That photograph is not, however, probative of whether Person 5 referred to Person 4 as the "rookie" in 2009. It could only be relied upon as tendency evidence of this fact in issue, but the notice requirements under the *Evidence Act* have not been complied with, nor has any application been made to dispense with those requirements.
30. Further, there was no evidence of how long the words "rookie fuck" remained written on the white board in 2010, nor was there any evidence about who wrote those words on the "white board". It was not put to Person 5 that he wrote the words "rookie fuck". Indeed, Person 5 could not recall seeing the white board.³⁸ No other witness to whom it was shown could recall seeing the white board (Person 35,³⁹ Person 27,⁴⁰ Person 29⁴¹ and Person 38⁴²). The most likely explanation for why no one could recall seeing the white board with the words "rookie fuck" written on it is because those words only remained in place momentarily before being deleted. For these reasons, Ex R210 does not assist the Respondents' case in relation to para [43] of the PoT.

Person 5 did not tell Person 14 and Person 24 that he was going to "blood the rookie"

31. The Court should not find that Person 5 said "*I'm going to blood the rookie*" in the troop briefing room in Tarin Kowt in 2009. Person 14 was the only witness who gave evidence that Person 5 said these words during the troop briefing. His recollection of a conversation that occurred in 2009 is uncorroborated and should not be accepted.
32. Person 14 claims that others were present when Person 5 is alleged to have made this boast, including Person 3 and Person 24. Although he claimed that Mr Roberts-Smith was present when Person 5 made this boast,⁴³ with the inference being that Mr Roberts-Smith overheard it (and by his silence, assented to the substance of it), Person 14 subsequently agreed that Mr Roberts-Smith would not have been in earshot.⁴⁴
33. Person 14 said that the people in the room included Persons 3, 4, 5, 6, 14, 18, 24, 27, 29, 68, and 73.⁴⁵ Persons 18 and 24, who were called by the Respondents, did not corroborate Person 14's evidence about Person 5's boast in the troop briefing room. Nor did Person 27.⁴⁶ Nor did Person 38.⁴⁷ Nor did Person 29.⁴⁸ Person 5 denied the allegation when it was put to him.⁴⁹ The Court should not accept Person 14's uncorroborated recollection of what was allegedly said by Person 5 in the troop briefing room in March or April 2009. As McLelland CJ in Eq said in *Watson v Foxman* (1995) 49 NSWLR 315 at 319:

Human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes all litigation and intervene, and the processes of memory are overlaid, often subconsciously, by perceptions of self-interest as well as conscious consideration of what

³⁸ Closed court transcript 22 April 2022, T3 L19 (P5) (redacted version).

³⁹ T5244 L15-16 (P35).

⁴⁰ T5405 L26-27 (P27).

⁴¹ T5553 L30-31 (P29).

⁴² T6009 L38-39 (P38).

⁴³ T1395 L32 (P14).

⁴⁴ T1582 L20- T1584 L18 (P14).

⁴⁵ T1511 L32-34 (P14).

⁴⁶ T5405 L46 and T5405 L8 (P27).

⁴⁷ T6010 L1-2 (P38).

⁴⁸ T5554 L1-16 (P29).

⁴⁹ T5030 L1-11 (P5).

should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

34. Similarly, the Court should not find that Person 5 said “*We are going to blood the rookie*” in Person 6’s patrol room in Tarin Kowt in 2009. That evidence was based entirely on Person 24’s recollection and was not corroborated by any other witness. Person 24 recalled that Person 6 and other members of Person 6’s patrol were also present when he allegedly heard Person 5 say these words, although he could not remember which ones. Person 14 was a member of Person 6’s patrol in 2009. He did not corroborate Person 24’s evidence. Person 6 was not called by the Respondents to give evidence corroborating this allegation, even though he was someone, it is submitted, who the Respondents acknowledged they had decided not to call for forensic reasons.⁵⁰ The Court is invited to draw an adverse inference that Person 6’s evidence about whether Person 5 appeared outside Person 6’s patrol room in Tarin Kowt in March or April 2009 and exclaimed that he was going to the blood the rookie, if adduced, would not have assisted the Respondents’ case.
35. See Applicant’s Closed Court Submissions at paragraph A1.
36. Another and perhaps the main reason why it is improbable that this alleged conversation occurred in the vicinity of Person 6’s patrol room was because of the aversion that Person 5 had for Person 6, Person 24 and Person 14.⁵¹ It is unlikely that someone would act so convivially and boastfully in front of at least three persons he strongly disliked.
37. The Court should not accept Person 24’s uncorroborated recollection of what was allegedly said by Person 5 in Person 6’s patrol room in March or April 2009, in circumstances where the Respondents seek to rely upon the existence of what was said as evidence of a motive for Person 5 to direct Person 4 to unlawfully kill a person during the W108 mission.
38. The Respondents submit that the likelihood that Person 5 did in fact refer to “bleeding” in 2009 is supported by Person 19, who said that he had heard Person 5 use that term. Person 19’s evidence, however, has no probative value. His evidence was vague and he could not remember where and when he had heard Person 5 use that term.⁵²
39. The evidence relied upon by the Respondents stands in stark contrast with the evidence of the Applicant’s witnesses. Each of Person 38,⁵³ Person 27,⁵⁴ Person 35,⁵⁵ Person 29⁵⁶ and Person 5⁵⁷ said that they had never heard the phrase “bleeding the rookie” used within the SASR and that they had only heard the phrase through media reporting or through the IGADF Inquiry. The Court should not accept the submission (at RS Section IV [8]) that Person 102 used the phrase “bleeding the rookie” in 2013. It is submitted that Person 18’s evidence, on close inspection, did not rise as high as confirming that the then RSM, Person 102 used the phrase “bleeding the rookie” when asking questions about the mission to W108 in 2013.⁵⁸ Person 18 said that Person 4 and Person 32 were present during this meeting. Person 18’s evidence, however, was not corroborated. No other witness gave evidence that they heard Person 102 use that phrase.

⁵⁰ T6090 L16-22 (P39).

⁵¹ T4959 L36 (P5).

⁵² T2321 L25-28 (P19).

⁵³ T6010 L6 (P38).

⁵⁴ T5386 L13-26 (P27).

⁵⁵ T5167 L36-40 (P35).

⁵⁶ T5464 L38-47 (P29).

⁵⁷ T4847 L20-36 (P5).

⁵⁸ T3085 L9-47 (P18).

40. The main reason why the Court should find that Person 5 did not possess an intention to “blood” Person 4 during the W108 mission was because Person 5 knew that Person 4 had already participated in the killing of Objective Depth Charger prior to the mission to W108. In his evidence about the Objective Depth Charger mission, Person 5 said that the first rounds that went into the objective were fired by himself and Person 4.⁵⁹ Person 4 agreed that he engaged the target along with Person 5 and Person 6.⁶⁰ The Respondents accept that Person 4 participated in the killing of the objective (RS Section IV [24]) but submit that Person 5’s perceived need to “blood” Person 4 remained unfulfilled (RS Section IV [27]).
41. Whether Person 4 was solely responsible for killing Objective Depth Charger, or whether the objective was killed by a combination of rounds by more than one operator, is beside the point. The practice of blooding propounded by the Respondents is defined in paragraph [44] of the PoT. The definition eschews any requirement that the initiate take sole and unambiguous credit for a kill. If a practice of “blooding rookies” existed within the SASR in 2009, which is denied, then Person 4 became either “[initiated] in the practice of killing” or did in fact experience a “taste for killing” (PoT [44]) during the targeting of Objective Depth Charger. The Court should reject the Respondents’ submission that following that mission, Person 5’s perceived need to “blood” Person 4 remained unfulfilled (RS Section IV [27]).

Person 5 did not confirm that a rookie was blooded at the W108 VDOP

42. Relying upon the evidence of Person 14 and Person 18, the Respondents submit that Person 5 said that he had “blooded the rookie” after the mission was completed. They rely upon this as evidence of an admission by Person 5 that he did in fact unlawfully “blood” Person 4.
43. Person 18 gave the following evidence in chief:⁶¹

Can I ask you this: within the period shortly after the mission, did you hear anything said about what had happened on the mission?---When we got to the troop – vehicle dropoff point back on the western side of the valley out of the green belt, we got back into the harbour and I then heard by Person 5 and Ben Roberts-Smith that they’ve blooded the rookie.

Right. Did both of them – did you hear both people say that?---Yes, it was a conversation that the team had had – or these members had had. I didn’t know what they were talking about at the time.

44. Person 18’s evidence of overhearing a conversation at the VDOP was vague. He did not identify whether it was Person 5 or Mr Roberts-Smith who said that the rookie had been blooded. Person 5 denied that he had such a conversation at the VDOP.⁶² Although Person 18’s account was not put to Mr Roberts-Smith during cross-examination, Mr Roberts-Smith denied hearing the phrase “blooding the rookie” used to describe the engagements at W108.⁶³ The Court should not accept Person 18’s evidence of this alleged conversation between Person 5 and Mr Roberts-Smith at the VDOP. It was not corroborated by any other witness. Furthermore, as described above, Person 4 had already participated in the killing of Objective Depth Charger. The allegation that Person 5 and/or Mr Roberts-Smith had just blooded Person 4 during the W108 mission makes no sense in this context.

⁵⁹ T4846 L45 (P5).

⁶⁰ T2768 L1-2 and T2808 L7-8 (P4).

⁶¹ T3020 L25-34 (P18).

⁶² T5121 L10-11 (P5).

⁶³ T172 L46-47 (BRS).

45. Person 14 also gave evidence that he heard Person 5 say words to the effect of “I finally blooded the rookie” at the vehicle harbour.⁶⁴ Person 5 denied saying those words.⁶⁵ Person 14 did not suggest that either Person 18 or Mr Roberts-Smith was present when Person 5 allegedly said “I finally blooded the rookie”. For that reason, Person 14’s evidence does not, it is submitted, corroborate Person 18’s evidence of overhearing a conversation between Person 5 and Mr Roberts-Smith. Again, the Court should not accept the uncorroborated evidence of a witness about the existence of a conversation that is alleged to have occurred in April 2009.
46. The Respondents contend that there was no challenge to Person 18’s evidence and Person 14’s evidence of hearing Person 5 say that he had blooded the rookie after the W108 mission. This contention of itself cannot result in the Court concluding that Person 5 did say that he had blooded the rookie after the W108 mission. The Court is required to review the entirety of the evidence in order to reach a conclusion in relation to this discrete issue.
47. Even if the Court accepts that Person 5 did say that he had “blooded the rookie” these words do not amount to an admission of unlawful conduct by Person 5, let alone establishing that Person 4 murdered anyone at W108. It is to be noted that the evidence of the Respondents’ witnesses that “blooding” did not necessarily involve a breach of the ROE⁶⁶ is ignored by the Respondents. Further, nor have the Respondents advanced any case, let alone led any evidence, that Person 5 prior to 2009, was an individual who would give orders to members of his patrol to engage insurgents contrary to the ROE. In those circumstances, no case theory is put forward as to why in 2009, Person 5 would all of a sudden become a patrol commander who would give directions to members of his patrol to engage in unlawful killings. The objective evidence does not permit the Court to come to the conclusion urged upon it by the Respondents.

C. FACTS NOT IN DISPUTE

Location of Person 6’s patrol in the cordon

48. The evidence of Person 14’s and Person 24’s evidence as to where they were positioned in the vicinity of W108 as part of a cordon is at best unreliable. It appears, that they were positioned in the vicinity of the northern side of W108, most likely between the areas indicated by Person 14 on Ex R98 and indicated by Person 24 on Ex A130, nearby a structure or a wall that was on the northern side.⁶⁷ The evidence of the Troop Commander was that for operational reasons and situational awareness, the persons who formed part of the cordon would not have been too far towards W109.⁶⁸
49. Person 14’s and Person 24’s evidence about what they say they saw during the mission is challenged. In particular, it is submitted that the credit of each of these two witnesses was so badly damaged that the Court could not accept either of them as witnesses of truth and for that reason alone, should not accept their evidence about what they allege Mr Roberts-Smith did at W108.

Who was present when the tunnel was discovered

50. The Respondents submit that the Court should find (RS Section IV [124] and [249]):

(a) Just before the tunnel was discovered, present in or very nearby the courtyard were:

⁶⁴ T1424 L46 (P14).

⁶⁵ T5121 L13-14 (P5).

⁶⁶ T1519 L40-43 (P14); T3573 L22-31 (P24); and see T3094 L40-T3095 L2 (P18).

⁶⁷ T1405 L46-47 (P14) and T3527 L39-40 (P24).

⁶⁸ T6174 L23-32 (P81).

- (i) A group of commanders who were beginning to assemble for the commanders' RV, including Person 81, Person 80, Person 43, Person 5 and Person 29. The troop interpreter was also present.
- (ii) Members of Person 5's patrol, who had commenced SSE duties, including Mr Roberts-Smith and Person 4.
- (iii) Members of Person 29's patrol, who had commenced SSE duties, including Person 35, Person 38, Person 40, Person 41 and Person 42.
- (iv) A group of Afghan women, who were agitated and indicating the presence of something in the vicinity of the tunnel.

51. There is no dispute that each of Mr Roberts-Smith, Person 5, Person 29, Person 35, Person 38 were in the northern tunnel courtyard area when the tunnel was discovered or very shortly after the tunnel was discovered (RS Section IV [70] and [107]).
52. The Applicant does not challenge the evidence of Person 18, Person 40, 41, 42, 43 to the effect that they were also present in the tunnel courtyard area either when the tunnel was discovered or shortly afterwards, save that the Court should find that the tunnel was discovered before the compound had been declared secure and therefore, before SSE had properly commenced (see the next section below). This concession in relation to the evidence of Person 18, Person 40, 41, 42, 43 is limited only to their position at the tunnel courtyard contemporaneously with the discovery of the tunnel and does not extend to their evidence insofar as it is relied upon to support the Respondents' allegations that two Afghan men came out of the tunnel, were PUC'd and then executed by Mr Roberts-Smith and/or Person 4.
53. The Applicant submits that there were no Afghan women in the vicinity of the tunnel. The recollection of Person 42⁶⁹ and Person 40⁷⁰ should not be preferred over the recollections of Person 38, Person 35, Person 29, Person 5 and Person 81 as described below. Each of Person 38,⁷¹ Person 35⁷², Person 5⁷³ and Person 29⁷⁴ denied or could not recall seeing any Afghan women in the tunnel courtyard. Person 29 recalled that Afghan women were found not far from the tunnel courtyard (at "B" on Ex A219).⁷⁵ When it was put to him that the women were located in a place where there was visibility of the tunnel courtyard, he could neither confirm nor deny.⁷⁶
54. Person 81's evidence about the presence of Afghan women at W108 does not assist the Respondents' case either. He could recall seeing Afghan women at the compound but could not indicate where.⁷⁷ The following exchange occurred:⁷⁸

Now, I also want to put to you – and it may be that you just can't say. But at the point in time just before the commanders' RV, there were some Afghan women nearby, some of whom were quite agitated. Are you able to say one way or another whether you recall that?--I don't recall

⁶⁹ T2096 L40-47 (P42).

⁷⁰ T3264 L1-12 (P40).

⁷¹ T5944 L31 (P38).

⁷² T5306 L27-28 (P35).

⁷³ T5055 L9-25 and T5067 L40-42 (P5).

⁷⁴ T5531 L13-24 (P29).

⁷⁵ T5471 L39-40 (P29).

⁷⁶ T5531 L25-26 (P29).

⁷⁷ T6163 L40 and T6178, L37-T6179 L3 (P81).

⁷⁸ T6177 L28-35 (P81).

anything significant, but that is reasonably typical that they would be agitated as we enter the compound. So - - -

And, to be clear, I wish to suggest that their agitation suggested that they were concerned about people or something being hidden in the vicinity?---I don't recall.

55. It was not put to Mr Roberts-Smith that there were Afghan women in the tunnel courtyard. His evidence about encountering women at the compound, prior to moving into the tunnel courtyard, is consistent with women being located in the southern part of the compound.⁷⁹

D. THE DISCOVERY OF THE TUNNEL

The tunnel was discovered before the compound was declared secure

56. The Respondents submit that the tunnel was discovered after the compound was declared secure (RS Section IV [58]-[67]) on the basis of the evidence of Person 18, Person 40, Person 41, Person 42 and Person 43.
57. None of the relevant operational documents, which are set out below, record when the tunnel was discovered.
58. The most reliable evidence about whether the tunnel was discovered before or after the compound was declared secure is found in the Troop's standard operating procedures for clearing compounds and for the convening of a team commanders' rendezvous with Troop Headquarters.
59. Person 5 described the process for declaring a compound secure. He said that once all of the patrol commanders have deemed that their areas are clear, the person who is the lead assault commander would make a decision to call a compound secure. That message would then be relayed to the troop sergeant and the troop commander.⁸⁰ After the compound is declared secure, Person 81 would call all of the patrol commanders to move to a team commanders' rendezvous.⁸¹
60. Person 5's evidence of the standard operating procedure was corroborated by Person 81, who confirmed that the lead patrol commander for the assault is the person who determines whether and when a compound is secure.⁸² Person 5 said he was the one who called Person 81 and told him that W108 was secure.⁸³ Although Person 81 could not recall the identity of the lead patrol commander for the assault,⁸⁴ Person 5's evidence that he held this responsibility was not challenged and should be accepted, as he and Person 29 were in charge of assaulting and clearing W108 and Person 29 did not suggest that he was tasked with this responsibility for that mission.
61. Person 81 confirmed that the standard operating procedure as to when a patrol commanders' RV would take place during a mission was usually once the compound was secure.⁸⁵ He said "*the patrol commanders – you know, they would confirm with each other to make sure it was secure, and then*

⁷⁹ T170 L29-41 (BRS).

⁸⁰ T4842 L26-29 (P5).

⁸¹ T4861 L38-40 (P5).

⁸² T6158 L34-37 (P81).

⁸³ T4861 L25-28 (P5).

⁸⁴ T6158 L40-41 (P81).

⁸⁵ T6161 L26-31(P81).

they would bring the troop headquarters forward.”⁸⁶ The reason for that was a practical one. Troop headquarters was not trained to clear compounds. That is the responsibility of SASR patrols.⁸⁷

The evidence of the Applicant’s witnesses was consistent with the Troop’s standard operating procedures

62. Mr Roberts-Smith gave the following evidence in relation to whether the tunnel was discovered before or after the compound had been declared secure.⁸⁸

And do you know was the compound – had the compound been declared secure at this point?---I have no idea.

Okay. Had - - -?---I can’t imagine it could have if we were still searching through the tunnel.

All right?---But I don’t have a recollection of if it was or not.

Do you remember if SSE had started?---Again, I don’t recollect it had started, but I can’t – again, if you have someone in the tunnel it really couldn’t have started.

63. It was not put to Mr Roberts-Smith that the tunnel was discovered after the compound had been declared secure. Had it been put, it is unlikely that Mr Roberts-Smith would have agreed with the proposition.
64. The evidence of the Applicant’s other witnesses on this issue was consistent. Person 5 said that after Person 35 went into the tunnel and confirmed that it was clear, he then contacted Person 81 to inform him that the compound was secure.⁸⁹ This evidence was corroborated by Person 29, who denied that the tunnel was discovered after the compound was declared secure.⁹⁰ He also denied that it was found during SSE.⁹¹ Person 35 also denied that the tunnel was discovered after the compound was declared secure.⁹²
65. The Respondents’ attack the credit of Person 29 and Person 35 based on alleged prior inconsistent statements in their outlines of evidence in reply relating to the discovery of the tunnel during SSE (RS Section IV [71] and [72]). The challenge to their credit based on inconsistencies with their outlines of anticipated evidence should be rejected by the Court. Person 29’s and Person 35’s evidence that the outlines did not accurately record their recollections should be accepted.⁹³ Relevant to this is that when the outlines were prepared in 2019, the Applicant was not on notice that the timing of the discovery of the tunnel would be in issue, nor was the Applicant on notice that the Respondents would allege that Afghan Male 1 and Afghan Male 2 were PUCs who had been found hiding in a tunnel in a courtyard at W108.
66. Person 38 also recalled that the compound was declared secure after the tunnel had been discovered.⁹⁴ In answer to the proposition that the compound was declared secure and the team commanders’ rendezvous was convened prior to the tunnel being discovered, Person 38 said:⁹⁵

⁸⁶ T6161 L32-33 (P81).

⁸⁷ T6158 L31-32 (P81).

⁸⁸ T430 L27-36 (BRS).

⁸⁹ T4861 L7-9 and L25-40 (P5).

⁹⁰ T5528 L28-30 (P29).

⁹¹ T5529 L1 (P29).

⁹² T5301 L8-12 (P35).

⁹³ T5529 L20-21 (P29) and T5301 L33-41 (P35).

⁹⁴ T5945 L40-T5947, L22; T5984 L27-T5985 L4 (P38).

⁹⁵ T5985 2-4 (P38).

If that had occurred, it would have been the only mission that I did in hundreds of missions where compound secure was called before the compound was secure.

67. The Respondents submit that Person 81 corroborated the evidence of the Respondents' witnesses (RS Section IV [74]) because he said that he "wouldn't like to speculate" when asked if the tunnel was discovered while he was standing nearby.⁹⁶ The Court should not accept the Respondents' submissions. Person 81's evidence, as a whole, was not consistent with the evidence of the Respondents' witnesses that the tunnel was found after the compound had been declared secure. In particular, Person 81 said that:
- (a) he would not have approached the compound until it was declared secure;⁹⁷
 - (b) he would not have seen the tunnel before the compound had been declared secure;⁹⁸ and
 - (c) he could not recall that the tunnel was discovered while he was standing with Person 43 and Person 82 [at the team commanders' rendezvous].⁹⁹
68. Person 81's evidence is consistent with the tunnel having been discovered before he entered the compound for the purpose of attending the team commanders' rendezvous.

Conclusion

69. It is improbable that the compound was declared secure prior to the discovery of the tunnel. Allowing the Troop headquarters to enter a compound before the discovery of a tunnel nearby which may have contained an enemy threat would have constituted a significant departure from the Troop's standard operating procedures (SOPs). It is telling that none of Mr Roberts-Smith, Person 5, Person 29, Person 35, Person 38 and Person 81 recalled that occurring.
70. The Respondents assert that their witnesses were not questioned about whether the tunnel was discovered after the compound had been declared secure and/or during the SSE phase (RS Section IV [68]). In advancing this submission, the Respondents ignore the fundamental proposition that their evidence has to be assessed by reference to the totality of the evidence before the Court. The Court cannot just accept the assertions of their witnesses as to when they recall the tunnel was found and ignore the other evidence before the Court.¹⁰⁰ This does not mean that the Court must accept the Respondents' evidence as to when the tunnel was found.
71. The evidence of the Respondents' witnesses about whether the tunnel was discovered after the compound had been declared secure and/or during the SSE phase is contradicted by the unchallenged evidence of the Troop's SOPs in relation to clearing compounds and the convening of a team commanders' rendezvous with Troop headquarters. No attempt was made in the Respondents' case to lead evidence from their witnesses to explain why their alleged actions were carried out at W108 contrary to the Troop's SOPs. The Court is invited by the Respondents to seemingly ignore the evidence of the Troop's SOPs.

E. THE EVENTS FOLLOWING THE DISCOVERY OF THE TUNNEL

72. The Respondents submit that the Court should find (RS Section IV [124] and [249]):

⁹⁶ T6178 23-25 (P81).

⁹⁷ T6160 L23-24 (P81).

⁹⁸ T6160 L20-21 (P81).

⁹⁹ T6177 L37-43 (P81).

¹⁰⁰ *Bulstrode v Trimble* [1970] VR 840 at 838 (Newton J).

- (a) The tunnel was discovered by a member of Person 29's patrol, most likely Person 35.
- (b) When the tunnel was discovered, a group of operators quickly moved to the tunnel entrance, pointed their weapons down the entrance, began calling out, and called for an interpreter.
- (c) The interpreter soon joined and began calling out.
- (d) Two Afghan men came out of the tunnel, and were placed under control.
- (e) EKIA 56 was executed by Person 4 in the tunnel courtyard, at the direction of Mr Roberts-Smith; and
- (f) EKIA 57 was executed by Mr Roberts-Smith outside the northwest corner of the compound.

73. The most reliable evidence of what occurred during the mission, the circumstances in which EKIA were killed and the location of their engagements is found in the contemporaneous reporting corroborated by witness' recollections.

F. THE CONTEMPORANEOUS REPORTING

74. See Applicant's Closed Court Submissions at paragraph A2 to A3.

Exhibit R192, Tab 1 Patrol Debrief.

75. Ex R192, Tab 1 is a document described as Patrol Debrief, Operation Harpoon. It describes several missions including the mission to W108.

76. At paragraph 5c., the debrief records "[t]hroughout the day numerous insurgents were engaged. The insurgents were identified as either spotters or squirting from known insurgent locations within the green."

77. The debrief described the clearance of W108 and W109 as follows (at paragraph 5.f):

"Infil: A daylight infil was conducted into the green. Due to the high risk and the known threat G TP conduct the infil with two patrols up and one back with two patrols further back for reserve. The infil route pushed toward W125 and then changed direction NE to W108. This gave the Tp an approach that would prevent any friendly fire and also enable MRTF to provide fire support if required. The infil route is shown at figure 3.

Passage of info from ISR: Scan Eagle was available, but there is no capacity to have direct liaison with the asset and therefore was not viable.

Approach route: There there were numerous aqueducts and channels throughout the approach route with good water flow. The rate of movement was approximately 1km/hr. The heavy cloud, rain and good vegetation provided excellent cover and concealment for the approach. This in turn enabled the FE to close with the INS and kill using stealth and precision. Three x INS were KIA on the approach."

Clearance W108:

- (1) *MOE: EMOE used.*
- (2) *Squirters: 2 x squirters were killed.*
- (3) *Exploitation:*
 - (a) *EKIA: 9 x EKIA (including 3 x EKIA from JDAM)*
 - (b) *PUCs: Nil*
 - (c) *FAMs: 1 x FAM*
 - (d) *LN Protected: Several WaCs*
 - (e) *Items of Interest: Substantial cache found with 107, 73 RCL, 7.62, 2.75", AKs, RPD, etc. There were tunnel systems, false walls and cache locations throughout the compound. More detail can be found in the Exploitation Report to be released SEPCOR."*

78. The description of the clearance of W109 indicates that while there were no EKIA, two fighting aged males were located along with several women and children.

79. Later, the patrol debrief recorded the following (at paragraphs 24 and 26):

"24. MRTF engagement: the insurgents used spotters to report on CF locations. They were positioned North and South of the engagement area. During the infill for the clearance of W108 and W109 the insurgents use spotters in the green in order to attempt to detect CF movement.

...

26. Upon breaching the compound and commencement of clearance insurgents attempted to squirt, but were engaged."

80. Person 81 said that the document was written by operational staff but that he read it and "cleared it" for release.¹⁰¹ Person 81 confirmed that these paragraphs (24 and 26) were referable to the clearance of W108.¹⁰² His evidence about how that information came to be approved by him was as follows:¹⁰³

Yes. Now, can I just ask you to have a look at paragraph 26. You will there that says that, upon breaching the compound and commencement of clearance, insurgents attempted to squirt but were engaged. Do you see that?---I do.

And, again, is that something that would have been based on something that you were told after the mission?---It – it would be. Yes.

You don't have any recollection yourself of anything of that kind happening that you were aware of on the day?---No.

¹⁰¹ Closed Court 1 June 2022 p 4, T36-44 (P81) (redacted version).

¹⁰² T6173 L26-27 (P81).

¹⁰³ T6173 L29-T6174 L3 (P81).

So is this right that after the mission at some point someone had told you that, upon breaching the compound and the commencement of clearance, there was an attempt to squirt from Whisky 108?---That's what it – the report states. I don't recall that conversation personally.

No. But whatever is – may we take it that, whatever you were told, you would have endeavoured to accurately convey in the reporting?---Yes.

So we may take it that what you were told after the mission was that, upon breaching the compound and commencing clearing, there was an attempt to squirt by insurgents?---Yes.

81. The Respondents accept, as does the Applicant, that the description “Squirters: 2 x squirter were killed” in the patrol debrief relates to EKIA 56 and EKIA 57. Person 81 could not confirm this.¹⁰⁴ Person 81 said that that was something he would have been told after the mission.¹⁰⁵ His understanding of the reference to the two squirter being killed was that “the assessment was made that, on approach, two people were seen departing the compound and that they were engaged.”¹⁰⁶ It is likely that this information came from Person 5, who confirmed that he provided input in to the patrol debrief document,¹⁰⁷ and who said that he was told by Mr Roberts-Smith that squirter had been engaged during the mission.¹⁰⁸ The Respondents seek to restrict the definition of a “squirter” to someone leaving a compound of interest. That is not correct. A “squirter” is someone moving away from a target area, namely an area the SASR is trying to contain.¹⁰⁹ Person 5 also explained that the word “squirter” is a generalisation for anybody around a compound.¹¹⁰ The area between W108 and W109 had not been secured.¹¹¹
82. See Applicant’s Closed Court Submissions at paragraph A4 to A17.

Exhibit R192, Tab 2 “TF66-SUPINTREP 028-09”

83. This report states that it is correct as at 15 April 2009. It provides:
84. TF66-A conducted special operations in DEH RAFSHAN (specifically KAKARAK and SYVEDAN) over the period 11-13 April. On 11 April, the FE conducted ‘cordon and call out’ and subsequent clearances of compounds W0108 and W0109 near KAKARAK. The details of actions taken on target and initial TSE results are provided in ref A.
85. In addition to an INS KIA 500m South of W0108, a further two INS were KIA; one of these 10m from the North-west corner of W0108 and the third 5m from the North-west corner of W0108. Hand held imagery was captured of the first INS but not of the second and third INS due to the tactical situation at the time.
86. Three INS were also found KIA inside W108 as a result of an earlier CAS engagement; however, they could also not be identified or photographed due to the tactical situation. Captioned SSE photographs appear in the remainder of the document. The captions describing the photographs refer to the existence of an eastern tunnel in W108 (see Figure 2 and 4), a southern tunnel in W108 (see Figure 3) and a northern tunnel (see Figure 6).

¹⁰⁴ T6172 L25 (P81).

¹⁰⁵ T6172 L28-29 (P81).

¹⁰⁶ T6173 L4-6. (P81)

¹⁰⁷ Closed court transcript 21 April 2022 T5, L21 (P5) (redacted version).

¹⁰⁸ T4863 L28-29 (P5).

¹⁰⁹ T134 L13-17 (BRS) and T5863 L35-38 (P32).

¹¹⁰ T5097 L6-7 (P5).

¹¹¹ T6174 L23-32 (P81).

87. The reference to an eastern, southern and a northern tunnel is consistent with the reference in the patrol debrief to existence of “tunnel systems, false walls and cache locations throughout the compound.”¹¹²

Exhibit A221 – Footage of CAS strike

88. Person 29 said that the cloud of dust or debris emanating out of the compound through the tree line and into the creek line may indicate the presence of another tunnel at the compound.¹¹³

G. THE APPLICANT’S EVIDENCE ABOUT THE DISCOVERY OF THE TUNNEL AND THE ENGAGEMENT OF EKIA 56 AND 57

89. Mr Roberts-Smith described the clearance of W108 as follows:¹¹⁴

So as the team was clearing buildings and I was effectively sort of holding the security out the front of each room as you rolled through them, we did come across women – a couple of women, I believe – and maybe a couple of children that were effectively just sat off to one side initially. I did not see any fighting-age males in the building that day; however, I’m now aware, obviously, there was one taken, and the other team – or other team members would be able to talk to that, but I didn’t see that individual. We found what was effectively a sheet hanging over a gap in one of the exterior walls which opened up into what was another courtyard, and that courtyard was to the very northern end of Whisky 108. Once we made entry into that as a team, there was a large pile of grass – grass hay in one – towards the outer wall, which is not really typical. There were no animals in there from – from what I remember. And it was quite a large space, perhaps 18 by 30 metres, the – the area itself.

90. Mr Roberts-Smith could not recall who found the tunnel. He said:¹¹⁵

I’m actually not sure how it was found, but somebody got into the – the hay or the grass and moved it, and there was a grate on the ground which had a – a tunnel entrance to – to that grate – under that grate, sorry.

91. Mr Roberts-Smith recalled that there was a discussion about who should go into the tunnel and that Person 35 was selected to complete this task.¹¹⁶ He said that one of the other team members, possibly Person 18, was supporting Person 35 by covering him at the top of the tunnel. Mr Roberts-Smith said that “the rest of us were just, effectively, searching that area. And there was another couple of rooms, I think, at one end of the building near the sheet that we came through. So just finishing off the search itself.”¹¹⁷

92. What is apparent from Mr Roberts-Smith’s evidence about the circumstances in which the tunnel was discovered is that it differs in a number of respects from the recollections of Person 5, Person 29, Person 35 and Person 38 about who discovered the tunnel and who was providing cover to Person 35 as he went inside the tunnel to clear it. If each of Mr Roberts-Smith, Person 5, Person 29, Person 35 and Person 38 had colluded to fabricate their evidence about the mission to W108, as the Respondents submit, than each person’s account about who discovered the tunnel and who covered Person 35 would be much more aligned. This, and the other many inconsistencies between their evidence, some

¹¹² Ex R192, Tab 1, para 5 f.iv.(3)(e).

¹¹³ Closed court 6 May 2022 T21 L14-20 (P29) (redacted version).

¹¹⁴ T170 L29-41 (BRS).

¹¹⁵ T170 L44-46 (BRS).

¹¹⁶ T171 L10 and L22-23 (BRS).

¹¹⁷ T171 L28-30 (BRS).

of which are described in RS Section IV [170], provides a clear basis for the Court to reject the Respondents' submission that Mr Roberts-Smith has colluded with Person 5, Person 29, Person 35 and Person 38 for the purpose of fabricating their evidence to the Court.

93. Mr Roberts-Smith then left the northern courtyard area to go outside. There was a rational reason for doing this. *First*, the area adjacent to the W108 compound had not yet been cleared. *Secondly*, Mr Roberts-Smith carried the para minimi machine gun which was not effective for room combat. He said that there was no point trying to "clear the last couple of rooms" with his weapon, so he went outside to clear that area. He said:¹¹⁸

There was an exit point to the courtyard on the northwestern side of the extension to Whisky 108, and that gap, when you walked out, was effectively an alleyway for a couple of metres because there was a wall opposing it, and then it opened up along the side of the exterior of Whisky 108 heading towards the corner, the north-east corner, the very far north-east corner of Whisky 108. I came out of the entry point, I turned right, started to walk down that track, and when I did that, I saw an insurgent moving from right to left on the outside of the line

of the compound and just coming around – it wasn't in corn; it was effectively around the outside of corn, sort of on an arc, and I engaged that individual with my Minimi, but I had a stoppage. I think I got maybe two rounds away. I had a stoppage and I dropped down onto my knee to rectify the stoppage, and while I was doing that, I'm not – I don't re 5 collect who it was, but there was a second insurgent out there and that insurgent was dropped by one of the guys that came up behind me or – or shot from behind me - - - but I didn't see exactly who it was.

94. Mr Roberts-Smith continued:¹¹⁹

So once I rectified my stoppage, I came up. The insurgent had fallen, as I said, past the line of the compound. So for me to go outside and into the open and try and clear him or do any type of SSE on him would be dangerous, because you're exposing yourself with no cover. So I had moved out and grabbed hold of my guy and dragged him back perhaps five metres, just so it was on the inside of the corner of the building side, the protection of the wall, and then gave him a quick pat search. And that initial search was simply to identify whether or not he had any further weapons or anything like that.

95. Mr Roberts-Smith said he grabbed the weapon and put it down the far end of the building against the wall, at the entry point.¹²⁰

H. PERSON 5'S EVIDENCE AT W108

96. Person 5 said that while the assault was continuing on the western side, an ANA soldier attached to the troop called him back. The soldier was pointing at a pile of hay. There was cyclone fence on top and loads of green grass.¹²¹ They started ripping off the grass and the grate and discovered the tunnel.¹²²

¹¹⁸ T171 L41-T172 L9 (BRS).

¹¹⁹ T172 L17-25 (BRS).

¹²⁰ T172 L26-29 (BRS).

¹²¹ T4858 L28-34 (P5).

¹²² T4858 L42-43 (P5).

Person 5's recollection was that Person 35, Person 29, Person 28 and Mr Roberts-Smith were present.¹²³ Person 5 made a radio call that a tunnel had been discovered.¹²⁴

97. Person 5 made the decision that Person 35 would hold security on the tunnel while the rest of the compound was cleared.¹²⁵ Person 5 and Person 29 determined that Person 35 should clear the tunnel.¹²⁶ Person 35 took off his body armour and helmet, took his pistol out, put his long gun down and went into the tunnel.¹²⁷ After a couple of minutes Person 35 reported the tunnel was "clear".¹²⁸
98. Person 81 was informed that the compound was secure.¹²⁹ A "rummage" of the compound commenced. Person 5 moved to the team commanders RV.¹³⁰ Person 5 heard gunshots outside the compound on the northwest corner.¹³¹ Person 5 ran out of the compound and observed Mr Roberts-Smith and Person 4 just off the north corner of the compound. Person 5 shouted at Mr Roberts-Smith to ask if "they were right", Mr Roberts-Smith said yes and that they had "just engaged two squirts to the north". Person 5 returned to the team commanders RV and informed Person 81 there were two EKIA on the northwest corner.¹³²
99. As Person 5 left the compound to undertake a reconnaissance on W109, he saw Mr Roberts-Smith with the EKIA and observed that the body had a prosthetic leg.¹³³ He asked Mr Roberts-Smith if he had checked to see if it was Objective Xiphos. Person 5 then removed the leg, looked inside for IEDs and finding nothing, he put the limb back down beside the body.¹³⁴ On Person 5's return from the reconnaissance on W109, he observed Person 4 and Mr Roberts-Smith together with a second EKIA.¹³⁵
100. Person 5 confirmed that he was aware that ISR was being used during the mission. Person 5 had no responsibility for determining where the ISR was to be located.¹³⁶ Person 5 denied that he had any discussion with Mr Roberts-Smith about being concerned about the ISR recording. He also confirmed that he knew ISR footage could not be deleted.¹³⁷

I. SUBMISSIONS BASED ON THE CONTEMPORANEOUS REPORTING

101. The contemporaneous reporting indicates that there were a high number of insurgents present in the vicinity of W108 and W109 on 12 April 2009 as well a significant level of foot traffic between W109, W103 and W108 throughout the afternoon (see Ex R286 and Ex R192, Tab 1).
102. The contemporaneous reporting also suggests the presence of more than one tunnel at W108, including an eastern, southern and northern tunnel.¹³⁸

¹²³ T4859 L3-4 (P5).

¹²⁴ T4859 L7-9 (P5).

¹²⁵ T4859 L14-37 (P5).

¹²⁶ T4860 L41-42 (P5).

¹²⁷ T4861 L3-5 (P5).

¹²⁸ T4861 L7-9 (P5).

¹²⁹ T4861 L25-26 (P5).

¹³⁰ T4861 L39-42 (P5).

¹³¹ T4863 L6-8 (P5).

¹³² T4863 L24-38 (P5).

¹³³ T4875 L31-47 (P5).

¹³⁴ T4876 L1-15 (P5).

¹³⁵ T4878 L26-27, L46, T4879 L1-4 (P5).

¹³⁶ T4882 L43 (P5).

¹³⁷ T5117 L20-46 (P5).

¹³⁸ Ex R192, Tab 1, para 5 f.iv.(3)(e); Ex A221 and Ex R192, Tab 2.

103. The presence of insurgents moving between W108 and W109 during the course of that day is consistent with Mr Roberts-Smith's evidence that EKIA 57 and EKIA 56 were insurgents who were engaged outside W108. The Respondents seemingly invite the Court to conclude that there were no insurgents outside W108. There is no basis upon which the Court could conclude in any definitive manner that it is satisfied there were no insurgents outside W108.
104. That the insurgents were not seen by members of Person 6's patrol can be readily dealt with by reference to the objective evidence. *First*, from their vantage point, they would have been unable to observe – around the corner of the tunnel courtyard walls – the area immediately adjacent to the north-east of W108. *Secondly*, that area, between W108 and W109 and adjacent to the river, was marked by the presence of thick trees and vegetation. As the imagery in Ex A13 and Ex A10, Tab 13 reveals, that vegetation would have provided excellent concealment to any insurgents present in that area. Person 81 noted that part of the green had not been cleared and was not secure.¹³⁹ The suggestion that it would have been a serious matter (and brought to the attention of Person 81) if the cordon team had failed to detect insurgents in close proximity to the compound was not accepted by Person 81:¹⁴⁰

Now, if insurgents had managed to approach Whisky 108 from the north to a distance of, say, 10 metres, that would have been a serious matter that you would have expected to be brought to your attention; is that right?---Not necessarily. Obviously, a range of contacts occur, a range of time and other complicating factors. In the end, my job is coordinating a range of different support mechanisms to enable that action to occur rather than specifically about that tactical manoeuvre inside a compound.

105. See Applicant's Closed Court Submissions at paragraphs A18 to A25.
106. The Applicant submits that the contemporaneous reports corroborate his evidence that EKIA 57 and EKIA 56 were insurgents who were lawfully engaged during the clearance of W108. This is corroborated by the patrol debrief, which refers to these insurgents as squinters. See Applicant's Closed Court Submissions at paragraph A26.
107. Each of the patrol debrief and the Exploitation Report record that only one fighting aged male was located at W108.
108. It is submitted that the engagements of EKIA 56 and EKIA 57 occurred sometime prior to the W108 compound being declared secure at approximately 1706DE.
109. See Applicant's Closed Court Submissions at paragraphs A27 to A28.

J. THERE WERE NO MEN HIDING IN THE TUNNEL

110. Each of Mr Roberts-Smith, Person 5, Person 29, Person 35 and Person 38, who the Respondents accept were at the tunnel at the time of its discovery or shortly thereafter, denied that there was anyone in the tunnel. Their evidence carries force and cannot simply be dismissed as the product of collusion.
111. Mr Roberts-Smith said that there were no men in the tunnel.¹⁴¹ Person 5 said that no one came out of the tunnel.¹⁴² Person 29 said that no one was pulled out of the tunnel.¹⁴³ Person 35 said that there was

¹³⁹ T6174 L23-32 (P81)

¹⁴⁰ T6175 L22-28 (P81).

¹⁴¹ T578 L26-27 and L32-33; T580 L23-24, 39-40 (BRS).

¹⁴² T5005 L6; T5063, L8; T5067 L44-T5068 L46 (P5).

¹⁴³ T5475 L12; T5518, L34-36; T5533 L44-T5534 L23 (P29).

no one in the tunnel.¹⁴⁴ Person 38 said he did not see any fighting aged males come out of the tunnel or in the vicinity of the tunnel.¹⁴⁵ The evidence of Mr Roberts-Smith, Person 5, Person 29, Person 35 and Person 38 about whether any fighting aged males were pulled out of the tunnel and then PUC'd at W108 was categorical.

112. The Respondents submit that Person 81 had a positive recollection of seeing fighting aged males in the compound (RS Section IV [112]) and that this is “highly corroborative of the fact that men were found in the tunnel” because the only confirmed FAM found at W108 was a male located in the southern portion of the compound. The Court should attribute little weight to the evidence of Person 81 that the Respondents rely upon in support of this submission. It is submitted that Person 81’s evidence, when considered as a whole, did not rise as far as a positive recollection of seeing more than one fighting aged male at W108. At T6176, L35-40, the following exchange occurred:

Now, did I understand your evidence correctly yesterday that you do have a recollection of seeing fighting-age males as you moved through the compound?---That is correct.

And may we take it again that you don’t have a recollection of where in the compound you saw fighting-age males?---That is also correct.

113. But Person 81’s evidence of the previous day, to which senior counsel for the Respondents was purporting to refer, was ambiguous about the presence of more than one fighting aged male within W108. That evidence appears at T6159, L16-23.

Are you able to recall in terms of the area that you moved into after the Whisky 108 compound was called secure whether you saw any Afghan fighting-aged males in the Whisky 108 compound?---I did see people in Whisky 108, yes. As to their actual description, I would say I couldn’t give you an accurate picture, but there was people inside the compound, yes.

Are you able to recall whether you saw any Afghan women in the compound?---Yes one of the memories I do have is a lady sweeping.

114. Person 81’s evidence of seeing people in W108 including a lady sweeping did not clearly refer to the existence of more than one fighting aged male in the compound. The questions put to Person 81 at T6176, L35-40 did not summarise accurately his evidence from the previous day. Accordingly the Court should attribute little weight to his agreement with the proposition that he saw “fighting aged males” as he moved through the compound.

115. Likewise Person 81’s evidence at T6179, L5 is ambiguous and does not clearly support the Respondents’ submission at (RS Section IV [112]):

But are you able to say that there were men and – local men and women present?---There was. Yes.

116. The Applicant submits that Person 81’s evidence corroborates the evidence of Mr Roberts-Smith and Persons 5, 29, 35 and 28 about whether anyone was pulled out of the tunnel at W108. Person 81 recalled seeing the tunnel at W108.¹⁴⁶ He did not, however, see any Afghan fighting aged males coming out of the tunnel.¹⁴⁷ Nor did he see any Afghan fighting aged males being PUC'd near the

¹⁴⁴ T5178 L14-16 and T5306 L39-T5307 L15 (P35).

¹⁴⁵ T5957 L9-10; T5985 L40-44 (P38).

¹⁴⁶ T6177 L5-8 (P81).

¹⁴⁷ T6160 L43 (P81).

tunnel at W108.¹⁴⁸ Nor did he observe any individuals within the compound being PUC'd¹⁴⁹ or hear any engagements whilst he was in the compound.¹⁵⁰ Person 81's evidence, notably, directly contradicts the evidence of Person 40, who said that Person 81 was in the tunnel courtyard when two men emerged from the tunnel.¹⁵¹

117. Despite the categorical evidence of Mr Roberts-Smith, Person 5, Person 29, Person 35 and Person 38 that no one came out of the tunnel and that there were no fighting aged males in the vicinity of the tunnel as it was being cleared, the Respondents submit that their collective evidence does not contradict the evidence of the Respondents' witnesses because "it may be that Person 35 entered the tunnel and cleared it in the manner described after the two men had already come out of it compliantly as described by the Respondents' witnesses." (RS Section IV [121]). That submission should not be accepted. There were no fighting aged males pulled out of the tunnel at W108. Nor were any fighting aged males PUC'd in the vicinity of the tunnel at W108.

K. LOCATION OF EKIA 56

118. The Court should find that EKIA 56 was engaged outside the tunnel courtyard on the north-western side of W108. It is submitted that the contemporaneous reporting that records an inconsistent location of EKIA 56 is unreliable because:
119. *First*, none of the Applicant's witnesses, who were each present in the tunnel courtyard at the time of the discovery of the tunnel, said that they saw an engagement in that courtyard or the body of EKIA 56 there. According to Person 41, the execution of EKIA 56 occurred only a couple of minutes following the discovery of the tunnel, when, it is submitted, each of these witnesses would likely have still been there, either attending the team commanders' rendezvous or assisting with SSE after the compound had been declared secure. On the other hand, the only two witnesses who can recall seeing EKIA 56 in the tunnel courtyard (and thus corroborate the information contained in the Exploitation Report) are Person 41 and Person 18.
120. *Second*, none of Person 40, Person 42 or Person 43, who were also present in the tunnel courtyard at the time of the discovery of the tunnel or shortly thereafter, said that they saw the body of EKIA 56 in the tunnel courtyard. None of them were asked whether they saw the body of EKIA 56 in the tunnel courtyard during their evidence-in-chief. The Court should draw an adverse inference from the Respondents' failure to adduce evidence from these witnesses about the location of EKIA 56. It is submitted that the evidence of Person 40, Person 42 or Person 43 regarding this issue, if adduced, would not have assisted the Respondents' case.
121. *Third*, Person 81, who said that he saw the tunnel and therefore was present in the tunnel courtyard, denied seeing EKIA 56 in that courtyard. It was put to Person 81 that the body of EKIA 56 was inside the tunnel courtyard area close to the time of the patrol commanders' RV. Person 81's answer was firm "[n]ot when I was there."¹⁵²
122. See Applicant's Closed Court Submissions at [paragraph A29](#).
123. *Fifth*, the errors in the Exploitation Report regarding cardinal directions, the manner in which it was prepared (at 2am-3am in the morning) and Person 18's acceptance that there may be other errors in the

¹⁴⁸ T6160 L45-46 (P81).

¹⁴⁹ T619 L41-42 (BRS).

¹⁵⁰ T6159 L47 (P81).

¹⁵¹ T3276 L17-20 (P40).

¹⁵² T6180 L40-41 (P81).

document and the fact that SSE reports were not designed to be evidentiary documents¹⁵³ support the Applicant's case that the information regarding the location of EKIA 56 contained therein is incorrect.

124. The Respondents rely on the evidence of Person 42 and Person 43 in support of their submission that EKIA 56 was located in the tunnel courtyard. Person 42 said, in respect of the last page of Ex R6, that "*there's nothing specific that indicates to me where exactly that image is taken*" but that it was "*consistent with [his] memory of what the courtyard looked like where we found the tunnel*".¹⁵⁴ He then observed that the grass was similar to the grass that covered the tunnel and is consistent with where animals were kept. He identified the oval shapes shown in Ex R6 as cooking areas. Ultimately, his evidence was equivocal: "*it looks like it could be the area where the – tunnel was found*".¹⁵⁵ It is important to note that Person 42 did not give evidence that he saw EKIA 56 at any time, much less in the courtyard. Person 43 also did not give any evidence that he saw EKIA 56 in the courtyard.
125. Person 43, when shown page of Ex R6, said that the grass depicted in the photograph is similar to the grass that was covering the entrance to the tunnel.¹⁵⁶
126. Person 42's and Person 43's identification evidence about the grass depicted on page 5 of Ex R6 has no probative value for the following reasons.
127. *First*, the Court is able to draw its own inferences and conclusions from a comparison of the grass depicted on page 5 of Ex R6 and the grass depicted adjacent to the tunnel entrance.
128. *Second*, neither Person 42 or Person 43 recalled the area depicted on page 5 of Ex R6 as being in the tunnel courtyard. If they had this recollection, they presumably would have said so. As described elsewhere in these submissions, it is telling that neither of them said the area depicted was in the tunnel courtyard.
129. *Third*, Person 42's evidence that the oval-shaped mud structures shown in Ex R6 were cooking areas and that such areas "can be sometimes slightly outside ... the compound"¹⁵⁷ was not corroborated by any other witness. Person 35 agreed with the suggestion that the mud structures appeared to be cooking ovens, but said that in his experience, cooking areas were not usually located in areas where animals are kept.¹⁵⁸ Person 5 did not agree that they were cooking ovens.¹⁵⁹ Person 29 did not recognise the mud structures as cooking ovens.¹⁶⁰ Nor did Person 38.¹⁶¹ He said that the mud structures were latrines and for that reason said that the area depicted "looks like an external area".¹⁶²
130. *Fourth*, none of the Respondents witnesses said that they recalled seeing the mud structures or the drainage channel that appear in the last photograph of Ex R6 in the tunnel courtyard area. The absence of this evidence confirms that the area depicted in the photograph is not inside the tunnel courtyard. The fact that the photo shows that there is grass in this area, does not mean that the photos were taken near the tunnel entrance.¹⁶³ The images in Ex R5 establish that grass was everywhere, in particular, outside the compound walls of W108. The link is pure conjecture. Person 41 said that there were

¹⁵³ Closed court transcript 6 May 2022 T14 L5-7 (P29) (redacted).

¹⁵⁴ T2101 L14-16 (P42).

¹⁵⁵ T2102 L27-28 (P42).

¹⁵⁶ T3355 L2-5 (P43).

¹⁵⁷ T2102 L27-28 (P42)

¹⁵⁸ T5311 L45-T5312, L4 (P35).

¹⁵⁹ T5105 L23-24 (P5).

¹⁶⁰ T5523 L7-8 (P29).

¹⁶¹ T5973 L37-38 (P38).

¹⁶² T5950 L1-2 and L15-16 and T5973 L34-35 (P38).

¹⁶³ Ex A10, Tab 11, p 17.

animal stables in the area he marked “F” on Ex R92.¹⁶⁴ He also said that there was a drainage channel that ran adjacent to a compound wall although he could not recall its exact location.¹⁶⁵ He also said that there were “a couple of small footpad tracks leading up to those small buildings”. The presence of grass in the photo at page 5 of Ex R6, along with a footpad and a drainage channel are consistent with the area depicted being outside the north-western tunnel courtyard.

131. Person 29 said described the palm oil container as “ubiquitous” and explained that they were “everywhere in and around compounds in Afghanistan”.¹⁶⁶ Person 29 said:¹⁶⁷

And you know for sure, don't you, that there was a yellow palm oil container in that courtyard on that day?---The yellow palm oil – yes. I can say that. Because there was a yellow – to the best of my recollection, a yellow palm oil container came out of that tunnel. Whether that yellow palm oil container is that yellow palm oil container there, I can't say. And I can't say whether that was inside – well, I can say that that's not inside the courtyard, because when I was inside the courtyard there was no EKIA engaged or killed inside that courtyard.

132. Further, the time stamps of the SSE photographs taken by Person 18 in Ex R18 (RS Section IV [150]-[151]) do not unambiguously support the Respondents' case about the location of EKIA 56. A one-minute time difference between photographs 13 (of EKIA 56) and 14 (the tunnel entrance) is relied upon to support an inference that the two areas depicted in the photograph are located in close proximity. But the same reasoning applies to photographs 35 (of EKIA 57) and 36 (of EKIA 56) which appear also to be taken one minute apart. Ultimately, the evidence of the time stamps of the photographs in Ex R18 is equivocal and equally supports the Applicant's submission that EKIA 56 was engaged outside the tunnel courtyard in close proximity to EKIA 57. The Court should not accept that time stamps in Ex R18 assist the Respondents' case.

L. THE ALLEGATION OF FALSE REPORTING

INTRODUCTION

133. Although the Respondents do not seek a specific finding that the contemporaneous reporting of EKIA 56 and EKIA 57 are false, it is clear from their questioning of Person 81¹⁶⁸ and their submissions that they challenge the accuracy of the contemporaneous reporting and allege it was the product of “an attempt to conceal unlawful executions.” (RS Section IV [171] and [211])
134. Whether the contemporaneous reporting that two squirters were killed is false and how a false account could have been propounded in official Defence records following the preparation of consolidated reporting after the mission, are matters that are relevant to any consideration of the probabilities of the occurrence of the Respondents' allegations that two insurgents were PUC'd and then unlawfully executed during that mission.
135. The Respondents do not allege that anyone other than Person 5 and/or Mr Roberts-Smith had any involvement in the fabrication or falsification of the accounts in these documents which had the input of a number of persons. This demonstrates why this allegation cannot be made out. The Court should accept the accuracy of the contemporaneous reporting.

¹⁶⁴ T1311 L23-24 (P41). See “F” on Ex R92.

¹⁶⁵ T1346 L30-35 (P41).

¹⁶⁶ T5523 L31-37 (P29).

¹⁶⁷ T5523 L44-T5524 L3 (P29).

¹⁶⁸ T6181 L15-18 (P81).

There was a troop debrief process

136. The debrief process following a mission is relevant to understanding how the patrol debrief was prepared. Mr Roberts-Smith gave the following evidence about the process in 2009:¹⁶⁹

As we evolved into strike operations, the debriefing remained in a similar – a similar way, but the patrol commanders would typically have to take – or do a debrief with their team, then they would leave the team, they would go to the officer commanding the squadron’s office with the operations staff there. We would then all go around the room and explain what our part of that mission was on the – on the actual job and the operations officer would record that. Typically record it with a – you know, a notebook and pen. And then they would write the after action report, which can come in many forms. We had – a lot of duplication was done because you need certain reports to be sent to coalition partners, which may contain more or less information due to, you know, our secrets. And then there had to be reports done for the headquarters itself.

...

In 2009, the troop commanders were still writing the after action reports, if you like. But you’re also talking about an issue around terminology, your Honour. So an after action report is what we call it now, whereas there may have been – back then, it could be simply termed a patrol report. It could have been termed a debrief - - - ... - - - because some things – I mean, 2006, people would literally get a Toughbook laptop out and they would type it up on a laptop and send the Word document to the headquarters and that was the after action report. And now we have a templated system. In 2009, it was definitely the troop commanders that were – the troop commander that would write the reports because we were still in vehicles for the moment.

137. Person 5 explained, in the context of his evidence about the battle of Tizak in 2010, the troop debrief process as involving the troop commander, the troop sergeant and the patrol commanders, who would meet following a mission to discuss it:¹⁷⁰

So it’s pretty much a set standard, a debrief: you go through the whole process from prelims to launch to orders to the execution, the exfil and then the post-assault, as I said. He generally starts it off and opens it up to the floor and then all the team leaders give their – their version of – or the lessons learnt that they want to add to that document or their version of events.

138. It may be readily accepted that following the W108 mission, separate patrol debriefs were conducted followed by a troop debrief between the troop commander, the troop sergeant and the patrol commanders. That this process occurred is consistent with the Troop’s standard operating procedures, the recollections of those witnesses who gave evidence about this topic, as well as the existence of Ex R192 Tab 1, which the Court may infer was the product of a debrief process.
139. Person 5 recalled a troop debrief following the W108 mission.¹⁷¹ Person 29 could not specifically recall a debrief after the W108 mission (other than confirming that no debrief occurred at the VDOP)¹⁷² but said that a debrief would have occurred.¹⁷³ Person 42 believed there would have been a

¹⁶⁹ T134 L45-T135 L22 (BRS).

¹⁷⁰ T4903 L18-22 and T5122 L13-36 (P5).

¹⁷¹ T5122 L13-36 (P5).

¹⁷² T5486 L7-8 (P29).

¹⁷³ T5486 L7-8 (P29).

troop debrief on return to Tarin Kowt following the mission to W108, although he did not have an independent recollection of it.¹⁷⁴

140. Person 24 recalled participating in a patrol debrief following the mission.¹⁷⁵ He said all of the members of Person 6's patrol would have been there as that was the SOP post a mission.¹⁷⁶ This is consistent with the practice of conducting patrol debriefs prior to the troop debrief.
141. Person 81 said that he relied on his patrol commanders to provide "*honest and accurate reporting*" to him concerning the number and circumstances of any EKIA's by members of their patrols.¹⁷⁷ He agreed with the proposition that what he learned about the circumstances of any EKIA's would have been based on what he was told by others.¹⁷⁸ He explained that "*what they [the patrol commanders] would have told me would have been put into a report, and – then the report provided to our operations team, would have put it in an operational summary.*"¹⁷⁹ Person 81 said that the patrol debrief document was written by operational staff but that he read it and "cleared it" for release.¹⁸⁰

Conclusion

142. If the evidence of Persons 14, 18, 24, 40, 41, 42 and 43 is accepted, broadly speaking, EKIA 56 and EKIA 57 were removed from the tunnel and then shortly afterwards executed by Mr Roberts-Smith and Person 4 in or just outside the tunnel courtyard. The Applicant accepts that the following persons were in the tunnel courtyard either at the time of its discovery or shortly afterwards (Person 81, Person 80, Person 43, Person 5, Person 29, Person 18, Person 4, Person 35, Person 38, Person 40, Person 41 and Person 42). On the Respondents' case, each of them must have seen the two fighting age males emerge from the tunnel and be PUC'd. Given Person 41's evidence, which the Respondents' primarily rely upon, to the effect that the two alleged executions occurred minutes after the FAMs were PUC'd, it is reasonable to assume that a large number of these persons would have still been present in the tunnel courtyard, conducting SSE, when the alleged executions occurred or proximate enough (for example, at the team commanders' rendezvous) to hear them.
143. Further, Person 14 claimed that everyone in his patrol witnessed the alleged execution by Mr Roberts-Smith.¹⁸¹ That included Person 6, Person 24, Person 73, Person 80 and Person 68. Even if it may be doubted that all members of Person 6's patrol witnessed the alleged execution, Person 14 was adamant that Person 6 saw it.¹⁸² Person 24 claimed that the topic of an execution and a bleeding had been discussed at his patrol debrief with Person 6 following the mission.¹⁸³
144. If even a fraction of the Australian soldiers claimed by the Respondents to have been present in the close vicinity of the alleged executions by Mr Roberts-Smith and Person 4, it would have been all but impossible for Person 5 and/or Mr Roberts-Smith to get away with the fabrication of the reporting. Enough members of the Troop would have seen and/or heard sufficient of the relevant conduct alleged by the Respondents for the patrol commanders at the Troop debrief to immediately reject Person 5's account.

¹⁷⁴ T2144 L10-43 (P42)

¹⁷⁵ T3472 L25-27 (P24).

¹⁷⁶ T3473 L3-5 (P24).

¹⁷⁷ T6169 T21-31 (P81).

¹⁷⁸ T6170 L41-43(P81).

¹⁷⁹ T6170 L41-43(P81).

¹⁸⁰ Closed Court transcript 1 June 2022 p 4, T36-44 (P81) (redacted).

¹⁸¹ T1417 L4-5 (P14).

¹⁸² T1524 L5-10 (P14).

¹⁸³ T3472 L13-16 and T3473 L16-17 (P24).

145. Person 43, who was a patrol commander, claimed that he had understood that PUCs had been executed during that mission. On Person 43's version, he must have done nothing to challenge Person 5's account about the engagement of squirkers at the Troop debrief. Likewise, if the evidence of Person 14 and Person 24 is accepted, Person 6 knew about (at least) the alleged execution by Mr Roberts-Smith and did not challenge Person 5's account at the Troop debrief either.
146. The Respondents' case theory about false reporting presupposes, at the least, the existence of a widespread failure to challenge a false account of how two PUCs came to be executed during the W108 mission or, at worst, a widespread conspiracy by at least four patrol commanders (Person 5, Person 29, Person 43 and Person 6) to conceal the truth concerning the deaths of EKIA 56 and EKIA 57 in the operational reporting.
147. Person 5 and/or Mr Roberts-Smith did not fabricate the contemporaneous reporting that two squirkers were killed to conceal the deaths of EKIA 56 and EKIA 57. The high number of persons who are alleged to have seen the PUCs alive, the likely presence of a high number of persons in the vicinity when the PUCs were allegedly executed shortly thereafter and the Troop's debriefing process, which in effect requires the whole troop to contribute to the consolidated reporting, make it highly unlikely that the contemporaneous reporting about the W108 mission contains fabricated accounts.

M. THE RESPONDENTS' WITNESSES

The assessment of the evidence of the Respondents' witnesses

148. The recollections of Persons 14, 24 and 41, each of whom say they witnessed an execution or executions should not be accepted by the Court. The recollections of Persons 40, 41, 18, 42 and 43 who say they saw local nationals in the vicinity of the tunnel courtyard should also not be accepted by the Court
149. This is a case where the Court would readily adopt the observations of Street CJ in the *Report of the Royal Commission of Inquiry into Certain Committal Proceedings Against K E Humphreys* (July 1983) about the difficulties in ascertaining the truth about a matter after time has done its work. His Honour said (at 9-10):

"In the intervening five or six years, rumours waxed and waned. In some cases suspicion underwent subtle change to belief, which itself progressed to reconstruction, which in turn escalated to recollection. No presently stated recollection could be safely assumed not to have progressed upwards and not to be the product of one of these earlier stages. The sheer frailty of human memory of necessity required a most anxious and critical appraisal of the evidence of the witnesses, no matter how credit-worthy they might be.

It became apparent that in the years since August 1977 the recollections even of those with undoubted first-hand knowledge have in some instances faded, in some instances fermented, and in some instances expanded. Moreover, in many cases the realisation of the significance – indeed, the enormity – of what had occurred has tended to transmute into a more or less cynical acceptance of what had, or was believed or rumoured to have, taken place."

150. A remarkable feature of this aspect of the case is that this alleged unlawful killing by Mr Roberts-Smith or Person 4 was never the subject of any contemporaneous reporting by anyone who is alleged to have observed it. The first time that it is raised is nearly a decade after the event. According to the Respondents' evidence, Person 14, Person 24, and Person 6 observed the alleged unlawful killing by Mr Roberts-Smith. Person 14 did not raise it with anyone prior to speaking to Mr Masters when on

that occasion he gave an inconsistent version to the one provided to this Court. Person 6 who on the Respondents' own case had a degree of animus towards Mr Roberts-Smith, raised complaints about Mr Roberts-Smith on a range of matters but never mentioned this allegation when raising those complaints. Person 24 is a discredited witness (as to which, see the submissions below). Person 24's evidence has clearly been coloured by his discussions with Person 14 over the years.

151. The Respondents' allegations are almost entirely dependent on the asserted recollections of witnesses given years after the event. It is submitted that the inconsistency between the evidence of the Respondents' witnesses and the Applicant's witnesses about what occurred at W108 is explicable by reason of a process of reconstruction of the kind to which Street CJ refers in this passage. Person 27 confirmed the existence of rumours about what happened at W108.¹⁸⁴ It is submitted that the evidence of the Respondents' witnesses has fermented to reconstruction, which in turn has escalated into selective recollection.

Person 41's evidence and reliability

152. The Court should not accept as reliable the evidence of Person 41. He said that during the mission of W108, Mr Roberts-Smith and Person 4 approached him to borrow his suppressor which he handed over to Person 4. Person 41 claimed that he saw Mr Roberts-Smith and Person 4 walk towards an Afghan male who was squatting against a wall. Mr Roberts-Smith then grabbed the Afghan male, picked him up, and marched him a couple of metres before then kicking him and forcing him to the ground in a kneeling position before directing Person 4 to shoot him at which point Person 41 claims that he turned away and then heard the discharge of an M4 rifle. Person 41 could not remember seeing any other person in the tunnel courtyard of this point. He then claimed that Person 4 handed the suppressor back to him. Person 41 recognised EKIA 56 (Ex R6) as the person who was shot by Person 4.¹⁸⁵
153. Person 41 then said he moved out through an exit to the north-western side of the compound. Person 41 said he saw Mr Roberts-Smith holding an Afghan male by the scruff of his clothing with his left arm, throw him to the ground, flip him onto his stomach and shoot him. Mr Roberts-Smith then said "Are we cool? Are we good?" and Person 41 replied, "Yeah no worries". Person 41 identified EKIA 57 as the person shot by Mr Roberts-Smith.
154. Person 41 then said that he had a conversation with Person 40 who asked him "do you know what happened to the two blokes they pulled out of a tunnel" and Person 41 said "No, mate, I was just in that cowshed there."¹⁸⁶ He explained that he did not tell Person 40 what he had seen because he was a new trooper and he wanted to "toe the line".¹⁸⁷
155. The Court should not accept Person 41's evidence for the following reasons:
156. *First*, no one else has corroborated his evidence about Person 4's and Mr Roberts-Smith's involvement in the alleged execution of EKIA 56. On Person 41's evidence, this execution occurs only a matter of minutes after the tunnel has been discovered. Person 41 did not see anyone emerge from the tunnel.¹⁸⁸ He said he left the tunnel to inspect nearby rooms, which he searched for a "minute or two".¹⁸⁹ After hearing a commotion, he then stepped outside and saw Mr Roberts-Smith, Person 4

¹⁸⁴ T5389, L19-23 (P27).

¹⁸⁵ T1238, L28 (P41).

¹⁸⁶ T1242 L20-24 (P41).

¹⁸⁷ T1242 L26-30 (P41).

¹⁸⁸ T1223 L24-28 (P41).

¹⁸⁹ T1236 L1-5 (P41).

and an Afghan male. Person 41 said that he saw Person 5, Person 29 and Person 35 in the tunnel courtyard at the time it was discovered.¹⁹⁰ Only minutes pass before Mr Roberts-Smith and Person 4 arrive. It is highly improbable that there was no one else in the vicinity of the tunnel courtyard when Person 41 claims the execution occurred. None of Person 18, Person 40, Person 42 or Person 43, corroborated Person 41's account of the execution of EKIA 56 yet each of them were in the vicinity at the time of or shortly after the discovery of the tunnel. Remarkably, none of Person 40, Person 42 or Person 43 said that they saw the body of EKIA 56 in the tunnel courtyard – see paragraph 120 above.

157. *Second*, Person 41's account is inconsistent with the contemporaneous mission reporting in two respects. First, none of the reports record more than one fighting aged male being located at W108. Second, the patrol debrief describes, it is submitted, EKIA 56 and EKIA 57 as squirts who were engaged while attempting to squirt during the clearance of W108.
158. Person 41's account of the alleged execution of EKIA 57 contradicts Person 14's and Person 24's description. Person 41 denied that that Mr Roberts-Smith was carrying the Afghan male,¹⁹¹ whereas a central feature of Person 14's and Person 24's accounts is that Mr Roberts-Smith was said to have been carrying the Afghan male with one arm while carrying his minimi in the other. Neither Person 14 nor Person 24 corroborated the alleged conversation between Mr Roberts-Smith and Person 41 following the alleged execution.
159. Person 41's peculiar evidence about the borrowing of a suppressor is not credible. Person 5 said that he enforced within his patrol in 2009 a standard operating procedure that everyone had to carry a suppressor.¹⁹² He said that suppressors were not required to be fitted to a weapon during the day but were required to be used at night.¹⁹³ It was put to Person 5 that Person 4 was carrying his suppressor in his pack and that it would have been easier for him to borrow a suppressor from another operator than to remove it from his pack. Person 5 said it would have been just as fast to ask someone to retrieve it from Person 4's pack.¹⁹⁴ The suggestion that Person 4 would not have had a suppressor readily accessible on his body armour should be rejected.¹⁹⁵ Person 29 said:¹⁹⁶

If the suppressor was not on the weapon, where was it to be carried on the body armour?---It wasn't designated, but the member had to be able to access it himself. So it wouldn't be on the back of your body armour; you would have to be able to put it on yourself.

And why is that?---In the event that we – you know, you needed it – you needed it rapidly, you know, you wouldn't have to get one of your opposite numbers to give you, you know, assistance in getting it off your system.

160. Person 29 further explained:¹⁹⁷

The suppressor was designated to be carried on a position that you could self-retrieve it. So it wasn't specifically designated it had to be in X or Y pouch; it had to be in a position where you could – if you had it on your body armour, that you could actually take it out of the pouch and place it on your weapon without any assistance.

¹⁹⁰ T1223 L43-44 (P41).

¹⁹¹ T1358 L43-44 (P41).

¹⁹² T4842 L6-9 (P5)

¹⁹³ T4997 L26-45 (P5).

¹⁹⁴ T4999 L21-25 (P5).

¹⁹⁵ T5462 L29-30 (P29).

¹⁹⁶ T5462 L34-40 (P29).

¹⁹⁷ T5551 L27-40 (P29).

...

However, they would have – it would have been unacceptable for an operator to have a suppressor – you know, to have it in the middle of their back where they wouldn't be able to reach it. They would have to get someone else to reach it. And as – it wouldn't make sense that a competent operator would do that. Because he's putting himself at a detriment not being able to access that suppressor and place it on his weapon if he were required to do so.

161. Person 35 explained why he had never borrowed a suppressor from another operator:¹⁹⁸

By adding the suppressor onto the end of your barrel, you change – you change the barrel harmonics of that rifle. They're – in layman's terms, that's – that bullet is not going to go where you want it to go once you suppress that gun with a suppressor that's not yours, that has not been zeroed to your rifle. That's not something you change out. It would make as much sense to change out a suppressor as it would to change out a scope mid operation.

162. Person 4 agreed that he was proficient at using weaponry and that he did not experience a stoppage when he needed to shoot. The following exchange occurred in cross-examination:¹⁹⁹

And you knew exactly what type of equipment to carry with you in respect of your weapons; correct?--That's correct.

Yes. Again, that's something that you did without exception during your whole time within the SAS; correct?--Absolutely. I carried all of my mission – mission essential equipment.

163. The Court may infer from the evidenced of Person 4, Person 5, Person 29 and Person 35 above that it was unlikely that Person 4 forgot to bring a suppressor with him during the W108 mission or in the alternative, had brought a suppressor but had it placed on his person that was not readily accessible to him. The Court may infer that another reason why Person 4 would not have borrowed a suppressor is because using someone else's suppressor may affect the firing ability of the rifle.
164. But there is a more practical reason why Person 41's evidence that Person 4 borrowed his suppressor is improbable. Person 41 agreed that had Person 4 used a suppressor to execute an individual in the courtyard, a suppressor would not help to hide the fact that someone had been shot.²⁰⁰ The use of a suppressor would simply distinguish the shots as friendly fire.²⁰¹
165. Another reason why the Court should not accept Person 41's evidence is because he did not explain his failure to report what he says he observed at W108 until 2020, 11 years after the incident.²⁰² The Court may infer that this was at Person 41's second IGADF interview.²⁰³ Person 41's first IGADF interview occurred in late 2019.²⁰⁴ Although Person 41 explained why he lied to Person 40 about not having seen anything during the mission,²⁰⁵ the Court should not accept this is a satisfactory explanation for his failure to report the war crimes he claims to have observed. Person 41 was not afraid to express his concerns to Person 29 about the performance of the patrol's 2IC, Person 40.²⁰⁶

¹⁹⁸ T5165 L40-45 (P35).

¹⁹⁹ T2839 L29-34 (P4).

²⁰⁰ T1307 L44-46 (P41).

²⁰¹ T5165 L22-26 (P35).

²⁰² T1330 L24-L42 (P41).

²⁰³ T1269 L1-2 (P41).

²⁰⁴ T1266 L8-9 (P41).

²⁰⁵ T1242 L26-30 (P41).

²⁰⁶ T1249 L23-31 and T1252 L1-8 and T1294 L37-38 (P41).

Nor was he afraid to criticise the performance of the CO.²⁰⁷ The critical issue is the delay. Whatever the reason for its occurrence, the existence of this delay is a matter that undermines the reliability of Person 41's evidence about the mission to W108.

166. Person 41's identification of EKIA 56 and EKIA 57 from photographs shown to him in his evidence in chief should be given little weight, as that evidence was given in circumstances that strongly suggested the answer that was ultimately given.²⁰⁸ Person 41 identified EKIA 56 and EKIA 57 from photographs shown to him immediately after the witness had just described the events surrounding the alleged executions.²⁰⁹ Being presented with Exhibit R6 and R7 at the relevant junctures during his evidence in chief strongly suggested the answers that were ultimately given by Person 41 about the imagery shown in the photograph.
167. Similarly, Person 41's identification evidence of EKIA 56 as "an older male dressed in traditional Afghan loose top and clothing, either white or a very light colour with short cropped hair"²¹⁰ and of EKIA 57 as wearing a "dark-coloured top"²¹¹ should also be given little weight. It is not credible that Person 41 could recall, to the level of detail that he provided to the Court, the physical attributes of a person who he had seen fleetingly some 13 years previously. It is submitted that Person 41's identification evidence is a reconstructed memory based on imagery that he has seen prior to giving their evidence in these proceedings. Person 41 acknowledged his participation in the IGADF Inquiry and it is submitted that his identification evidence has been compromised by his participation in the Inquiry. The Court should place no weight on Person 41's description of the appearance of EKIA 56 and EKIA 57.

Person 24's credit and reliability

168. Person 24 should not be accepted as a witness of credit. As such, his evidence about what he saw at W108 should be rejected by the Court.
169. See Applicant's Closed Court Submissions at paragraphs A30 to A31.
170. See Applicant's Closed Court Submissions at paragraphs A32.
171. See Applicant's Closed Court Submissions at paragraphs A33.
172. Person 24's evidence that there was a discussion with Person 6 and other members of Person 6's patrol following the W108 mission at a patrol debrief about the bleeding of Person 4 and the execution of the PUC is improbable.²¹² It is inherently unlikely that a patrol commander, who once informed about serious allegations of the kind that Person 24 suggested were discussed at the patrol debrief, would not raise these allegations with the chain of command. Another reason why the Court can have no confidence in the truth of Person 24's evidence about the alleged discussion at the patrol debrief is because the letter that Person 6 prepared in 2013 complaining about Mr Roberts-Smith's conduct in 2012 makes no reference to any possible misconduct by him in 2009 (Ex A-51). Although that letter was directed towards Mr Roberts-Smith's service in Afghanistan in 2012, it is unlikely that someone

²⁰⁷ T1254 L6-14 and T1294, L40-46 (P41).

²⁰⁸ *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72 at [22].

²⁰⁹ T1238 L21-28 and T1242 L1-3 (P41).

²¹⁰ T1266 L12-14 (P41).

²¹¹ T1241 L22 (P41).

²¹² T3472 L13-16 and T3473 L16-17 (P24).

who many witnesses accepted²¹³ had a clear dislike for Mr Roberts-Smith, would not have grasped at the opportunity of maligning his reputation by referring to allegations of war crimes in that letter.

173. Person 24's demeanour is relevant also to his credit. He was argumentative,²¹⁴ prone to making speeches²¹⁵ and provided non-responsive answers.²¹⁶ It is plain that he found the task of cross-examination more difficult than many other witnesses. Those difficulties, it may be accepted, were exacerbated by cross-examination that was robust.
174. Person 24's admission of having lied to the ADF about the true circumstances of an injury he suffered, his continued reliance on that injury to obtain a financial benefit. See Applicant's Closed Court Submissions at paragraph A34.

Person 14's reliability

175. The Respondents accept that Person 14 was dishonest in answering questions about his dealings with journalists but submit that his lack of honesty was confined and did not infect his evidence generally (RS Section IV [186(d)]). The Applicant contends otherwise. The Applicant repeats and relies upon the submissions made in Section VII Chenartu concerning Person 14's reliability as a witness. For the supplemental reasons set out below, Person 14 should not be accepted as a reliable witness.
176. Person 14's evidence about his contact with journalists was deliberately evasive. He attempted to defend his meeting with Mr Masters in January 2018, after attending the book launch of *No Front Line* in 2017, by claiming that Mr Masters told him that he was developing a second edition or second volume to that book.²¹⁷ The following exchange occurred:²¹⁸

Thank you. After that contact in January 2018, did you have another contact with Mr Masters, Person 14?---No.

No further contact?---No.

So since January 2018 to the present date, your evidence is you've had no further contact with Mr Masters?---Correct.

177. Despite this evidence, Person 14 subsequently changed his position and admitted to having a further meeting with Mr Masters in January or February 2018.²¹⁹
178. Person 14's evidence that he could not recall what was discussed in meetings with Mr McKenzie at further meetings that occurred in February and/or March 2018 was not credible (in view of his recollection of the topics he had discussed at the January 2018 meeting with Mr Masters), as was his denial that he provided information against Mr Roberts-Smith to Mr McKenzie.²²⁰ He later accepted that Mr McKenzie attended a meeting where Person 14 was discussing with Mr Masters the events of W108.²²¹

²¹³ T3471 L32 (P24); T3054 L24-25 (P18); T1276 L1 (P41).

²¹⁴ T3572 L1-2 (P24).

²¹⁵ Closed Court transcript 14 April 2022 T30 L17-27 (P24).

²¹⁶ Closed Court transcript 14 April 2022 T33 L10-T34, L4 (P24).

²¹⁷ T1703 L35-40 (P14).

²¹⁸ T1713 L16-22 (P14).

²¹⁹ T1725 L16-29 (P14).

²²⁰ T1729 L43-45 and T 1731 L8-10 (P14).

²²¹ T1790 L27 (P14).

179. Person 14's evidence that he told Mr Masters that it was Mr Roberts-Smith who shot the man with the prosthetic leg²²² was also false. He subsequently admitted that he did not tell Mr Masters that he had observed something at the W108 mission concerning Mr Roberts-Smith.²²³
180. Person 14 admitted lying to the Australian Defence Force about his contact with Mr Masters and Mr McKenzie when confronted with his Record of Conversation that he signed on 30 June 2020.²²⁴ The Record of Conversation was required to be signed by members of the SASR to determine who had disclosed information to the media about an address to the SASR given by SOCAUST. The Record of Conversation noted that:
- You are reminded that it is an offence under the Commonwealth Criminal Code to disclose Defence information obtained in your official capacity where you are not authorised to do so. Unauthorised engagement with the media constitutes a breach of Defence's 'Media and Communication Policy'. Additionally as a member of this unit you have been specifically directed not to engage with the media.*
181. Person 14 noted on the Record of Conversation that his only contact with any journalist or media representative in the past 10 years was with Mr Roberts-Smith in June 2018, who was an executive at Seven Media.²²⁵
182. Person 14 refused to accept the obvious truth that the reason he lied on the Record of Conversation was to conceal the fact that he had been disclosing information to journalists.²²⁶ Person 14 then refused to accept that his reference of a meeting with Mr Roberts-Smith was an attempt to mislead the Department of Defence.²²⁷ Person 14 understood that he was obliged to be honest when signing his Record of Conversation. Indeed s.55(1) of the *Defence Force Discipline Act 1982* (Cth) provides that a Defence member commits an offence if with intent to deceive the person makes or signs a service document that is false in a material particular. The Court should infer that his misstatement on the Record of Conversation was deliberate. The Court can have no confidence in the reliability of Person 14 as a witness given that he knowingly made a false representation in circumstances when Person 14 understood that he was obliged to tell the truth.
183. Further, Person 14 did not disclose that Person 24 had contacted him on the evening of 4 February 2022. Person 24 said that he contacted Person 14 on the evening of his first day of giving evidence and received a report on his cross-examination.²²⁸ There was no reason to doubt Person 24's evidence. On 7 February 2022, when asked whether he had received any phone calls over the weekend, Person 14 disclosed only that he had spoken with his wife and when asked if he had received calls from anybody else, he replied "Not that I can recall."²²⁹ The Applicant submits that Person 14 was not simply a poor historian, but deliberately chose to conceal the fact of his communication with Person 24 over that weekend.
184. There are aspects of Person 14's evidence that are inherently improbable and were not corroborated by anyone else. It is improbable that he could recall, unaided, the camouflage paint worn by members of Person 5's patrol during the W108 mission. His evidence that his entire patrol (including Person 6)

²²² T1790 L16-25 (P14).

²²³ Closed Court transcript 10 February 2022 T20 L26-29 (P14) (redacted).

²²⁴ Closed Court Transcript 9 February 2022 T9 L42-47 (P14). See Ex A59.

²²⁵ Ex A59.

²²⁶ Closed Court Transcript 9 February 2022 T10 L22-23 (P14) (redacted).

²²⁷ Closed Court Transcript 9 February 2022 T12, L20-21 (P14) (redacted).

²²⁸ T3458 L29 (P24).

²²⁹ T1466 L24-26 (P14).

also witnessed the alleged execution,²³⁰ was also improbable. Not only was it uncorroborated by Person 24, who said that the only other operator he could see at the time was Person 14,²³¹ if it were true, then the failure by Person 6 or by other members of the patrol to report the alleged execution with the chain of command is inexplicable. Person 14's evidence that he saw two other soldiers in close proximity to Mr Roberts-Smith at the time of the alleged execution was not corroborated by any other witness.

185. For these reasons, it is submitted the Person 14's evidence about what he saw at W108 should be rejected by the Court.

N. OVERALL CONCLUSION

186. Who was present when the tunnel was found, the timing of when the tunnel was found, how the tunnel was found (that is, whether it was found with the aid of local women or not), whether two or more local nationals emerged from the tunnel shortly after it was discovered and whether those two local nationals were subsequently PUC'd and executed is the subject of sharply conflicting evidence.
187. The contemporaneous reporting confirms that two insurgents were killed during the clearance attempting to squirt. The Respondents' answer to this obstacle is to submit that reporting is false.
188. The Respondents' case theory is that Person 5 wished to "blood the rookie" during that mission and that desire was the motive for the execution of an unarmed PUC, who was likely a Taliban fighter, in contravention of the laws of armed conflict that governed when it was permissible to use lethal force against the enemy.
189. The Respondents have not propounded a motive for Mr Roberts-Smith's killing. It could not be that Person 5 ordered Mr Roberts-Smith to direct Person 4 to execute a PUC, as that allegation has not been established on the evidence. None of the Respondents' witnesses suggested that Mr Roberts-Smith wished to "blood" Person 4 on that mission. One then may only speculate about Mr Roberts-Smith's supposed motives for allegedly directing Person 4 to execute a PUC and for himself allegedly executing a PUC. The absence of any established motive for these murders is a factor that points to the unlikelihood that any such murders occurred.
190. The Respondents ask the Court to find that the two men who became EKIA 56 and EKIA 57 came out of the tunnel and were placed under confinement by unidentified Australian soldiers. They seek further findings that EKIA 56 was executed by Person 4 in the tunnel courtyard, at the direction of Mr Roberts-Smith (but not at the direction of Person 5) and that EKIA 57 was executed by Mr Roberts-Smith outside the northwest corner of the compound.
191. Person 4, who was responsible for the engagement of EKIA 56 and who it would be reasonably expected could give the best evidence about the circumstances of that engagement and where it occurred, objected to answering questions about the mission pursuant to section 128 of the *Evidence Act*. The Applicant accepts that no *Jones v Dunkel* inference may be drawn by the Court in respect of Person 4's failure to give evidence, on the basis that the Court may be satisfied that there is a satisfactory explanation for that failure. Person 4's election not to give evidence about the W108 mission has left a gap in the evidence, which must ultimately fall upon the Respondents who bear the onus of proving their allegations.

²³⁰ T1417 L4-5 and T1523 L5-46 (P14).

²³¹ T3451 L4-5 (P24).

192. In any murder case, a motive for the conduct of a person is raised for consideration by the Court. In this case, there is simply no motive that has been advanced as to why Mr Roberts-Smith would have unlawfully killed an insurgent at W108. There were other fighting aged males at W108 who were not unlawfully killed by Mr Roberts-Smith. There was no one at W109 who was unlawfully killed by Mr Roberts-Smith. In fact, there was a subsequent mission after W108, before the troop returned to base in which a number of insurgents were taken into custody with no suggestion of any unlawful killings. The Respondents have put forward no rational or cogent motive as to why EKIA 56 or EKIA 57 were selected to be unlawfully killed on 12 April 2009. The Court is being asked to assume that a member of the Australian Defence Force with an exemplary service record with no history of conducting himself contrary to the ROE, would on 12 April 2009 decide for no reason to engage in an act of murder.
193. For the reasons set out in this section, the Applicant submits that the Respondents have not established their allegations on the balance of probabilities and that the Court should instead find, consistently with some of the contemporaneous reporting:
- (a) EKIA 56 and EKIA 57 were not found hiding in the tunnel at W108 and then rendered *hors de combat*; and
 - (b) EKIA 56 and EKIA 57 were engaged lawfully, in each case outside the northwest corner of the compound.
194. The last word on the W108 mission was had by Person 81 in re-examination.²³²

On 12 April 2009, did you observe any conduct by Person 4, Person 5 or Mr Roberts-Smith that caused you to have a suspicion that they had PUC'd and murdered anybody?---No, I didn't.

²³² T6182 L26-29.

SECTION V: 2012 PRE-DEPLOYMENT TRAINING

A. ALLEGED MOCK EXECUTION

1. There are five imputations relied upon in relation to the 2012 pre-deployment training (Imputations 1, 2, 3, 11 and 14), although the Respondents accept that the conduct alleged is not directly relevant to the proof of any imputation but rather should be relied upon as establishing that Mr Roberts-Smith had a tendency to act in a particular way, which in turn bears upon the probability that the alleged murders committed by Mr Roberts-Smith in 2012 did in fact occur (RS Section V [4], [5]).
2. It is submitted that the evidence of Mr Roberts-Smith's alleged conduct during the 2012 pre-deployment training is not admissible to prove that he had a tendency to act in a particular way because the notice requirements of s 99 of the *Evidence Act 1995* (Cth) have not been complied with (and no application to dispense with those requirements has been made) and because the evidence, taken at its highest, does not have significant probative value. That is, even if Mr Roberts-Smith did say what it is alleged he said at the Lancelin training exercise, which is a single instance of conduct during one of many training exercises, that conduct does not have significant probative value as to whether the alleged murders committed by Mr Roberts-Smith in 2012 did in fact occur.
3. Further, the Respondents have not identified with specificity the particular tendency use of the alleged conduct. It is unclear, for example, whether the alleged tendency is that Mr Roberts-Smith encouraged his patrol members in 2012 to kill any PUCs that they encountered or just those PUCs who were deemed to be members of the Taliban.
4. For those reasons, the Court should prohibit any tendency use of the admitted evidence. Notwithstanding the limited use to which the admitted evidence it is submitted may be put, the Applicant addresses each of the particular allegations below.
5. It is alleged, based on the evidence of Person 19, that Mr Roberts-Smith trained his patrol members in 2012 to summarily execute individuals suspected of being enemy combatants (RS Section V [3], [8] and [9]).
6. Person 19's recollection of what he claims Mr Roberts-Smith said during a training exercise at Bindoon in May or June 2012 were not corroborated by Person 31²³³ or Person 56, who were called by the Respondents and who Person 19 recalled were present at the time.²³⁴ The Court should draw an adverse inference from the Respondents' failure to adduce that particular evidence from Person 56, who was not asked about the topic. Accordingly, Person 19's recollection should not be accepted as reliable, for the reasons expressed by McClelland CJ in Eq in *Watson v Foxman* (1995) 49 NSLR 315 at 319. Mr Roberts-Smith denied the alleged conversation.²³⁵ As did Person 35²³⁶ and Person 11.²³⁷
7. Person 19 could not recall whether Mr Roberts-Smith or Person 35 discussed the use of "throw downs" during the training exercise.²³⁸ His evidence on this topic emerged as follows:²³⁹

Do you remember him saying anything else about the SSE process?---I remember it's – my recollection is – is not great of this part, but number – Person 35 and Mr Roberts-Smith

²³³ T4638 L11-17 (P31).

²³⁴ T2319 L16-20 (P19).

²³⁵ T827 L34-45 (BRS).

²³⁶ T5323 L34-45 (P35).

²³⁷ T5694 L4-7 (P11).

²³⁸ T2320 L9-17 and T2363 L45-T2364 L2 (P19).

²³⁹ T2320 L9-13 (P19).

discussed if – if the requirement arose that you could put down a throw-down weapon on a body and photograph them and it could be submitted as evidence that they were killed in the conduct of the assault.

8. The Court can have no confidence in the reliability of Person 19’s recollection given his candid admission that his recollection was “not great” in relation to this aspect of the discussion. In any case, taking his evidence at its highest, it does not establish the allegation propounded in paragraph [66A] of the PoT as he was unable to say with any certainty that Mr Roberts-Smith said the alleged words.
9. Similarly, the Court should not accept as reliable Person 19’s evidence that Mr Roberts-Smith said to Person 19 and Person 4 at a café in 2012 that Person 10 needed to be blooded. Person 4 could not recall any having a conversation with Mr Roberts-Smith and Person 19 at a café in 2012 but admitted it may have been possible.²⁴⁰ In any case, Person 4 did not corroborate Person 19’s evidence. Mr Roberts-Smith denied the alleged conversation.²⁴¹
10. In relation to the allegation that Mr Roberts-Smith said to Person 10 during a training exercise at Lancelin words to the effect of “shoot him” (directed at Person 9) and “that’s how it’s going to be on the day”, the Court should accept Mr Roberts-Smith’s denial that those words were said.²⁴² It is inherently improbable that a patrol commander, in the presence of other patrol commanders (Person 7 and Person 31), would instruct junior members of his patrol to simulate conduct that would constitute a breach of the ROE. It is also unlikely that Person 7 and Person 31 would not have immediately remonstrated with Mr Roberts-Smith in front of the patrol members present. Mr Roberts-Smith, at the time, held a more junior rank than Person 7 and Person 31. Although the accounts provided to the Court by Person 10, Person 7 and Person 19 substantially corroborate one another, Person 19 did not suggest that Mr Roberts-Smith used words to the effect of “that’s how its going to be on the day”.²⁴³ Person 11 confirmed that he did not observe Mr Roberts-Smith encourage his patrol members to simulate the execution of PUCs²⁴⁴ and said that he was never directed by Mr Roberts-Smith to execute a PUC.²⁴⁵
11. Person 9 was to be called by the Applicant in relation to this allegation. He was to give evidence via AVL from the United Kingdom. At T5909 L40-42 the Court refused the Applicant’s application to call Person 9 via AVL from the UK. In these circumstances, no *Jones v Dunkel* inference is available in relation to his failure to give evidence about the Lancelin training exercise.
12. No weight should attach to Person 4’s evidence about his discussion with Person 9 about what occurred at during the Lancelin training exercise because Person 9, ultimately, was not called to give evidence in these proceedings, and thus Person 4’s evidence about what Person 9 told him was not able to be tested. It is submitted that s.64(3) of the *Evidence Act 1995* (Cth) is not applicable to Person 4’s evidence, as Person 9 was ultimately not called (and could not be the subject of a subpoena), and that either s.64(2) or s.63(2) are the only available gateways to avoid the application of s.59. It is unnecessary to determine which of s.64(2) or s.63(2) is applicable, as in either case, those provisions require notice to be given under s.67, which notice was not provided. As such, the Court should refuse to admit Person 4’s evidence of his discussion with Person 9.²⁴⁶

²⁴⁰ T2642 L35-T2643 L19 (P4).

²⁴¹ T825 L31-33 (BRS).

²⁴² T826 L16-29 (BRS).

²⁴³ T2318 L34-47 (P19).

²⁴⁴ T5694 L10-11 (P11).

²⁴⁵ T5706 L2 (P11).

²⁴⁶ T2636 L10-17 (P4).

SECTION VI: DARWAN – 11 SEPTEMBER 2012

A. INTRODUCTION

1. The allegation of an assault and the execution of an unarmed PUC (Ali Jan) during a raid on the village of Darwan on 11 September 2012 appears at particulars [102] to [117] of the PoT. The allegation depends upon, primarily, the evidence of Person 4, Person 56 and the three Afghan witnesses.
2. The particulars of the allegation refer to a mission in which Mr Roberts-Smith and other soldiers were alleged to be involved. In summary, it is alleged that they were clearing compounds in a village and in one compound located and detained three fighting-aged males one of whom was Ali Jan. The particulars state that the detention of these males rendered each of them *hors de combat* ([102A] PoT).
3. It is alleged the males were interrogated. Towards the end of the interrogation, it is further alleged Mr Roberts-Smith moved Ali Jan, who was handcuffed, outside the compound. It is then said that Ali Jan was placed at the edge of a rocky cliff and forced to kneel. It is alleged Mr Roberts-Smith then kicked Ali Jan in the abdomen causing him to fall back over the cliff ([107] PoT). The particulars state (at [107A] PoT) that it may be inferred that Mr Roberts-Smith, in doing this, intended to kill Ali Jan and/or to act with reckless indifference to Ali Jan's life.
4. After he had allegedly fallen the full height of the cliff, it is asserted that Ali Jan was moved by two soldiers and then shot multiple times either by Mr Roberts-Smith or Person 11, who was under Mr Roberts-Smith's command, or by both of them ([107B] PoT). It is alleged Ali Jan died as a result of the cliff fall or the gunshot wounds or both ([107C] PoT).
5. The particulars state that Mr Roberts-Smith and Person 11 both knew that Ali Jan was *hors de combat* when he was kicked off the cliff. The shooting of Ali Jan was the result of an agreement between the Applicant and Person 11 to make sure he was dead ([108] PoT). The particulars make clear that it was carried out pursuant to a joint criminal enterprise and in furtherance of Mr Roberts-Smith's intent when he kicked Ali Jan off the cliff, either to kill or to act with reckless indifference to his life ([108A]-[108B] PoT).
6. It is alleged that Mr Roberts-Smith and others then covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a "spotter". This conduct is said to demonstrate that Mr Roberts-Smith was conscious that the killing of Ali Jan was unlawful ([110B] PoT).
7. Mr Roberts-Smith's alleged conduct towards Ali Jan is said to constitute violence, cruel treatment and murder. It is contended in the alternative that by his conduct with respect to Ali Jan, Mr Roberts-Smith was complicit in and responsible for murder ([113]-[117] PoT).
8. It is now said by the Respondents in their submissions that Person 11 shot Ali Jan.²⁴⁷ There is no evidence of an alleged agreement between Mr Roberts-Smith and Person 11 that Person 11 shoot Ali Jan.
9. The ultimate issue is whether Person 11 murdered a PUC named Ali Jan as part of an agreement with Mr Roberts-Smith, or whether they engaged a spotter legitimately on their way to the extraction HLZ. For the reasons set out in this section, the Respondents have failed to establish the allegation on the balance of probabilities. The Court should find that:

²⁴⁷ RS Section VI [1].

- (a) there were no fighting aged males in the last compound;
- (b) neither the interpreter, Person 56 nor Person 47 were present at the last compound; and
- (c) the individual who was engaged by Person 11 and Mr Roberts-Smith was a spotter.

B. THE EVIDENCE OF MR ROBERTS-SMITH

10. Mr Roberts-Smith gave evidence about the key factual issues as follows. After swimming across the Helmand river in pursuit of an armed insurgent who he thought could be Hekmatullah,²⁴⁸ and engaging him, Mr Roberts-Smith used his foot to roll the body of the dead insurgent down an embankment to its base, closest to the river and held the body up so that Person 4 could take a photograph of the insurgent's face for identification purposes.²⁴⁹ Mr Roberts-Smith said that he recovered from the insurgent an AK variant rifle with a bullet hole in it, chest webbing with magazines and a small box of detonators. After swimming back across the river, he handed the equipment over to Person 11.²⁵⁰ Mr Roberts-Smith's patrol then met up with the Troop Bravo (Person 26) at which time he gave the equipment, wrapped in a shawl, and the rifle to Person 26.²⁵¹
11. Mr Roberts-Smith's patrol, including Person 4, Person 11, Person 56 and Person 47 commenced clearing compounds along with other patrols. An interpreter was with his patrol as well. His patrol located fighting age males who were PUC'd. Before moving into the last group of compounds at the southern end of the village, Person 47 left Mr Roberts-Smith's patrol to perform other tasks, as he was a troop asset.²⁵² Shortly thereafter, Person 26 contacted Mr Roberts-Smith and requested that the interpreter be sent back to the PUC holding area. Mr Roberts-Smith asked Person 56 to escort the interpreter to Person 26 as the interpreter was unarmed and not permitted to be left unaccompanied during a mission.²⁵³ Mr Roberts-Smith was not happy that his patrol had been reduced to three men for the purpose of conducting the remainder of the clearance.²⁵⁴
12. Mr Roberts-Smith, Person 4 and Person 11, along with another patrol, moved into the last group of compounds at the southern end of the village to clear them.²⁵⁵ During that clearance, the other patrol ceased clearing compounds due to a lack of activity and left the southern end of the village, leaving Mr Roberts-Smith's patrol to finish clearing the remainder of the southern compounds.²⁵⁶
13. Mr Roberts-Smith, Person 4 and Person 11 cleared the remaining compounds in the southern part of the village and then waited for an extraction call. There was no one in the last compound of the village. Mr Roberts-Smith said that his team sat at the last compound "for a while" and that it "would have been at least 10 minutes or more" before they got the call to extract.²⁵⁷ Even if Mr Roberts-Smith's recollection about the duration of the period in which his patrol waited for the extraction call at the last compound is incorrect, there is no basis for the Respondents' contention that this was an attempt by Mr Roberts-Smith to give knowingly false evidence.
14. After the call for extraction was made, Mr Roberts-Smith moved his patrol from the last compound down into the creek bed. Person 11 commenced engaging an individual who was in a cornfield on an

²⁴⁸ T235 L2 (BRS).

²⁴⁹ T236 L20-27 (BRS).

²⁵⁰ T236 L33-34 (BRS).

²⁵¹ T236 L40-42 (BRS).

²⁵² T236 L18-21 (BRS).

²⁵³ T239 L10-16 (BRS).

²⁵⁴ T239 L21 (BRS).

²⁵⁵ T243 L1-3 (BRS).

²⁵⁶ T243 L13-16 (BRS).

²⁵⁷ T243, L30-32 (BRS).

embankment within the creek bed. As Mr Roberts-Smith moved up the embankment, he commenced firing at the individual as well. Person 11 and Mr Roberts-Smith had identified the individual as a spotter, as he was carrying an ICOM radio, a communication device used by members of the Taliban. Spotters are lawful targets under the ROE. Mr Roberts-Smith explained:²⁵⁸

And also, because of the tactics and the TTPs of the enemy of that time, we knew that people, particularly at extractions, hiding in corn or moving around in cornfields or thick areas of vegetation on our extraction are likely to be a threat. And I say that because in 2012, they had stopped trying to hit us on insertion and they had very much focused on trying to hit us as we were leaving. And whilst people may argue that point, the reality is that's exactly why our troop commander was shot and wounded, because we were trying to extract and he got shot through the leg. Prior to that, we had been hit at least four or five times as we tried to leave from different operations during our tour. Also, your Honour, it's – funnily enough, the corn is – the local nationals – it's not a pattern of life, a normal pattern of life for local nationals to sit in the corn. Even if they're scared, what they will typically do is they come out and they get on their haunches and sit on the edge of cornfields or somewhere where it's open, so they – sort of indicating to us that they're not a – they're not a Taliban or they're not part of the enemy force. They certainly don't run, because, you know, they know what – what the potential is if that happens. And Darwan had been hit at least three times before we had got there. Multiple SAS assaults had taken place in 20 that village over the course of those years.

15. Mr Roberts-Smith further explained:²⁵⁹

Well, from my perspective, Person 11 had already deemed it necessary to engage, so in that position, I support or supported his engagement, because he was already firing, which meant that he had deemed that the ROE – or he was able to engage under the ROE. So from my perspective, I've been there enough to understand what he was thinking in terms of why he would have opened fire, because you don't have an individual hiding in a cornfield and – like, as I said, I didn't see him moving; he was already going down when I engaged him, but the fact of the matter was it was more in relation to supporting Person 11 because he believed him to be a spotter, which, given the atmospherics, there's a few things we have to consider, your Honour. One is we were receiving ICOM traffic that day. There's real-time reports that identify that people on ICOM were talking about our dispositions, so that was another part of the environment that we knew. There had been spotters in that area previously on previous missions; intelligence had told us that, that we would be spotted coming in, and that's in the reports which we get briefed on before we go in, so in our intelligence briefing. He was behaving in a manner that is consistent with current enemy tactics, techniques and procedures by being in the corn. As I said, a civilian pattern of life is not like that. So all of those things coupled with the fact that we had already had engagements that day, and particularly my team, noting that we had engaged an insurgent on the other side of the river that was armed, and, from what I had seen, was carrying detonators, it made absolutely perfect sense that this guy was a spotter.

16. Following the engagement, sensitive site exploitation (SSE) was conducted, the GPS location was recorded and marked on an SSE bag and photographs of the deceased were taken. Mr Roberts-Smith made a radio transmission to the Troop Alpha to notify him of the engagement which occurred

²⁵⁸ T244 L5-21 (BRS).

²⁵⁹ T246 L14-35 (BRS).

approximately three minutes prior to extraction.²⁶⁰ The SSE bag and the ICOM were taken back to Tarin Kowt.²⁶¹

17. See the Applicant's Closed Court Submission at paragraph B1.

C. THE EVIDENCE OF PERSON 11

18. After Mr Roberts-Smith had engaged an individual who was hiding among some rocks across the Helmand river, Person 11 saw Mr Roberts-Smith drag that person's body out of the rocks and move it to a position closer to the river's edge so that the person's face could be photographed. Person 11 said:²⁶²

He was holding it from the back. It was orientated – or he was initially just oblique to us as he was trying to get it out of the – this area of rocks. It appeared that he struggled with it a bit. It slipped from his hands at times. Eventually, then, it appeared that there was a depression, from my – my perspective anyway, that he needed to get – he was attempting to get it out of this depression or over a, you know, a rise in the rocks, you know, which was then for to be able to – to show us in order for to try and gain some identification. ...

Once he had – whether he – he did – he held the body up for identification purposes. Now, whether – I can't exactly recall whether it was before or after this, he had also held up the assault rifle that we had observed. I couldn't observe him holding anything else, but remember him holding up the weapon and, whether it was 30 before or after that, he held up the body and – and once he was satisfied with that, then he dropped the body where it lay.

19. Person 11 observed that Mr Roberts-Smith had recovered from the individual who was killed across the river a rifle that had been impacted by a round and half a dozen electric detonators which appeared to be military grade. Person 11 said it was "odd and very uncommon" to see detonators as they were hard to come by for insurgents.²⁶³ Person 11 could not recall what happened with the equipment but said that the standard operating procedure for the troop was that the Troop Bravo was responsible for coordinating a centralised area for anyone under detention and any equipment to be collected.²⁶⁴ Person 11 did not recall seeing anyone with that equipment as they extracted on the helicopter.²⁶⁵
20. An interpreter joined Mr Roberts-Smith's patrol for part of the clearance to assist with fighting aged males, women and children that the patrol encountered.²⁶⁶ The interpreter did not remain with the patrol for the entire duration of the clearance. He was required in a different location²⁶⁷ and Person 56 was tasked with escorting the interpreter.²⁶⁸ This occurred during the clearance of the last group of compounds towards the southern end of the village.²⁶⁹ Person 11 could not recall where the interpreter was required to go.²⁷⁰ After that time, only Mr Roberts-Smith, Person 4 and Person 11 remained in the patrol.²⁷¹ There were no fighting aged males in the group of compounds that were cleared after the

²⁶⁰ T244 L22-29 (BRS).

²⁶¹ T245 L24-25 (BRS).

²⁶² T5666 L17-33 (P11).

²⁶³ T5667 L33-40 (P11).

²⁶⁴ T5671 L22-24 (P11).

²⁶⁵ T5682 L33-39 (P11).

²⁶⁶ T5670 L35-45 (P11), T5671 L1-9 (P11).

²⁶⁷ T5672 L37 (P11).

²⁶⁸ T5673 L6 (P11).

²⁶⁹ T5673 L19-25 (P11).

²⁷⁰ T5673 L12-13 (P11).

²⁷¹ T5674 L1-2 (P11).

interpreter and Person 56 left the patrol.²⁷² The patrol waited in the vicinity of the southern end of the compounds in the village for the extraction call.²⁷³ Once it was received, Person 11, as the scout, led the patrol into the creek bed towards the vegetated area for the purpose of clearing any potential threats in close proximity to the HLZ.²⁷⁴ Person 11 identified an individual in the cornfield who he assessed was a spotter because of his disposition and the fact he was carrying a radio.²⁷⁵ Person 11 engaged the individual and heard supporting fire from his rear who he later understood was Mr Roberts-Smith.²⁷⁶

21. Person 11 explained:²⁷⁷

Shortly after coming out of the dry creek bed, I identified an individual in amongst the corn and the rest of the fields. This individual was moving – my assessment, this person was moving in a very suspicious manner. Under observation, I made the assessment and saw this person was carrying a radio which led me to make the assessment that this was a spotter that was come to – as previously discussed, to try and report on our dispositions and movements.

22. A “hasty SSE” was then conducted.²⁷⁸ That involved a quick search of the body.²⁷⁹ Person 4 took SSE photographs.²⁸⁰ Person 11 wrote the GPS coordinates on an SSE bag.²⁸¹ An ICOM radio was placed in the bag and taken off target. The patrol moved to the HLZ where they met Person 56 and then extracted.²⁸²

D. OVERVIEW OF DOCUMENTARY EVIDENCE

23. The OPSUM (operational summary)²⁸³ records that it was prepared at 1445DE on 11 September 2012. It records four EKIA and six persons detained. The OPSUM mission chronology includes the following critical events:

- (a) Turn 1 departed Tarin Kowt at 0532DE and arrived at 0547DE.
- (b) At 610DE, 23 minutes after the arrival of the first turn, there was an engagement in a compound resulting in two EKIA.
- (c) Turn 2 departed Tarin Kowt at 0608DE and arrived at 0623DE. Clearance is recorded as commencing at this time.
- (d) At 805DE the OPSUM records the Applicant’s engagement with the insurgent across the river. It states that he was armed with an assault rifle and was “*taking a direct part in hostile action by manoeuvring into a firing position from which to engage the clearance force. The FE engaged the INS utilizing resulting in 1 x Chicom Assault Rifle, 1 x Icom and 1 x PCD*”.

²⁷² T5674 L13-14 (P11).

²⁷³ T5674 L30-36 (P11).

²⁷⁴ T5676 L20-22 (P11).

²⁷⁵ T5676 L26-31 (P11).

²⁷⁶ T5677 L7-10 (P11).

²⁷⁷ T5676 L26-31 (P11).

²⁷⁸ T5678 L7 (P11).

²⁷⁹ T5678 L15-36 (P11).

²⁸⁰ T5678 L44 (P11).

²⁸¹ T5678 L31 (P11).

²⁸² T5682 L13 (P11).

²⁸³ Ex R11.

- (e) At 0806DE the OPSUM records the identification and destruction of a motorcycle being used by the insurgents.
 - (f) At 0907DE the OPSUM records that clearance is continuing to move through the western and eastern compound series, as well as the location and destruction of a dried poppy cache.
 - (g) At 0930DE the OPSUM records that clearance was nearing completion.
 - (h) At 0945DE clearance KLE and SSE are described as complete. Extraction is requested.
 - (i) At 1045DE the FE moved to their extraction locations and “*adopted PZ posture*”. 6 x POI are detained based on behaviour, association with the COI and prevailing circumstances at the time of capture.
 - (j) Turn 1 departs at 1052DE and arrives at Tarin Kowt at 1106DE
 - (k) At 1110DE the last EKIA for the mission is recorded. The OPSUM states that whilst awaiting RW extraction, an FE member observed an individual moving through a thickly vegetated cornfield and using an ICOM radio. The individual is assessed as taking part in hostile activity by reporting on FE movements. It was also assessed that it was probable that the individual was manoeuvring between tactical weapons caches. The OPSUM then records “*the FE called to the individual to stop and pursued him into the cornfield. The manner in which he manoeuvred (deliberate rapid movement followed by ignoring clear and repeated warnings from the FE) was consistent with the application of this INS TTP. The FE assessed that they would not be able to apprehend he individual before he reached a potential weapons cache. A MWD as not immediately available in order to effect detention. The FE engaged the individual resulting in 1 x EKIA. BDA of the EKIA recovered 1 x ICOM.*”
 - (l) Turn 2 departs at 1121DE and arrives at Tarin Kowt at 1137DE.
 - (m) The six persons of interest are handed over to the ISA at 1153DE.
24. Page 5 of the OPSUM states that “*a significant amount of accurate ICOM activity indicated a detailed understanding and awareness of CF RW patterns.*” It is further observed that a historical fighting position located on high ground indicates insurgent activity.
25. The OP Summary section of the OPSUM records four EKIA but does not specifically refer to the engagement in the cornfield. The Commander’s comments record that the clearance was successful in confirming the presence of insurgents in the area.
26. The same time chat appears at Ex. R10/Ex A10 Tab 40. Relevantly it records:
- (a) Turn 1 departed Tarin Kowt at 0532DE and arrived at 0547DE and Turn 2 departed Tarin Kowt at 0608DE and arrived at 0623DE. Clearance is recorded as commencing at this time (consistent with the OPSUM)
 - (b) At 0653DE “*FE update reports 3 x EKIA, chest rig and wpns recovered. NFI Att*”.
 - (c) At 0744DE and 0907DE updates from GFC advising that clearance has progressed to certain identified compounds

- (d) At 0930DE “GFC update advises clearance nearing LOE’s and planning extraction details. WNGO – Fe is tracking 4 x POI likely to come off tgt Att”
- (e) At 0949DE there is reference to an extraction plan with four prisoners to depart on Turn 2. At 1008DE a mechanical issue is recorded and a probable delay in departure from Tarin Kowt is noted.
- (f) At 1038DE by way of update it is recorded that one POI will depart on Turn 1 and the other three on Turn 2.
- (g) Turn 1 departs Darwan at 1052DE and arrives at Tarin Kowt at 1106DE.
- (h) At 1106DE it is noted there will be an additional prisoner on Turn 2.
- (i) At 1109DE an additional EKIA is recorded.
- (j) Turn 2 departs Darwan at 1121DE and arrives at Tarin Kowt at 1137DE.
- (k) At 1153DE the six prisoners are handed over to ISA.
- (l) At 1437DE a “*post debrief consolidation*” is recorded as having occurred. The same time chat records the engagements in the compound resulting in the two EKIA, the engagement across the river resulting in one EKIA and the engagement in the cornfield. The language is largely reproduced in the OPSUM although the cornfield engagement records the following sentence immediately prior to the language recorded in the OPSUM “*A significant amount of ICOM traffic indicated that INS were attempting to co-ordinate an attack against the FE.*”
- (m) At 1444DE it is recorded that the OPSUM for today’s msn was sent. It is plain that the OPSUM was based on the post debrief consolidation at 1437DE.

27. See Applicant’s Closed Court Submissions at paragraphs B2 to B9.

28. Ex. R1 is a map showing the locations of the prisoners and EKIA from the Darwan mission. EKIA 4 is shown closes to compound 45.

29. Ex. R3 is a map indicating the helicopter landing zones at Darwan.

30. As to the contemporaneous photographic evidence:

- (a) Ex. R21 is a photograph of the PUC train taken on Person 1’s camera at 9.06 am.
- (b) See Applicant’s Closed Court Submissions at paragraph B10.
- (c) Ex R2 is the well referenced photograph of Darwan taken from the overwatch position. Metadata suggests it was taken at 12.26pm on 11 September 2012. This cannot be precisely correct as the photograph depicts at least one soldier standing outside the next to last set of structures on the left-hand side. As discussed above, Turn 2 had departed at 1120DE so the metadata for this photograph cannot establish the time at which it was actually taken.
- (d) Ex R13 contains a series of photographs of a body. There is no dispute that the photographs depict the person killed in the cornfield. According to the Respondents the photographs depict

Ali Jan. He is shown in the photographs next to an ICOM radio adjacent an evidence bag. There appear to be wounds to his face and chest and arms.

E. PERSON 4'S EVIDENCE AND HIS RELIABILITY AS A WITNESS

31. Person 4's recollection of how the mission concluded was inconsistent with the evidence of Mr Roberts-Smith and Person 11. Person 4 said that the members of Mr Roberts-Smith patrol who were involved in clearing the last group of compounds in the village comprised Mr Roberts-Smith, Person 4, Person 11, Person 56 and Person 47.²⁸⁴ There was no interpreter with the patrol at that time.²⁸⁵ The patrol then deconflicted with Person 57's patrol and continued on with the assault towards the southern end of the village.²⁸⁶ According to Person 4, an individual was found in the second last compound of the village.²⁸⁷ He described this person as "stout, relatively short, relatively heavy, standard dark beard."²⁸⁸ The last compound was empty but then an individual with a donkey approached the compound and was PUC'd.²⁸⁹ Person 47 and Person 56 were still with the patrol.²⁹⁰ Although no other local national was present at the last compound when the Afghan with a donkey arrived, Person 4 claimed that a second individual was later present at that end compound.²⁹¹ He could not recall at what point in time that second individual appeared.²⁹² According to Person 4, Mr Roberts-Smith directed Person 56 to move back towards the THQ elements and bring back an interpreter to the last compound. Person 47 left with Person 56 and the interpreter.²⁹³ When Person 56 returned with the interpreter, tactical questioning was conducted.²⁹⁴ Person 4 said he thought two local nationals were present during the tactical questioning but that the "initial individual" (being the Afghan with a donkey) was deemed "as not a primary concern."²⁹⁵ After the tactical questioning was completed, Person 4 said that a call for extraction was received.²⁹⁶ Mr Roberts-Smith directed Person 56 to take the interpreter back towards the THQ element.²⁹⁷ Person 4 claimed he then followed Person 56 and the interpreter move from the last compound to the other call signs so as to provide them with cover.²⁹⁸ He then claimed that he returned to the last compound where he saw Person 11 holding the Afghan who had arrived with a donkey next to a large slope. Mr Roberts-Smith then turned around, walked forward and kicked the individual in the chest.²⁹⁹ The individual, who was handcuffed, was catapulted down the slope. His face struck a rock and the impact knocked out his teeth.³⁰⁰
32. Person 4 then followed Mr Roberts-Smith and Person 11 down a track into the creek bed.³⁰¹ The individual was quite dusty and had suffered a serious facial injury.³⁰² He attempted to sit up and fell back down again.³⁰³ Mr Roberts-Smith then directed Person 4 and Person 11 to drag the individual to a large tree across the creek bed. Person 4 could not recall whether there was an embankment or slope on the other side of the creek bed but denied that there was an embankment in the order of one to two

²⁸⁴ T2619 L5 (P4).

²⁸⁵ T2619 L11-12 (P4).

²⁸⁶ T2619 L18-19 and T2620 L13 (P4).

²⁸⁷ T2621 L5 (P4).

²⁸⁸ T2621 L12-13 (P4).

²⁸⁹ T2621 L39 (P4).

²⁹⁰ T2621 L34 and T2622 L34-35 (P4).

²⁹¹ T2622 L14 and L25 (P4).

²⁹² T2622 L28-29 (P4).

²⁹³ T2623 L20-27 (P4).

²⁹⁴ T2622 L34-45 (P4).

²⁹⁵ T2623 L9-10 (P4). Cf RS Section VI [84].

²⁹⁶ T2623 L36 (P4).

²⁹⁷ T2624 L47 (P4).

²⁹⁸ T2625 L5-7 (P4).

²⁹⁹ T2625 L35-37 (P4).

³⁰⁰ T2626 L1-2 (P4).

³⁰¹ T2626 L13-15 (P4).

³⁰² T2626 L40 (P4).

³⁰³ T2626 L43 (P4).

metres high.³⁰⁴ Mr Roberts-Smith and Person 11 then had a discussion while Person 4 moved off to try and identify where Person 56 and the other call signs were at the HLZ.³⁰⁵ He heard shots from an M4 rifle, turned around and saw Person 11 holding his rifle to his shoulder.³⁰⁶

33. Mr Roberts-Smith then said “*We need to take photos*” and Person 4 handed his camera to Person 11 to take photos.³⁰⁷ Person 4 observed an ICOM radio positioned next to the body. He was not aware of how it came to be placed next to his body and did not observe the person with an ICOM prior to that time.³⁰⁸ He described the ICOM as “*slightly wet. The screen had – had water penetrated in it. So it was fogged up. ... I guess it dawned on me that I – I did know where – where it came from. ... From the individual across the river.*”³⁰⁹
34. Person 4 said he thinks the handcuffs were removed during the SSE process but can’t recall seeing them removed.³¹⁰ After the SSE was conducted, the patrol moved to the extraction point.
35. Person 4 said that back in the ready room at Tarin Kowt, Person 11 “*sort of went into a description [of what had occurred during the mission]*” but could not recall the words that were said.³¹¹ Mr Roberts-Smith returned from the troop debrief and said to Person 4, Person 11 and Person 56 “*The story is we engaged a spotter whilst moving to our HLS.*”³¹²
36. Person 4 said that he told Person 7 around late 2016 that Mr Roberts-Smith had kicked a PUC off a steep slope.³¹³ Person 4 said he told Person 18 the same thing around the same time, although he subsequently changed his evidence and said that he did not tell Person 18 until 2019.³¹⁴ Person 4 said he subsequently saw a drawing on a whiteboard of a winged penis kicking an individual off a cliff. He said Person 35 had a reputation for drawing winged penises.³¹⁵
37. Person 4’s evidence that an individual was assaulted and then executed during the Darwan mission is unreliable and should not be accepted by the Court.
38. The Applicant did not adduce any evidence about the nature or symptoms of Person 4’s conditions. Instead, this evidence was adduced by Person 4 in support of an objection to answering a question based on section 128 of the *Evidence Act*.³¹⁶
39. Person 4 readily acknowledged that he has been diagnosed with a number of psychiatric conditions by his psychiatrist.³¹⁷ He admitted that he had been diagnosed with [REDACTED].³¹⁸ He admitted that he had undergone hospital treatment in 2020 and 2021 in relation to his psychiatric conditions³¹⁹ and that he had taken antipsychotic medication during a hospital stay in early 2021³²⁰ to address [REDACTED].³²¹ He claimed that he

³⁰⁴ T2627 L25-33 (P4).

³⁰⁵ T2627 L38, T2628 L16 (P4).

³⁰⁶ T2628 L19-L33 (P4).

³⁰⁷ T2626 L18-25 (P4).

³⁰⁸ T2626 L29-36 (P4).

³⁰⁹ T2629 L38-45 (P4).

³¹⁰ T2630 L33-34 (P4).

³¹¹ T2631 L31 and T2632 L7 (P4).

³¹² T2632 L27 (P4).

³¹³ T2632 L37 (P4).

³¹⁴ T2632 L40 (P4).

³¹⁵ T2633 L1-8 (P4).

³¹⁶ See Ex A106 and A107.

³¹⁷ T2709 L3-4 (P4).

³¹⁸ T2709 L18-22 (P4).

³¹⁹ T2709 L6-7 and T2713 L39-42 (P4).

³²⁰ T2726 L29-31 (P4).

³²¹ T2728 L9 (P4).

ceased taking that medication because it was causing “clouding”, fogginess and difficulties concentrating.³²²

40. Person 4 said that although the minutia had been “fading away”, he resisted the proposition that he was forgetful of “large details”.³²³ He gave similar evidence later in relation to the effect of the medication causing him not to recall things: “*Your honour, just the – the – minor elements to the incidences, but the major elements I can absolutely recall.*”³²⁴
41. Person 4 made admissions about the effect of his conditions and medication upon his memory. He agreed that he had been told by his psychiatrist that the medication he had been taking impacted his memory and that he suffers from memory impairment.³²⁵ He agreed that his memory “wasn’t good”.³²⁶ This was illustrated by his uncertainty as to when, in the prior week, he conducted his last phone consultation with his psychologist.³²⁷ He also qualified his evidence about his understanding of the matters about which he would be required to give evidence to this Court with the phrase “if my memory serves me correct...”. He agreed with the proposition that he had difficulty recalling a conversation with his lawyer on this topic because of his memory impairment.³²⁸ His recollection about being contacted by a journalist, Mark Willacy, was demonstrated in cross-examination to be wrong.³²⁹ He candidly admitted that his memory was not as good as it should be sometimes.³³⁰
42. Person 4 admitted that he told his psychiatrist in August 2021 that he “still gets triggered a lot” by media reporting on Afghanistan.³³¹ He also agreed with the proposition that media reporting about this case caused him to ruminate about his service in Afghanistan, have night terrors, experience severe anxiety and to suffer near panic episodes.³³² He said that he had read media reporting describing the Darwan mission³³³ and watched a 60 Minutes program in 2019 purporting to contain a re-enactment of Darwan,³³⁴ which caused him to have flashbacks and ruminate about what occurred at Darwan.³³⁵
43. Person 4’s admissions about his poor memory concerning what are, in the context of this trial, largely trivial facts should not be lightly brushed aside. They go to the heart of his reliability as a witness to an allegation of murder that occurred in September 2012. Person 4’s candid admissions are illustrative of a person whose powers of recall have been adversely affected, by his own admission, by his mental health issues involving [REDACTED] and the medication he has been prescribed. The likelihood of error has been compounded reading about the events in Darwan in media reporting, talking about the events with others or being told about the mission in other forums. The Respondents rely upon Person 4 as a witness of truth, yet they submit that his evidence about when Person 4 claimed to first disclose the alleged cliff kick incident to Person 7 and Person 18 should not be accepted by the Court on the basis that his recollection was wrong (RS Section VI [190]).
44. Person 4 evidently posed a unique difficulty to the Respondents of their own making. On the one hand, the Respondents were, in effect, accusing him of murdering a PUC during the mission at W108.

³²² T2727 L1-6 (P4).

³²³ T2727 L10-12 (P4).

³²⁴ T2800 L21-22 (P4).

³²⁵ T2710 L1-8 and T2725 L20-24 (P4).

³²⁶ T2800 L2 (P4).

³²⁷ T2715 L24-34 (P4).

³²⁸ T2950 L8-11 (P4).

³²⁹ T2800 L27 - T2801 L26 (P4).

³³⁰ T2801 L22 (P4).

³³¹ T2972 L5-15 (P4).

³³² T2975 L19-28 (P4).

³³³ T2802 L9-19 (P4).

³³⁴ T2806 L7 (P4).

³³⁵ T2807 L5-9 (P4).

On the other hand, they wanted him to give evidence against Mr Roberts-Smith about the mission at Darwan. The Respondents overcame this difficulty by entering into an arrangement with Person 4 concerning the evidence he would give in these proceedings. The arrangement was described in a letter from the Respondents' solicitors to Person 4's solicitor dated 7 February 2022.³³⁶ Evidence of the arrangement was only put before the Court after the intervention of senior counsel for the Respondents.³³⁷

45. Person 4's evidence about his knowledge of the existence of the arrangement with the Respondents was inconsistent. On the one hand, he claimed that he did not personally know about the letter, that he did not see it and was not aware whether an agreement with the Respondents had been confirmed at the time of giving evidence.³³⁸ On the other hand, Person 4 said that he was told by his counsel that there was an agreement in place with the Respondents regarding the questions he would be asked in Court.³³⁹ He said he was coached on what he needed to say at certain times for "self-protection".³⁴⁰ It may be inferred that Person 4 was referring to the need for him to object to answering questions about certain topics pursuant to section 128 of the *Evidence Act*. Person 4 also agreed with the proposition that he was told by his solicitor that if he came to Court and gave evidence concerning matters in relation to Darwan, the Respondents were not going to ask him any questions in relation to W108.³⁴¹ The Court would infer that Person 4 was aware of the existence of an arrangement in broad terms that he if willingly gave evidence about Darwan, the Respondents would not ask him questions about the W108 mission.
46. On the basis of the fourth paragraph of the letter dated 7 February 2022, the Respondents submit that the arrangement was not directed to the content of Person 4's evidence about Darwan, but only at his willingness to appear at Court and speak about the mission. With respect, this submission disregards Person 4's evidence that he was not shown a copy of that letter. In any case, it would be reasonable to infer that Person 4 understood that the price of being protected against the risk that the Respondents might seek to compel him to answer questions about W108 was that his evidence about Darwan should assist the Respondents' case. Person 4 was clearly concerned about the risk that he would have to answer questions about the mission to W108, and that concern no doubt coloured, whether consciously or unconsciously, the evidence he gave about the Darwan mission. The Respondents' submission that the arrangement would have been upheld by them even if Person 4 had given evidence that supported Mr Roberts-Smith's account is highly doubtful (RS Section VI [200]) and there was no evidence that this position was ever communicated by the Respondents to Person 4.
47. While it is no part of the Applicant's case that Person 4 has committed an offence under Australian law or the law of a foreign country, Person 4's alleged participation in the events that led to the death of EKIA 4 (on the Respondents' case), his concern to guard against the risk of any allegation of a war crime being made against him by the Respondents in connection with the mission at W108 (even if such concerns are misplaced) and Person 4's understanding of his arrangement with the Respondents has the result that his evidence must be treated so cautiously that the Court could not feel an actual persuasion that what Person 4 says occurred in relation to the death of EKIA 4 did in fact occur.
48. Person 4's evidence contained irreconcilable inconsistencies. He claimed that immediately after the mission in Darwan, Mr Roberts-Smith directed him, Person 11 and Person 56 to use a cover story to explain the last engagement in Darwan, namely that the individual was a spotter who was engaged on

³³⁶ Ex A267.

³³⁷ T2685 L15-41 and T2688 L37-46 and T2690 L16-21 (P4).

³³⁸ T2946 L43-44 and T2742-2743 (P4).

³³⁹ T2952 L1-2 (P4).

³⁴⁰ T2952 L23-26 (P4).

³⁴¹ T2950 L13-16 (P4).

the way to the HLS.³⁴² He also claimed that it was his understanding that Mr Roberts-Smith was saying to them that the truth of what occurred at Darwan had to be kept a secret among the four of them.³⁴³ However, he also said that it had become “common knowledge amongst the majority of the callsigns” that Mr Roberts-Smith had kicked someone off a cliff because Mr Roberts-Smith told a group of soldiers, including Person 32, about the incident.³⁴⁴ Person 32 did not corroborate Person 4’s evidence. Person 32 denied hearing about an allegation or suggestion that a PUC had been kicked off a cliff in Darwan prior to 2017.³⁴⁵ Person 4 claimed that he had seen in 2012 a drawing on a whiteboard of a winged penis kicking an individual off a cliff.³⁴⁶ Person 35 did not corroborate Person 4’s evidence. Person 35, who acknowledged drawing pictures of winged penises in 2012, denied drawing a picture in the manner described by Person 4.³⁴⁷ Apart from the lack of corroboration of Person 4’s account that the cliff kick was common knowledge, it is improbable that Mr Roberts-Smith directed Person 4, 11 and 56 to use a cover story regarding the circumstances of the death of a spotter during the Darwan mission while at the same time casually boasting about “kicking a cunt off a cliff.”³⁴⁸ Person 4’s evidence about these matters was hopelessly inconsistent.

49. There were other inconsistencies. On the one hand, Person 4 claimed that the ICOM that was photographed with EKIA 4 was a throwdown that had been retrieved from the insurgent who was engaged by Mr Roberts-Smith earlier in that mission.³⁴⁹ On the other hand, he said that the ICOM that was recovered from that insurgent, along with a weapon and a DET cord, were bagged up and handed over to the troop sergeant prior to their clearance of the southern compounds in the village. Person 4 said (recounting his Darwan story to Person 18 in 2019):³⁵⁰

“We saw an AK-47, an ICOM radio and some other items, with one item being some – a piece of det cord. The – the items were bagged in an evidentiary bag by Person 11, and from there we proceeded to move up to elements of tactical headquarters that was on the ground attached to the assault force. Once we married up with that element, the weapon was handed off, and items were handed off in that evidentiary bag to the troop sergeant”.

50. Person 4 later confirmed, again, this evidence in the following exchange:³⁵¹

And Mr Roberts-Smith then swam back across the Helmand River carrying the insurgent’s AK rifle?---That’s correct.

Correct. And other items; correct?---That’s correct.

And they included the ICOM?---That’s correct.

And the cord?---That’s correct.

Yes. And your patrol then married up with troop headquarters?---That’s correct.

And the – as you told us earlier – the items were handed over to the troop sergeant, correct?---That’s correct.

³⁴² T2889 L10-25 and T2890 L8-9 (P4).

³⁴³ T2889 L44-47 (P4).

³⁴⁴ T2890 L26-27 (P4).

³⁴⁵ T5914 L12-46 (P4).

³⁴⁶ T2890 L34 (P4).

³⁴⁷ T5289 L13-15 (P4).

³⁴⁸ T2893 L11 (P4).

³⁴⁹ T2629 L38-45 (P4).

³⁵⁰ T2797 L22 (P4).

³⁵¹ T2925 L23-35 (P4).

And that your patrol then began the next phase of its work, correct?---That's right.

51. The inconsistency was not explained. Indeed it is unable to be explained.
52. Person 4's evidence about the awarding of the Victoria Cross to Mr Roberts-Smith was also inconsistent. At one point, Person 4 said that he did not feel he deserved an equal award [to Mr Roberts-Smith] and that he did not think he deserved a Victoria Cross but that he believed Mr Roberts-Smith did.³⁵² However, Person 4 contradicted this evidence by describing his actions at Tizak as being equivalent to Mr Roberts-Smith's.³⁵³ Person 4 believed that his actions were "absolutely" the same as Mr Roberts-Smith's during the battle of Tizak.³⁵⁴ He also said: "*they could have, you know, accepted the fact that both of us did as much as each other that day*".³⁵⁵
53. Another aspect of Person 4's evidence was inexplicable. Despite knowing that Mr Roberts-Smith denies Person 4's claim that Mr Roberts-Smith kicked a person off a cliff in Darwan and then ordered his execution, Person 4 resisted the proposition that Mr Roberts-Smith was a "liar and a coward".³⁵⁶ Person 4 also agreed with the proposition that Mr Roberts-Smith was a "good man".³⁵⁷ This inconsistency in Person 4's evidence, which is unable to be explained, again points to his unreliability as a witness.
54. Person 4 also made assertions that were contrary to the objective facts. First he claimed that the person who had been kicked off a cliff by Mr Roberts-Smith was "dusty" as a result of his fall. The photograph of EKIA 4 does not corroborate this claim. Second, he claimed that the ICOM that was photographed with EKIA 4 was waterlogged, to support his claim that it had been retrieved from the insurgent killed across the river. Again, the photograph of EKIA 4 does not corroborate this claim.
55. The Applicant does not contend that Person 4's evidence was deliberately false. However, the Court should, when assessing his reliability of his evidence, take into account the likelihood that his feelings towards Mr Roberts-Smith have been coloured by his sense of disappointment and feelings of jealousy regarding the awarding of the Victoria Cross to Mr Roberts-Smith. He admitted that at times he obsessed about what he feels to be injustices done to him, that he does not trust the system, that he was upset about being made to wait to be recognised for Tizak while, at the same time, Mr Roberts-Smith's actions were swiftly recognised.³⁵⁸ He wanted recognition, not just for himself, but for his family.³⁵⁹ He was demonstrably upset when he said that during a video teleconference call in support of the application for the Victoria Cross for Mr Roberts-Smith, all SOCOST and SOCOMOD wanted to know was "who went first [over the wall at Tizak]".³⁶⁰ His pain and disappointment was evident.
56. Another reason why the Court cannot rely upon Person 4's evidence about the alleged assault and execution of a PUC at Darwan is because of the long period of delay between the occurrence of the alleged event and Person 4's first complaint about it. Two matters are relevant. *First*, although the Respondents allege that Person 4 complained about the Darwan mission as promptly as late 2012 to Person 18 and in early 2013 to Person 7, Person 4 did not corroborate the evidence of Person 18 and Person 7 in this respect. In the absence of corroboration about the occurrence of conversations said to have taken place many years ago, the Court should not accept the evidence of Person 7 and Person 18

³⁵² T2814 L44-2815, L26 (P4).

³⁵³ T2818 L1-4 and T2899 L4-6 (P4).

³⁵⁴ T2818 L1-4 (P4).

³⁵⁵ T2899 L4-6 (P4).

³⁵⁶ T2900 L11 (P4).

³⁵⁷ T2900 L16 (P4).

³⁵⁸ T2818 L34-46 (P4).

³⁵⁹ T2819 L1-45 (P4).

³⁶⁰ T2899 L21-34 (P4).

as to when these alleged conversations occurred. *Second*, similarly because of an absence of corroboration, the Court should not make a finding about when Person 4 actually did speak to Person 7 and Person 18 about the mission to Darwan. Person 4 claimed that he first told Person 7 about the cliff kick during a face-to-face meeting at 4 Squadron headquarters in 2016.³⁶¹ Person 7 did not corroborate the timing of this conversation; he said he was not in the country in 2016.³⁶² Person 4 said that he told Person 18 about the mission to Darwan in 2019 at Person 18's home after Person 18 had reached out to him.³⁶³ Person 18 did not corroborate the timing of this conversation either. Person 18 did not recall Person 4 visiting his home in 2019 and denied asking Person 4 to tell him about what happened at Darwan.³⁶⁴ On the available evidence, the only finding that the Court could reliably make is that there was a substantial period of delay of approximately a number of years between the occurrence of the alleged event and Person 4's first complaint about it to Person 7. The delay was not explained by Person 4. Whatever the reason for its occurrence, the existence of this delay is a matter that undermines the reliability of Person 4's evidence about the mission to Darwan. The fact that at these earlier stages Person 7 and Person 18 are said to have spoken only of a "cliff kick" allegation rather than an allegation that someone was executed is another reason to treat their evidence with caution.

57. There was other evidence that pointed against the likelihood that Person 4 complained about the alleged events of the mission to Darwan in late 2012 and early 2013. Contrary to the evidence of Person 7, Person 100 denied that he was informed in 2013 of a war crime by Mr Roberts-Smith.³⁶⁵ The Respondents' submission that Person 100 was plainly unwilling to investigate allegations of misconduct against Mr Roberts-Smith is baseless. He was an impartial witness. The attack upon his demeanour is unfair (RS Section VI [175]). Further, the absence of any reference to the execution of a PUC by Mr Roberts-Smith in the 2014 complaint letter (Ex A-51) which was reviewed by Person 7 before being finalised, is telling. It is simply improbable that in 2014 Person 7 would not have suggested to Person 6 that the complaint letter, the purpose of which was to challenge the decision to award a CDS to Mr Roberts-Smith for his leadership during the 2012 deployment, should contain a reference to the allegation of a cliff kick and execution in Darwan if Person 7 was aware of that allegation (by being informed by Person 4 and Person 18) at that time.³⁶⁶

F. PERSON 56'S EVIDENCE AND RELIABILITY AS A WITNESS

58. Person 56 recalled that the members of Mr Roberts-Smith's patrol for the mission included Person 4, Person 11 and Person 47.³⁶⁷ Whilst he did not see the engagement of an individual by Mr Roberts-Smith across the Helmand river, he recalled seeing Mr Roberts-Smith cross the river and then photographing an EKIA from "our side of the river."³⁶⁸ Mr Roberts-Smith held the body in a position so that a photo could be obtained.³⁶⁹ Mr Roberts-Smith retrieved an AK variant that had been struck by a round. The patrol then moved into the main part of the village to search compounds. At this time, the patrol comprised Mr Roberts-Smith, Person 4, Person 11 and an interpreter.³⁷⁰ Another operator was with the patrol "at some point throughout the job" but Person 56 was not sure who this was.

³⁶¹ T2755 L10-45 and T2792, L1 (P4).

³⁶² T3641 L10-14 (P7).

³⁶³ T2795-T2799 (P4).

³⁶⁴ T3056 L25-L37 (P18).

³⁶⁵ T5619 L27-34 (P100).

³⁶⁶ T3674 L38-T3675 L2 (P7).

³⁶⁷ T4747 L10-14 (P56).

³⁶⁸ T4748 L5-8 (P56).

³⁶⁹ T4748 L15-16 (P56).

³⁷⁰ T4750 L37 and T4751 L1 (P56).

59. Person 56 said his patrol cleared the southernmost compound in the village and were there for some period of time towards the end of the task.³⁷¹ There were local nationals of both sexes and children in the compound, including fighting aged males.³⁷² He did not observe anyone questioning these men as he was searching rooms in the compound and providing security.³⁷³ Person 56 said that each of Mr Roberts-Smith, Person 4, Person 11 and an interpreter were present at the last compound.³⁷⁴ He was unsure if the other regiment member was with the patrol at that time. He said that the other regiment member “may have been a dog handler.”³⁷⁵ Person 56 recalled being at the compound for perhaps half an hour before being tasked to “leave the compound and head to an area to select and/or provide security for a helicopter extraction site.”³⁷⁶ Person 56 took the interpreter with him and said that at some point during that task there was another regiment member with him as well.³⁷⁷ He later acknowledged that he could not recall this fact with any certainty.³⁷⁸ This occurred approximately 30 minutes prior to extraction. When he arrived at the HLZ in the creek bed, there was another regiment member but he could not recall who it was.³⁷⁹ Person 56 met the remainder of Mr Roberts-Smith’s patrol at the HLZ and then extracted together. In the ready room at Tarin Kowt following the mission, Person 56 said that Person 4 or Person 11 said words to the effect of “*there was an incident towards the end of the patrol*”³⁸⁰ and that “*an individual had been kicked off a cliff and subsequently shot*”.³⁸¹
60. Person 56’s recollection of the details of the mission at Darwan was poor. He could not recall that Mr Roberts-Smith retrieved other equipment including detonators in addition to the AK rifle from the insurgent killed across the river.³⁸² He could not recall that his patrol met with the THQ element following that initial engagement.³⁸³ His recollection that he did not PUC any fighting aged males³⁸⁴ was demonstrably wrong,³⁸⁵ as was his recollection of where in the village his patrol located fighting aged males.³⁸⁶ He acknowledged that his evidence about being directed to take the interpreter to the HLZ may have been wrong and that he may instead have been directed to take the interpreter back to the PUC holding area.³⁸⁷ He could not recall seeing the interpreter on his helicopter during the extraction.³⁸⁸ He said that the only persons he recalled on that helicopter were Mr Roberts-Smith, Person 4 and Person 11.³⁸⁹ He resisted the proposition that he was wrong about women, children and fighting aged males being present at the southernmost compound of the village but he accepted the possibility that he may have been thinking of a compound further to the north.³⁹⁰ His evidence that there was a conversation in the ready room at Tarin Kowt with Person 4 and Person 11 during which one of them explained that an individual had been kicked off a cliff was not corroborated by Person 4. Person 4 could not recall what he claimed Person 11 said in the ready room.³⁹¹

³⁷¹ T4751 L22-26 (P56).

³⁷² T4751 L32-35 (P56).

³⁷³ T4752 L4-8 (P56).

³⁷⁴ T4752 L23-27 (P56).

³⁷⁵ T4752 L30 (P56).

³⁷⁶ T4752 L33-39 (P56).

³⁷⁷ T4753 L1-2 (P56).

³⁷⁸ T4753 L24-25 (P56).

³⁷⁹ T4751 L6-8 (P56).

³⁸⁰ T4754 L34-35 (P56).

³⁸¹ T4755 L2-3 (P56).

³⁸² T4794 L19 (P56).

³⁸³ T4794 L22 (P56).

³⁸⁴ T4794 L36-37 (P56).

³⁸⁵ Closed Court Transcript 11 April 2022, T3 L36-46 (P56) (redacted)

³⁸⁶ T4795 L1-14 (P56) and see Closed Court Transcript 11 April 2022, T4 L3-19; T4797 L41-47 (P56) (redacted).

³⁸⁷ T4795 L21-30 and L46; T4798 L25 (P56).

³⁸⁸ T4796 L1-5 (P56)

³⁸⁹ T4796 L8 (P56).

³⁹⁰ T4798 L27-32 (P56).

³⁹¹ T2631 L31 and T2632, L7 (P56).

61. Like Person 4, Person 56 also posed a difficulty for the Respondents of their own making. The Respondents were, in effect, accusing Person 56 of having murdered an individual during the mission to Fasil. The Respondents sought to enter an arrangement with Person 56 concerning the evidence he would give in these proceedings, but that arrangement was later terminated when Person 56 attempted to set aside the subpoena requiring him to attend to give evidence.³⁹² The Respondents submit that the arrangement with Person 56 did not concern (and therefore did not affect) the content of his evidence on Darwan. But, like Person 4, Person 56 was clearly concerned about the risk that he would have to answer questions about the mission to Fasil and that concern, whether consciously or unconsciously, coloured the evidence he gave about the Darwan mission “to get the Respondents off his back”³⁹³ and to ensure that they didn’t ask him questions about Fasil.³⁹⁴ During cross-examination, the following exchanges occurred.³⁹⁵

Now, it’s true, is it not, Person 56, in relation to this approach by the respondents’ lawyers that you felt threatened that if you didn’t cooperate with them, then they would call you and make assertions against you in relation to the – to an allegation that something had happened at Fasil involving yourself? --- Yes.

...

Do you accept that your understanding, from what Mr Richter was telling you that Mr Levitan had informed him, was that, if you did not agree to speak with the respondents’ lawyers about Darwan and help them get what they need for their case against Mr Roberts-Smith, then they would subpoena you as a hostile witness and ask you questions about other matters, including Fasil? --- Yes.

And you considered that to be a threat? --- Yes.

And it was the making of this statement by Mr Levitan that caused you to change your mind and agree to meet with the respondents’ lawyers? --- Correct.

G. AFGHAN WITNESSES

Mohammad Hanifa

62. According to Hanifa, his stepmother was Ali Jan’s sister.³⁹⁶ He claimed to have been detained with Ali Jan on 11 September 2011 and to have witnessed Ali Jan being kicked.
63. In this trial Hanifa gave the following version of the key events:
- (a) After the raid begun Hanifa and Ali Jan had attempted to leave on their journey to Ali Jan’s village. After shots were fired, they returned to Hanifa’s guest house.³⁹⁷
 - (b) At the time the soldiers arrived, Hanifa told Mangul (his neighbour) to return to his own home next door. Mangul’s two daughters sat in front of Ali Jan and Hanifa’s own daughter sat in front

³⁹² RS Section VI [210].

³⁹³ T4776 L32-33 (P56).

³⁹⁴ T4779 L31-33 (P56).

³⁹⁵ T4765 L40-46 and T4774 L23-32 (P56).

³⁹⁶ T922 L22 - T923 L4 (Hanifa).

³⁹⁷ T942 L1-29 (Hanifa).

of him. A soldier arrived with a dog and grabbed Hanifa by the neck.³⁹⁸ The soldier hit Hanifa's head against a wall.³⁹⁹

- (c) Hanifa's hands were tied and he and Ali Jan were made to stand against a wall.⁴⁰⁰ Mangul was also tied and placed near an oven. The three men were then taken to Mangul's dwelling and sat down in the middle. Soldiers could be observed on the rooftops while some were in Mangul's house.⁴⁰¹
- (d) A big blue eyed soldier with a uniform wet up to his chest came up to the men and bent his knee. The men's faces were then turned to the wall. An interrogation begun. Hanifa denied being a Talib. The interpreter told Hanifa he had shot his father (Shahzada) and hit Hanifa with his pistol.⁴⁰² Mangul asked the interpreter why he had shot Hanifa's father and the interpreter slapped Mangul and struck Hanifa again with a pistol. Hanifa lied by saying that Mangul was his cousin. He did this because he felt he would be shot if he said he did not live in Mangul's house.⁴⁰³
- (e) After further interrogation of Mangul and Ali Jan, Hanifa and Ali Jan were brought outside. Ali Jan was placed closer to the river. Hanifa could not see Ali Jan. Hanifa did not see the soldier who brought him outside.⁴⁰⁴ Hanifa later added that he had been grabbed by the neck and thrown on the ground and that after this the big soldier had gone into the guesthouse. Then another soldier kicked Hanifa and he fell into the guesthouse.⁴⁰⁵
- (f) Hanifa then described being interrogated by the big soldier (wet to the chest) with the interpreter behind him. He said he was instructed to look directly into the big soldier's eyes. The big soldier then punched Hanifa "*many times, many times*" when he turned to look at the interpreter. The big soldier then kicked him in the upper abdomen. Hanifa was made to sit near the entrance of the door.⁴⁰⁶
- (g) The interpreter then brought Ali Jan to within two metres of Hanifa. Hanifa warned Ali Jan not to laugh or smile. Hanifa could see him. The interpreter left and the big soldier came.⁴⁰⁷ He said something to Ali Jan who smiled. The big soldier kicked Ali Jan hard (with the toes) and "*then he fell on his back*". Hanifa subsequently said Ali Jan rolled down the hill until he reached the river. Hanifa could see him roll at first but then lost sight of him.⁴⁰⁸
- (h) At this point the evidence was confused. When asked what happened next at T960 L 36-38 Hanifa said "*Here the big soldier, he shouted, and then there were – the helicopter they were firing. They were firing in some area but we could not see exactly where they were firing at.*" At T960 T40 Counsel for the Respondents asked what the big soldier did next and he replied "*After that a shot was fired. I heard the shot. The shot was fired and I heard some sound.*" Counsel asked the same question again and this time the witness said "*At that time the big soldier, he*

³⁹⁸ T945 L15 -T947 L10 (Hanifa).

³⁹⁹ T948 L41-44 (Hanifa).

⁴⁰⁰ T950 L29 - T951 L1 (Hanifa).

⁴⁰¹ T951 L25-34 (Hanifa).

⁴⁰² T952 L 10 - T954 L2 (Hanifa).

⁴⁰³ T954 L42-T955 L24 (Hanifa).

⁴⁰⁴ T956 L1-40 (Hanifa).

⁴⁰⁵ T957 L21-41 (Hanifa).

⁴⁰⁶ T958 L11 - T959 L24 (Hanifa), Closed Ct 27 July T18 L16-44 (Hanifa).

⁴⁰⁷ T959 L29 - T960 L1 (Hanifa).

⁴⁰⁸ T960 L1-32 (Hanifa).

shouted, and then at the time, there was also, a shot was fired, I heard the shot, but after that he disappeared”.

- (i) Hanifa was then asked what he next saw and he replied “*then they dragged Ali Jan towards the berry tree. They were firing shots – the soldiers, they were firing. The helicopters, they were also firing shots.*” The witness stated he had seen Ali Jan dragged to the berry tree by two soldiers but after that he did not know what had happened.⁴⁰⁹
- (j) Hanifa went next door to Mangul’s house where Mangul’s daughter untied his hands. He saw his brother Mohammad Shah tied up next to the well. He and sister then went to view Ali Jan’s body and sighted drops of blood en route.⁴¹⁰ His hands were not tied. Hanifa identified Ali Jan as the body in the photograph which became page 2 of Ex. R91 but stated that the bag and the radio device appearing in the photograph did not belong to Ali Jan.⁴¹¹

- 64. See Applicant’s Closed Court Submissions at paragraphs B11 to B13.
- 65. Other pieces of evidence are so improbable as to cast doubt on the reliability of anything said by the witness.
- 66. *First*, Hanifa claimed to have seen three soldiers “*shooting in the air*” at or around the time Ali Jan’s body was being dragged across the riverbed.⁴¹² That evidence is wildly improbable.
- 67. See Applicant’s Closed Court Submissions at paragraph B14.
- 68. *Thirdly*, Hanifa claimed that immediately before the arrival of the helicopters he heard vehicles “*honking*”.⁴¹³ He claimed that the honking sounds were made by the vehicles in an endeavour to pick up passengers rather than to warn of the commencement of a raid.⁴¹⁴ The timing makes this highly improbable.
- 69. *Fourthly*, Hanifa claimed that he observed and heard helicopters shooting at the ground at or about the time he heard the shots. This is also plainly wrong (and not one Australian witness suggested anything of the kind and nor do the contemporaneous documents).
- 70. *Fifthly*, the notion that Hanifa and Ali Jan would set off on a journey in the middle of a raid (after Ali Jan had abandoned his flour) appears improbable.⁴¹⁵ This issue is discussed further below in the context of Mangul’s evidence. See Applicant’s Closed Court Submissions at paragraph B15. It is equally unlikely that Hanifa would have seen the overwatch team from his position as there was a significant distance between the location of the overwatch team and Hanifa’s compound.
- 71. Finally, there is the manner in which Hanifa gave his evidence, including his evidence in chief. See especially T960-961. The impression is that of a witness who had attempted to learn and relay a story by rote, and then became hopefully confused under questioning, losing all sequence. Hanifa’s view that the soldiers were infidels and their victim’s martyrs gave him motive to lie or exaggerate.⁴¹⁶

⁴⁰⁹ T961 L18 (Hanifa).

⁴¹⁰ T962 L17 - T963 L17 (Hanifa).

⁴¹¹ T963 L 39-44, T964 L44-T965 L25 (Hanifa).

⁴¹² T971 L27-44, T973 L3-21 (Hanifa). Paragraph 54 of Ex. A47

⁴¹³ T940 L17-27 (Hanifa).

⁴¹⁴ T996 L46 - T997 L21 (Hanifa).

⁴¹⁵ T1013 L15-45, T1016 L14-25 (Hanifa).

⁴¹⁶ T1004 L25 - T1005 L30 (Hanifa).

Mangul Rahmi

72. Mangul was the neighbour of Hanifa. He also claimed to have been detained with Ali Jan and Hanifa. However he did not claim to have witnessed Ali Jan be kicked.
73. With respect to the key events Mangul gave the following evidence:
- (a) Mangul was on the way to his field when he heard the helicopters. He returned to his house as he had been warned to do on the radio.⁴¹⁷
 - (b) He and Hanifa told each other to go and stay in their houses. Later Hanifa called Mangul outside and they sat in their shared guesthouse.⁴¹⁸ They sat talking and then saw Ali Jan arrive from the river with three donkeys. Hanifa joined Ali Jan and they walked away.⁴¹⁹ Mangul heard shots and then Ali Jan and Hanifa returned. They had tea and melon and sat and talked for a long time.⁴²⁰
 - (c) When the soldiers arrived the three men went to the guesthouse. Mangul moved to the hut area with the children and a dog bit Mangul.⁴²¹ The soldiers searched him and tied his hands.⁴²² Mangul was sat down next to a wall outside the guest house. He saw Hanifa and Ali Jan sitting under the hut, facing the cliff. He was then moved to sit with the other two men.⁴²³
 - (d) Mangul observed many soldiers – some on the rooftop, some on the path, some with the three PUCs.⁴²⁴
 - (e) Mangul was interrogated about the identity of Hanifa and Ali Jan. Hanifa was also interrogated. The interpreter hit Mangul and then a big soldier hit him twice. The interpreter warned Mangul not to look at the big soldier.⁴²⁵ The interrogation continued before Hanifa and Ali Jan were taken away and made to stand in front of the guest house. Mangul could not see them anymore.⁴²⁶ He also did not see the big soldier any more.⁴²⁷
 - (f) Mangul could hear a conversation taking place between Hanifa, Ali Jan and the soldiers but could not see them.⁴²⁸ He then heard firing from a plane and from the ground. Hanifa approached and Mangul said to him “*What are you doing? There are still, I can see, 2 soldiers. They might fire at you.*” Hanifa’s daughter cut their ties. Mangul asked Hanifa “*Where is Ali Jan?*” and he replied “*they kicked him, and he went in – down to the river, and they dragged him towards the trees.*”⁴²⁹
 - (g) Mangul stated that he went down into the riverbed and observed blood. He went to the cornfield with Hanifa and his sister. Hanifa’s father arrived and they came to where Ali Jan’s

⁴¹⁷ T1065 L5 - 1066 L2 (Mangul).

⁴¹⁸ T1066 L 1-44 (Mangul).

⁴¹⁹ T1067 L13 - T1068 L9 (Mangul).

⁴²⁰ T1068 L 13-40 (Mangul).

⁴²¹ T1069L13-37(Mangul).

⁴²² T1071 L3-L44 (Mangul).

⁴²³ T1072 L11 - T1073 L 15, T1074 L18-20 (Mangul).

⁴²⁴ T1074 L35-43, T 1077 L15-17 (Mangul).

⁴²⁵ T1075 L1-45 (Mangul).

⁴²⁶ T1076 L20 - T1077 L3 (Mangul).

⁴²⁷ T1077 L30-44 (Mangul).

⁴²⁸ T1078 L10-13 (Mangul).

⁴²⁹ T1083 L 6 -T1084 L15 (Mangul).

body lay under the berry tree.⁴³⁰ Mangul identified a photograph of Ali Jan's body. He stated that the wireless device and white bag had not been on the body.⁴³¹

74. See Applicant's Closed Court Submissions at paragraphs B16 to B17.

75. Otherwise the Applicant relies on the following matters.

- (a) As with Hanifa the implausibility of the journey upon which Ali Jan and Hanifa embarked in the middle of a raid when people were advised to remain at home.⁴³² The only plausible explanation for such a risky journey at that moment would be if one or both of them were Taliban.
- (b) Mangul's evidence that Mohammad Sha was present in Darwan on the day of the raid in which Ali Jan was allegedly killed.⁴³³ The Applicant repeats the submission made on this issue in respect of Hanifa.
- (c) The evidence that Mangul heard firing from the helicopters.⁴³⁴ None of the military witnesses nor the contemporaneous documents corroborate this (most implausible) claim.
- (d) The evidence that Mangul was able to see two soldiers on a hilltop or mountain and that he warned Hanifa the soldiers might shoot him.⁴³⁵ The only plausible location for these soldiers would be the overwatch position. It would have been too far for Mangul to see the soldiers (let alone for the soldiers to fire at them).
- (e) As referred to above, the effect of Mangul's evidence is that an implausibly high number of soldiers were present in the vicinity towards the end of the mission.⁴³⁶
- (f) Mangul's hatred of foreign soldiers and his view that they were infidels and those they killed were martyrs. His evidence was unavoidably coloured by his strong antipathy towards foreign soldiers.⁴³⁷

Shahzada Fatih

76. Shahzada is Hanifa's father. He claimed to have been detained in a hut on the riverbed and to have observed Ali Jan be kicked down the slope from that vantage point. He did not say he witnessed any execution. He also claimed that big soldier came up to the hut in the riverbed and spoke Pashto.

77. Shahzada gave the following evidence as to the critical events:

- (a) When the soldiers arrived at Shahzada's house, he was there with his children and daughters. He saw Ali Jan and Hanifa return from down in the riverbed to Mangul's house after shots were fired from the top of the mountain.⁴³⁸

⁴³⁰ T1084 L 19 - T1085 L21 (Mangul). Ex R 91 page 2.

⁴³¹ T1087 L36 -T1088 L17 (Mangul).

⁴³² T1066 L1-2, T1098 L23 - T1099 L40, T1101 L6-25, T1129 L44-1130 L6 (Mangul).

⁴³³ T1094 L5-9, T1097 L1-18, T1098 L1-2 (Mangul).

⁴³⁴ T1091 L20-T47, T1092 L21 - T1093 L9 (Mangul).

⁴³⁵ T1093 L17 – L39 (Mangul).

⁴³⁶ To similar effect paragraph [40] of Mangul's May 2021 Statement. Otherwise see Applicant's Closed Court Submissions footnote 59.

⁴³⁷ T1103 L9-41, T1109 L17-30 (Mangul).

⁴³⁸ T1140 L12-36, T1155 L34 - T1156 L2 (Shahzada).

- (b) Soldiers came to Shahzada’s house and asked him to show them Taliban. He replied he did not know where the Taliban was. His hands were not tied and he was not touched. He described many soldiers on the rooftops and “*down there*” and “*in the house there*”. He observed a tall soldier who left with other soldiers for Mangul’s house.⁴³⁹
- (c) Shahzada was taken by other soldiers to Amir Jan Aka’s hut on the riverbed, near the fields. Amir Jan Aka and his four sons were already at the hut when he arrived.⁴⁴⁰ Many soldiers were present at the hut (sitting beside an irrigation ditch) and side of the riverbed at this time. He also saw soldiers near “*our houses*” and “*at the creek over the riverbed.*”⁴⁴¹
- (d) Shahzada observed Hanifa and Ali Jan sitting near a wall at Mangul’s compound. The soldiers tied their hands. The big soldier made Ali Jan stand up. The big soldier was alone at this point although other soldiers could be found on the rooftops or in the house. Ali Jan faced the big soldier who kicked him. He fell down until the trees blocked him from Shahzada’s sight.⁴⁴²
- (e) The big soldier then took a path downwards and Shahzada lost sight of him. The other soldiers remained sitting there. Shahzada heard light firing. The big soldier came up to Shahzada and Amir Jan Aka and said “*Until our planes come, none of you should move.*” A plane landed and the soldiers got into the plane.⁴⁴³ At one point Shahzada stated that the big soldier fired shots as he was coming down to Shahzada at the hut.⁴⁴⁴
- (f) Shahzada went looking for Ali Jan and went to the creek. He and Hanifa and his daughter found Ali Jan’s body in the cornfield. Mangul arrived at the scene after his daughter left.⁴⁴⁵ Mangul identified a photograph of Ali Jan’s body. He stated that the wireless device and white bag had not been on the body.⁴⁴⁶

78. Shahzada’s evidence suffered from serious inconsistencies and serial implausibilities:

- (a) Shahzada’s shifted position as to whether the “big soldier” was or was not shooting when he came down the mountain towards the hut.⁴⁴⁷ No Australian soldier confirmed the presence of PUCs in this place. Even if a PUC had been located there, the suggestion that Mr Roberts-Smith was shooting as he ran down from the compounds to the riverbed in the direction of the hut is plainly wrong.
- (b) Shahzada’s evidence (maintained in cross-examination) that the big soldier spoke Pashto to him when he came to the hut is also plainly wrong. A valiant attempt by Counsel for the Respondents to afford the witness a retreat in re-examination failed rather spectacularly.⁴⁴⁸
- (c) Shahzada admitted suffering from poor eyesight.⁴⁴⁹ His evidence that he could see what was happening up at Mangul’s compound, through a stand of trees, some 250 metres away, was totally implausible.⁴⁵⁰ His evidence that he saw Ali Jan kicked should be entirely disregarded.

⁴³⁹ T1141 L 27 – T 1142 L 28 (Shahzada).

⁴⁴⁰ T1142 L28 -47 (Shahzada).

⁴⁴¹ T1148 L42 - T1149 L14, T1175 L29-38, T1176 L25-47, T1177 L 1-19 (Shahzada).

⁴⁴² T1149 L19 – T150 L15 (Shahzada).

⁴⁴³ T1150 L19 – T1151 L42 (Shahzada).

⁴⁴⁴ T1156 L7-42 (Shahzada).

⁴⁴⁵ T1151 L4 6- T1152 L15, T1152 L33 - T1153 L11 (Shahzada).

⁴⁴⁶ T1154 L17-47 (Shahzada).

⁴⁴⁷ T1156 L 7-42, T1173 L1-18, T 1174 L23-26 (Shahzada).

⁴⁴⁸ T1174 L28-46, T 1183 L36-T1184 L1 (Shahzada).

⁴⁴⁹ T1166 L23-30 (Shahzada).

- (d) Shahzada gave evidence suggesting very high numbers of soldiers were present both up at the compounds and down on the riverbed and near the hut (from where according to him the Applicant's kicking of Ali Jan could be observed). That evidence is itself improbable. If it was even partially true it only substantially reduces the probability that Mr Roberts-Smith would risk kicking or assaulting a PUC in such a place – where he knew a vast audience watched.
- (e) Shahzada's claims that Hanifa and Ali Jan were shot at from variously the overwatch position and plane earlier in the day were improbable given the distances (and the fact that no document or soldier recorded engagements involving the helos).⁴⁵¹ Likewise his claim that he had never before seen photographs of Ali Jan's body is improbable,⁴⁵² as is his claim that in all these years he had never discussed the case with his son, Hanifa.⁴⁵³
- (f) Shahzada also gave evidence that his son Mohammad Shah was present on the day of the raid. For the reasons discussed above that is false.⁴⁵⁴

79. The Court had the opportunity to observe the erratic demeanour of the witness. It is unclear whether he was dishonest or hopelessly confused. Certainly he would have felt a sense of obligation to the Respondents given that his entire family had been supported by them via Dr Sharif (including rent, food, even medical expenses) for over a year.⁴⁵⁵

The embankment

80. The evidence of the Afghan witnesses, whilst most unclear tended to confirm that back in 2012 there was at least some drop or embankment between the field containing the berry tree and the riverbed.⁴⁵⁶

H. CREDIT OF THE AFGHAN WITNESSES

81. The evidence of the three Afghan witnesses should not be accepted. They purported to remember details (soldiers standing around shooting in the air, 20-30 soldiers in the riverbank, the "big soldier" speaking Pashto, firing from planes) which on any view did not happen. Neither Person 4 nor Person 56 corroborated Hanifa's and Mangul's evidence of being assaulted during tactical questioning. Nor did they corroborate Mangul's evidence about being bitten by a MWD. Person 13, who was the only interpreter in the village for that mission, could not have waved a pistol at Hanifa. Person 13 was unarmed,⁴⁵⁷ which is why Person 56 escorted him to THQ.⁴⁵⁸ Person 56 did not corroborate the presence of PUCs in the hut in the creek bed shortly prior to extraction. Perhaps they were confused with the multiple other raids that occurred on Darwan during the period of conflict.⁴⁵⁹ Perhaps they were lying as they wanted to cause as much damage to the infidels as possible. Perhaps they were trying to please the people that had housed and fed them for years. Whatever the answer, no weight can be placed upon the evidence they gave concerning the events on 11 September 2012 and the fate of the person they called Ali Jan.

⁴⁵⁰ See Ex R89 at Point C for the hut and Point A for Shahzada's house (Mangul's was further to the left), T1159 L16-T1161 L13. See T1164 L41-T1165 L25 (Shahzada) for the agreement the distance was 250-300 metres. See T1168 L9- T1169 L25 (Shahzada) for the extent of tree cover.

⁴⁵¹ T1155 L34-T1156 L2, T1180 L1-46 (Shahzada).

⁴⁵² T1178 L17-34 (Shahzada).

⁴⁵³ T1178 L38-T1179 L12 (Shahzada).

⁴⁵⁴ T1157 L43-T1158 L25 (Shahzada).

⁴⁵⁵ T1181 L9 – T1182 L5 (Shahzada).

⁴⁵⁶ T931 L42-T932 L8, T988 L 3-44, T1060 L28 – T1061 L35, T1147 L35-T1148 L29 (Shahzada).

⁴⁵⁷ T239 L15 (BRS); T5158 L46 (P35).

⁴⁵⁸ T239 L15 (BRS).

⁴⁵⁹ T1104 L14 – T1105 L10 (Mangul).

I. FINDINGS OF FACT

82. Neither Mr Roberts-Smith nor Person 11 recalled that there were fighting aged males (or anyone else) in the last compound. Person 4 said that when the patrol arrived, the compound was empty and that later, a local national with a donkey approached the compound from the southern end of the village. He also said that at some other point, there was another fighting aged male placed under control at the compound but Person 4's evidence about this second person was vague. How that person came to be in the compound was unexplained in circumstances were Person 4 said that the compound was empty upon the arrival of Mr Roberts-Smith's patrol. The Respondents attempt to explain away the failure of Person 4 to see other PUCs and the failure of the Afghan witnesses to see Person 11 by referencing the shock of Person 4 and the Afghan witnesses (RS Section VI [100]-[101]). The Applicant submits that such omissions only make their accounts less reliable.
83. Person 56's evidence about the presence of local nationals in the last compound was inconsistent with Person 4's evidence. He did not corroborate Person 4's evidence that the compound was empty and that someone later approached it with a donkey. Instead, he said that there were fighting aged males, women and children at the last compound. Person 56, however, accepted the possibility that his recollection about whether there were fighting aged males, women and children at the last compound may have been wrong and that may have been thinking of a compound further to the north. Person 56's acknowledgment of the possibility of his error is consistent with the evidence that Mr Roberts-Smith's patrol did encounter fighting aged males, women and children at an earlier point in their clearance (to the north of the southern compounds) and Mr Roberts-Smith's and Person 11's evidence that Person 56 was sent to escort the interpreter back to THQ prior to arriving at the last compound.
84. In relation to whether an interpreter was present at the last compound, the Applicant relies upon a *Jones v Dunkel* inference in relation to the Respondents' failure to call Person 13 to give evidence about whether he was in fact present at the last compound in circumstances where the Respondents had initially notified that Person 13 would be called by them as a witness in relation to the events of Darwan and had served an outline of his anticipated evidence. The Respondents submit that the only interpreter in Darwan village for the entire mission was Person 13. Their failure to call Person 13 has not been satisfactorily explained. The Court may infer that nothing that Person 13 could say would assist the Respondents' case.
85. Contrary to the evidence of Mr Roberts-Smith and Person 11, Person 4 and Person 56 both said that an interpreter was present at the last compound for part of the clearance although their evidence about the presence of the interpreter conflicted in one critical respect. Person 4 said that Mr Roberts-Smith sent Person 56 back to THQ to fetch the interpreter and that Person 56 then returned to the end compound with the interpreter. Person 56 on the other hand recalled that the interpreter was with the patrol when they arrived at the last compound. Person 4's account is doubtful. No one else corroborated that Person 56 made two separate trips to THQ. It is doubtful for another reason. If a fighting age male or fighting age males had been PUC'd at the last compound and needed to be tactically questioned, as Person 4's evidence suggested, Mr Roberts-Smith more probably would have escorted the PUCs back to the PUC holding area where the interpreter was located rather than request the only interpreter available to FE Alpha to be sent to his position at the last compound.⁴⁶⁰
86. Person 56's evidence about the interpreter being present at the last compound after having arrived with Mr Roberts-Smith's patrol should not be accepted. This account was not corroborated by Person 4, Mr Roberts-Smith or Person 11. Person 56's evidence was also undermined by Person 7 who said that

⁴⁶⁰ T248 L16-22; T371 L29; Closed Court transcript 22 June 2021 T33 L13-14 (BRS).

he had an interpreter with him in the PUC compound prior to extraction.⁴⁶¹ The Court should infer that Person 13's evidence about whether he was at the last compound or not, would not assist the Respondents' case in circumstances where the failure to call him has not been satisfactorily explained.

87. In relation to whether Person 47 was present at the last compound, the Applicant submits Person 4's evidence was not corroborated by Mr Roberts-Smith, Person 11 or Person 56. Person 56 did positively identify that Person 47 was with Mr Roberts-Smith's patrol at the last compound.⁴⁶² This was despite identifying Person 47 as someone who was attached to Mr Roberts-Smith's patrol at the beginning of the mission. Person 56 suggested that the other regiment member "may have been a dog handler".⁴⁶³ With respect, Person 56's guess ought not be received as corroborating Person 4's evidence that Person 47 was present at the last compound. Person 11 did not recall that Person 47 was with the patrol as it moved across a gap in the compounds and into the last group of compounds at the southern end of the village.⁴⁶⁴ Person 11 said that Person 47, as a dog-handler would be "quite fluid between different teams and assisting them."⁴⁶⁵
88. Even if an interpreter, Person 47 and Person 56 were briefly present in the last compound, it would not affect the improbabilities of the allegation as described below.

J. REASONS WHY THE RESPONDENTS HAVE NOT DISCHARGED THE BURDEN OF PROOF

89. The Respondents have failed to establish the allegation on the balance of probabilities for the reasons set out below.

It is improbable that Mr Roberts-Smith would have assaulted and killed a civilian

90. The allegation that Mr Roberts-Smith brutally assaulted and then directed the execution of a defenceless civilian only because he smiled at him is highly improbable. The Respondents allege that Ali Jan was an innocent farmer who was unaffiliated with the Taliban. The *only* motivation posited for the alleged assault and the execution is the Applicant's annoyance that Ali Jan was said to have smiled at him during tactical questioning (RS Section VI [91]).⁴⁶⁶ It was not put to the Applicant in cross-examination that Ali Jan was of "primary concern" to the Applicant from a tactical questioning perspective because he was not from Darwan. Nor was it put to Mr Roberts-Smith that Ali Jan was said to have been earlier prevented by the overwatch team from leaving the village and that this may have been a matter which caused him to become suspicious about Ali Jan. The Respondents' failure to comply with the rule in *Browne v Dunn* means that the Court may not take these matters into account as a possible motive for the alleged kick cliff, with the result that, on the Respondents' case, the only reason why Mr Roberts-Smith and Person 11 are said to have placed a defenceless civilian on the edge of a cliff to allow him to be kicked off it is because Ali Jan dared to smile at Mr Roberts-Smith. The allegation is highly improbable and should be rejected by the Court.
91. That Mr Roberts-Smith would react so impulsively and cruelly, first assaulting and then ordering the execution of an *unarmed civilian* in response to the slightest of provocations is inherently improbable. He was a professional soldier who was trained to observe the ROE. Beyond that, though, he was someone who had demonstrated uncommon courage and composure in the face of extreme danger. So

⁴⁶¹ T3612 L35-46 (P7).

⁴⁶² T4752 L22-26 (P56).

⁴⁶³ T4752 L30 (P56).

⁴⁶⁴ T5722 L8-10 (P56).

⁴⁶⁵ T5722 L28-29 (P56).

⁴⁶⁶ T507 L25-27; T508 L1-3 (BRS).

much was evident when Mr Roberts-Smith and his patrol were tasked with securing the forward operating base in the immediate aftermath of the killing of three Australian soldiers by Hekmatullah and de-escalating a tense situation with about 80 Afghan soldiers who were at the base.⁴⁶⁷ An impulsive assault of a defenceless civilian is plainly incongruous with Mr Roberts-Smith's character. So too is the callous disregard for human life that underpins the allegation that Mr Roberts-Smith then ordered the PUC to be killed for no reason at all other than "to put him out of his misery." Again, this conduct is plainly inconsistent with the character of a person who struck Person 10 in admonishment after he potentially endangered the lives of civilians by losing situational awareness while firing a machine gun during a mission in the Chora Valley. While the manner of the admonishment may fairly be criticised, Mr Roberts-Smith concerns about the consequences to Person 10 and to the unit if innocent civilians (or indeed, another member of the Troop) had been killed was undoubtedly genuine.⁴⁶⁸

EKIA 4 had an ICOM

92. EKIA had an ICOM, which is shown in the SSE photographs. The photographs corroborate the evidence of the Applicant and Person 11 that the person who was engaged was a spotter who was carrying an ICOM.
93. The Respondents allege that Mr Roberts-Smith recovered an ICOM from the insurgent but that instead of handing it over to Person 26, either he or Person 11 retained it for use as a "throwdown". Neither Mr Roberts-Smith,⁴⁶⁹ Person 11⁴⁷⁰ nor Person 56⁴⁷¹ recalled that an ICOM had been recovered from the insurgent killed across the river. Person 4 was the only witness who recalled that an ICOM was recovered and in this respect, his evidence is consistent with the OPSUM,⁴⁷² which recorded that a weapon, a PCD, two sim cards and an ICOM were recovered from the insurgent killed across the river. Although the OPSUM was a contemporaneous document, there is reason to doubt its accuracy as it did not record that detonators or a DET cord were recovered from that insurgent. Each of Mr Roberts-Smith and Person 11 recalled that detonators were recovered from that insurgent. Each of Mr Roberts-Smith and Person 11 noted that such a discovery was unusual as detonators were difficult for the insurgents to get hold of.⁴⁷³ Person 4 recalled that a piece/length of DET cord was recovered.⁴⁷⁴ That the OPSUM omitted an item or items that three of the patrol members recalled is indicative of human error in the reporting. Person 11 said that the list of equipment did not accord with his recollection.⁴⁷⁵ It is also relevant to note that a separate operational document did not record that an ICOM was recovered from the insurgent killed across the river.⁴⁷⁶
94. Person 4's explanation that the ICOM that was photographed with EKIA 4 was a waterlogged, throwdown that had been retrieved from another insurgent who was killed by the Applicant earlier in the mission was fanciful and should be rejected by the Court. *First*, the photographic imagery does not reveal the ICOM to be wet or foggy. It was obviously tattered and blood stained, but not waterlogged. *Second*, Person 4 said in cross-examination, inconsistently with his claim that the ICOM was a throwdown, that the items that were recovered from the EKIA engaged across the river, which

⁴⁶⁷ T229-230 (BRS).

⁴⁶⁸ T223 L25; T224 L14-16 (BRS).

⁴⁶⁹ T236 L7-12 (BRS).

⁴⁷⁰ T5667 L30-35 (P11).

⁴⁷¹ T4748 L25-30 and T4794 L16-19 (P56).

⁴⁷² Exhibit R11, p 3.

⁴⁷³ T236 L10-15 (BRS) and T5367 L33-40 (P11).

⁴⁷⁴ T2797 L23 (P4).

⁴⁷⁵ T5669 L32-39 (P11).

⁴⁷⁶ Ex A10, Tab 33, para 6.

included an ICOM, were placed in an evidentiary bag by Person 11 and handed over to the Troop Sergeant.⁴⁷⁷

95. Person 4's evidence about the equipment being handed over to the Troop Sergeant was largely consistent with the evidence of the Applicant and Person 11, although neither the Applicant nor Person 11 said that an ICOM was recovered from the EKIA engaged across the river. The equipment was promptly handed over to the Troop Sergeant for intelligence gathering purposes and safekeeping and was consistent with the Troop's standard operating procedure for dealing with equipment recovered from insurgents killed in action.

The overwatch photo corroborates the Applicant's case

96. The photograph of Darwan taken from the overwatch position is a critical item of evidence. As discussed elsewhere, the metadata suggests it was taken at 12:26pm on 11 September 2012, but this cannot be correct because Turn 2 had departed at 1120DE and the photograph depicts at least one and possibly two soldiers standing on the roof of the southernmost compound in the village. Although Mr Roberts-Smith could not remember which member/s of his patrol were standing on the roof, he did accept that the soldiers in that photograph were probably members of his patrol.⁴⁷⁸ The photograph was clearly taken at a time when Mr Roberts-Smith's patrol had reached their limit of exploitation towards the end of the mission and prior to their move to the extraction zone. The photograph does not reveal the presence of any person in the vicinity of that compound other than one or two persons standing on the roof of that compound.⁴⁷⁹ Nor does it reveal the presence of one or more donkeys in the vicinity of that compound, inconsistently with the evidence of Mangul,⁴⁸⁰ Hanifa⁴⁸¹ and/or Person 4.⁴⁸² It was put to Person 11 that there was a donkey located just outside the last compound. He denied any recollection of the presence of a donkey.⁴⁸³
97. The photograph is important for another reason. It shows that the overwatch team had a clear view of where Ali Jan is alleged to have been kicked off a cliff. It also shows that the overwatch team had a clear view of the creek bed at the base of the cliff, where it is alleged Person 4 and Person 11 dragged Ali Jan's body. There is no evidence that any member of the overwatch team observed any illegal conduct by any member of the Applicant's patrol on 11 September 2012.

The alleged assault and execution would have been observed by others

98. It is improbable that there is no other Australian military eyewitness to the alleged assault and execution other than Person 4. The alleged assault, involving a brazen act of kicking a handcuffed Afghan off a cliff, followed by the dragging of the wounded man by two Australian soldiers across an open creek bed, would have been observed by the overwatch team, whose function was to observe the mission and provide fire support if required,⁴⁸⁴ and who, according to Person 7, was sufficiently attentive to have observed one squighter leaving the green and crossing the river before losing sight of

⁴⁷⁷ T2797 L22 and T2925 L23-35 (P4).

⁴⁷⁸ T243 L19-28 (BRS).

⁴⁷⁹ T243 L19-28 (BRS).

⁴⁸⁰ T1067 L13-25 (Mangul).

⁴⁸¹ T942 L0-3 (Hanifa).

⁴⁸² T2621 L27-31 (P4).

⁴⁸³ T5754 L14-16 (P11).

⁴⁸⁴ Closed Court Transcript 16 March 2022, T7 32-35 (P7) (redacted).

him.⁴⁸⁵ The distance from the Helmand river to the observation post is self-evidently greater than the distance between the southernmost compounds in the village and the observation post.⁴⁸⁶

99. The alleged fall down a cliff, the dragging and the execution would also have been observed by any other Australian soldier who may have been in an elevated position either adjacent to the creek bed or in the creek bed to the north of where the alleged execution occurred, including the hut in the creek bed adjacent to the HLZ. At about the time of the alleged execution, which occurred in the minutes prior to the Turn 2 extraction, the FE Alpha teams would have been moving from the village into the HLZs located in the creek bed.⁴⁸⁷ As Person 35 explained, it was not safe to linger at the HLZ for an extended period of time,⁴⁸⁸ so the movement of the patrols from the village to the HLZs in the creek bed would likely have been conducted at about the time when the spotter was engaged, a matter of minutes prior to the Turn 2 extraction. On the evidence of the Afghan witnesses, there were a large number of Australian soldiers in the vicinity of the alleged assault and execution, far exceeding those who were actually members of his patrol. Person 56, who said he did not see or hear the engagement from his position in the hut in the creek bed, also said that there was another regiment member with him in the hut.
100. It is improbable that the alleged assault and execution of Ali Jan was not observed by the aerial assets that were scanning the extraction zones for signs of a threat. See Applicant's Closed Court Submissions at paragraph B17. Unlike the spotter who was concealed in the cornfield, the alleged cliff kick and dragging of Ali Jan occurred in the open, and in full view of anyone who had a clear line of sight to that part of the village, including the overwatch team and the aerial assets.
101. There is a high likelihood that the alleged assault and execution would have been observed by either the aerial assets, the overwatch team or other soldiers on the ground.

Integrity of the Documentary Record

102. The Respondents allege that the Mr Roberts-Smith fabricated his account of an engagement in the cornfield at the post debrief consolidation at 1437DE on 11 September 2012. The implication is that this fabricated account explains the reason why the contemporaneous documents refer to four EKIA at Darwan (including the account of the cornfield engagement) and do not otherwise refer to the circumstances of the death of the person the Respondents allege was Ali Jan.
103. On this version of events, the other patrol commanders at the post debrief consolidation would have had to have accepted Mr Roberts-Smith's wholly fabricated version of the events shortly before the departure of Turn 2. This seems unlikely. Enough persons outside of his patrol, including the members of the overwatch team would have seen and/or heard sufficient of the relevant conduct alleged by the Respondents, for the patrol commanders at the meeting to know enough to immediately reject Mr Roberts-Smith's account.
104. The same time chat inserts this sentence immediately before the account of the cornfield engagement these words "*A significant amount of ICOM traffic indicated that INS were attempting to co-ordinate an attack against the FE.*" That is not something Mr Roberts-Smith could have personally known. It was obviously something that was thought to be relevant in explaining this particular engagement. Unless some kind of conspiracy is alleged, it is not clear how such details (supportive of the Applicant's version) can do anything other than corroborate his account.

⁴⁸⁵ T3610 L42-44 (P7).

⁴⁸⁶ Ex R2.

⁴⁸⁷ T3612 L35-39 (P7).

⁴⁸⁸ T5206 L9-10 (P35).

105. See Applicant's Closed Court Submissions regarding Defence document at paragraphs B19 to B24.
106. ICOM traffic (that is, radio communications among insurgents reporting on the disposition of the Task Force) was recorded in the vicinity of Darwan during that mission.⁴⁸⁹ This is consistent with the presence of spotters in and around the village that day. Air crews reported observing a spotter with an ICOM during the transit back from Darwan to Tarin Kowt.⁴⁹⁰ There was nothing remotely improbable about a spotter with an ICOM radio hiding in or close to the village that morning.
107. Mullah Ghafur, a Taliban commander carrying a Kalishnikov had been killed by the Mr Roberts-Smith earlier in the morning. The enemy presence in Darwan was clear and obvious. Person 4 said that the general area in which the village was located was "quite non-permissive" meaning that there was a lot of enemy around and a "lot of spotting at work."⁴⁹¹

It is improbable that Mr Roberts-Smith or Person 11 chose to keep a throwdown for later use

108. It is implausible that Mr Roberts-Smith or Person 11, when handing over the items recovered from the EKIA to the Troop Sergeant for processing, opportunistically chose to retain one item of equipment on the chance that Mr Roberts-Smith or someone in his patrol would need to conceal an unlawful execution of a civilian later in the mission. This chain of reasoning, which the Respondents urge the Court to accept, is inconsistent with the inherent probabilities of the situation. The objective was to capture or kill Objective Jungle Effect. He was on the JPEL. See Applicant's Closed Court Submissions at paragraph B25. A throwdown was not required. Just as members of society do not ordinarily engage in criminal conduct, members of the armed forces do not ordinarily deliberately kill innocent civilians and therefore do not require throwdowns to legitimise what are otherwise unlawful kills.

It is improbable that no one else saw Mr Roberts-Smith or Person 11 carry an ICOM as a throwdown

109. Further, ICOMs are not inconspicuous – the antenna is protuberant. It is improbable that the ICOM would not have been observed by the Troop Sergeant, when the other items were being handed over to him or another member of the Troop, as the Applicant's patrol moved through the village and met up with other patrols during the clearance phase. To put it another way, it is highly likely that if Mr Roberts-Smith or another member of his patrol had carried an ICOM during the clearance of the village, some other member of the Troop would have observed and commented upon this item of equipment. Person 7 said that he saw Mr Roberts-Smith and his patrol in the village after Person 7's patrol had finished clearing the compounds that were assigned to them.⁴⁹² He said that Mr Roberts-Smith was wet.⁴⁹³ Person 16 saw Mr Roberts-Smith and saw that he was wet from the waist down.⁴⁹⁴ Person 35 also saw Mr Roberts-Smith and his patrol in the village after he had swum across the Helmand river.⁴⁹⁵ All of these witnesses observed that Mr Roberts-Smith was wet or soaking wet from the waist down. Person 35 recalled that Mr Roberts-Smith showed him the weapon that was recovered from the insurgent killed across the river.⁴⁹⁶ None of them said that they observed that Mr Roberts-Smith or Person 11 was carrying a Taliban issued ICOM as a throwdown. One might reasonably expect someone to have observed this had Mr Roberts-Smith or Person 11 been carrying an ICOM.

⁴⁸⁹ Ex A10, Tab 33, para 17.

⁴⁹⁰ Ex A10, Tab 33, para 14.

⁴⁹¹ T2942 L5-6 (P4).

⁴⁹² T3611 L6-10 and T3612 L7-9 (P7).

⁴⁹³ T 3611 L42-T3612 L5 (P7).

⁴⁹⁴ T1812 L12 (P16).

⁴⁹⁵ T5205 L16-20 (P35).

⁴⁹⁶ T5205 L24-27 (P35).

110. In addition, following the handing over of equipment to the Troop Sergeant, it is improbable that no other member of Mr Roberts-Smith's patrol, including Person 4, who was the 2IC, Person 56 or Person 47, noticed that Mr Roberts-Smith or Person 11 had opportunistically retained an ICOM for the remainder of the mission and said nothing about it. Neither Person 4 nor Person 56 gave evidence that they saw Mr Roberts-Smith or Person 11 carry a Taliban issued ICOM as a throwdown during the mission in Darwan. Again, one might reasonably expect that Person 4 or Person 56 observed this had Mr Roberts-Smith or Person 11 been carrying an ICOM.

The scanning capabilities of the aerial assets were not infallible

111. The ability of aerial assets or an overwatch team to detect a spotter in the vicinity of an extraction point was not infallible, as demonstrated by the fact that the FE Alpha was attacked on extraction on four or five occasions during the deployment in 2012.⁴⁹⁷ Person 11 said that it was his experience that "we had been heavily engaged upon extraction" despite "best efforts to clear [the] areas."⁴⁹⁸ On one occasion, the Troop Commander was shot and wounded during an extraction.⁴⁹⁹ See Applicant's Closed Court Submissions at paragraph B26. Anyone observing from the air would have had difficulty identifying a person wearing khaki green clothing among the vegetation. It is, however, improbable that the aerial assets or the overwatch team would have on the one hand, detected a camouflaged spotter concealed in thick vegetation in the creek bed and on the other, failed to observe a PUC being kicked off a cliff, dragged across an open creek bed and then executed. The problem with the submission at RS Section VI [119] to the effect that the overwatch team could have easily missed the alleged cliff kick but would not have missed the spotter, is that the cliff kick took place in full view of their position. The spotter would have been attempting to conceal himself in the vegetation.

The alleged causes of the wounds on EKIA 4 are speculative

112. The Court cannot make a finding based on the photographic imagery of EKIA 4 about the likely cause or causes of the observable wounds to the person's face or to his body, other than that he was shot. The Respondents allege that the observable wound to the face and mouth was caused by an impact against rocks as the person fell down a cliff. There are other reasonable possibilities. The wounds may be entry wounds caused by a bullet passing at an oblique angle to the face. Or they may be exit wounds caused by a bullet fragmenting after entering the body. Each of the Afghan witnesses recalled that Ali Jan had been shot in the head and/or jaw.⁵⁰⁰ Alternatively, the person's mouth may have impacted the ground as he fell *in situ* after being shot in the cornfield. The Respondents have not adduced any forensic evidence about the likely cause of injuries. In the absence of such evidence, the Court could not be satisfied that the circumstances raise a more probable inference in favour of what is alleged – namely, that the face wounds on EKIA 4 were caused by an impact against rocks as the person fell down a cliff, rather than by any other means, such as a direct or indirect impact from a bullet.
113. Likewise, the suggested explanations for the wounds to the left arm or for the partial absence of blood on the left wrist of the EKIA (see RS Section VI [136], [137]) are plainly speculative. Common sense would suggest that there may be other possible causes of those matters, other than the fact that the person was flexi-cuffed behind his back at the time he was shot. Mr Roberts-Smith said the level of trauma to the person's arm depended "*on where his arms were when we firing bullets at him, and the*

⁴⁹⁷ T244 L8-13 (BRS). Closed Court Transcript 22 June 2021 T48 L46-T49 L2 (BRS) (redacted).

⁴⁹⁸ Closed Court Transcript, 12 May 2022, T16 L1-5 (P11) (redacted).

⁴⁹⁹ T244 L8-13 (BRS).

⁵⁰⁰ T964 L22-27 (Hanifa); T1087 L3-5 (Mangul); T1153, L26-27 (Shahzada).

amount of bullets that we had fired means that that wound is totally possible.”⁵⁰¹ Mr Roberts-Smith also rejected the proposition that because part of the person’s wrist was not covered in blood, he must have been wearing flexi-cuffs. He said if the person had been wearing flexi-cuffs, you would expect to see an absence of blood around the entire area, and not just a small part of the person’s wrist.⁵⁰² With respect, that is a matter of common sense.

114. Although all reasonable hypotheses consistent with the non-existence of a fact do not need to be excluded before a fact can be found,⁵⁰³ the probable cause of the wounds to the left arm and the partial absence of blood on the left wrist of the EKIA can only be resolved by resort to conjecture. The Court could not be satisfied on the balance of probabilities that they were caused in the manner alleged by the Respondents.

EKIA 4 was not “dusty”

115. Had EKIA 4 rolled down a cliff/dirt slope and been dragged across a sandy creek bed as alleged, then it would be reasonable to expect that a substantial amount of dust, sand and/or dirt, would have collected upon that person’s clothing. Indeed, if the person’s face had struck a rock before he landed in the dry creek bed, where he attempted to sit up and then fell down again,⁵⁰⁴ it would be reasonable to expect to see dust, sand and/or dirt from the creek bed mixed among the congealed blood on the person’s mouth and face. That would be consistent with ordinary human experience. Person 4 alleged that the person was “quite dusty”⁵⁰⁵ (see RS Section VI [104]). Each of the Afghan witnesses claimed that Ali Jan had dirt/dust on his face.⁵⁰⁶ To a limited extent only, this evidence was corroborated by the SSE photographs. There was some grass on the face and clothing of EKIA 4, which is consistent with him having been rolled over from a face-down position in the cornfield so that his face was visible for the SSE photographs.⁵⁰⁷ However, the SSE photographs also reveal that the face and clothing of EKIA 4 was largely free of dust, sand and/or dirt. The absence of a substantial amount of dust, sand and/or dirt on EKIA 4 corroborates the Applicant’s and Person 11’s evidence that the person was not kicked off a cliff/dirt slope or indeed dragged across the sandy creek bed, but rather had concealed himself in the cornfield before he was engaged.

If fighting age males had been found over an hour before extraction, they would have been processed and moved to the PUC holding area

116. The fact that Mr Roberts-Smith may be wrong about the length of time that his patrol spent at the southernmost compound does not mean that his evidence about that part of the mission is deliberately false. His evidence in chief was that “*We sat there for a while, actually. It would have been at least 10 minutes or more. And then we got the call to extract.*”⁵⁰⁸ In cross-examination, Mr Roberts-Smith accepted that his patrol would have finished clearing the southern compounds at approximately 9:45DE,⁵⁰⁹ which meant that his patrol would have been waiting at the last compound for a period approximately an hour and 15 minutes before moving to the extraction zone.

⁵⁰¹ T504, L30-32 (BRS).

⁵⁰² T502, L30-33 (BRS).

⁵⁰³ *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd* [2008] NSWCA 246 at [55].

⁵⁰⁴ T2627 L4 (P4).

⁵⁰⁵ T2626 L40 (P4).

⁵⁰⁶ T963 L39-41 (Hanifa); T1087 L20 (Mangul); T1153 L37 (Shahzada).

⁵⁰⁷ T245 L34 and L41 (BRS).

⁵⁰⁸ T243 L30-32 (BRS).

⁵⁰⁹ T482 L23-24 (BRS).

117. Mr Roberts-Smith did not recall being there this long⁵¹⁰ and nor did Person 11.⁵¹¹ That they may have been mistaken about this minor detail is, of itself, not unsurprising, but it does not make it more likely than not that they are lying about what the Respondents allege occurred at that compound (and thereafter). Instead, it corroborates Mr Roberts-Smith's evidence (and Person 11's) that there was no fighting aged male in the last compound for the reason described below.
118. Mr Roberts-Smith said if PUCs had been located in the last compound, he and his patrol would have moved them to the PUC holding area and dropped them off there, so that they could be guarded up to the very last minute to minimise the risk that they might attack during the extraction phase.⁵¹² This was the Troop's practice. Person 35 corroborated this practice. He said that after locating and placing under control four fighting age males at a compound in Darwan, his patrol accompanied the PUCs to the centralised PUC holding area.⁵¹³ Person 32 gave similar evidence about dropping off PUCs that were picked up by his patrol.⁵¹⁴ The practice was also corroborated by Person 14 in relation to the mission in Chenartu. There, after having located PUCs, Person 14 and Person 27 led them to the tactical questioning area.⁵¹⁵
119. Had Mr Roberts-Smith encountered fighting aged males in the southernmost compound of the village when there was more than an hour to go before extraction, there would have been no reason for him not to move them back to the PUC holding area as he said he would have done.⁵¹⁶ In other words, it would have been highly unlikely that Mr Roberts-Smith elected to abandon the usual practice of moving PUCs to the PUC holding area for processing and safekeeping in favour of keeping them located close to his extraction zone in the last compound of the village, especially when it would have only taken a few minutes to walk from the southern end of the village back towards the PUC holding area in circumstances where there was more than an hour to pass before extraction.
120. Another matter points to the unlikelihood that Mr Roberts-Smith's patrol PUC'd fighting aged males in the last compound. The Troop's practice was to record each of the PUCs during that mission. The PUCs were photographed and identified by reference to the callsign of the member who PUC'd them as well as by reference to the compound in which they were located.⁵¹⁷ If PUCs were taken in the last compound, it would be reasonable to expect that photographic evidence corroborating that fact exists. Yet no such photographic evidence exists, despite exhaustive production by the Department of Defence. It is no answer to suggest that such photographic evidence may once have existed but was subsequently deleted. There is no obvious reason why photographic records of Hanifa, Mangul or Shahzada – if they did exist – would have been deleted by Mr Roberts-Smith's patrol.

The identification of Ali Jan was unreliable

121. The identification evidence of the Afghan witnesses was unreliable. The only evidence that EKIA 4 was a man named Ali Jan was given by the Afghan witnesses who each identified him from a photograph. The Court should not accept that identification evidence for two reasons.
122. *First*, in court identification evidence from a photograph is notoriously unreliable because it is usually performed in circumstances that strongly suggest the answer that is ultimately given.⁵¹⁸ That was

⁵¹⁰ T485 L20-21 and L32-33 (BRS).

⁵¹¹ T5727, L41-T5728, L17 (P11).

⁵¹² T248 L4-23 (BRS).

⁵¹³ T5205 L1-7 (P35).

⁵¹⁴ T5877 L17-19 (P32).

⁵¹⁵ T1432 L32-T1433 L19 (P14).

⁵¹⁶ T248 L16-22; T371 L29; Closed Court transcript 22 June 2021 T33 L13-14 (BRS).

⁵¹⁷ See Ex R22, R23, R24, R25, R26, R27, R28 and R29.

⁵¹⁸ *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72 at [22].

precisely what occurred here. Each of Hanifa, Mangul and Shahzada identified Ali Jan from a photograph of a deceased person (EKIA 4) lying in a cornfield. In each case, the identification was made after the witness had just described the events surrounding Ali Jan's alleged assault and execution.⁵¹⁹ Being presented with an image of a deceased Afghan male with bullet wounds lying in a cornfield at this juncture in their evidence strongly suggested the answers that were ultimately given about the identity of the person shown in the photograph. Although each of the witnesses claimed to know Ali Jan, which if accepted, would render their identification less prone to error, they had not seen him alive in nine years. Further, as substantial portion of EKIA 4's face, mouth and right eye is obscured by blood. As Kirby J observed in *Smith v The Queen* (2001) 206 CLR 650; [2001] HCA 50 at [55], even relatives can make mistakes of identification from photographs.

123. See Applicant's Closed Court Submissions at paragraph B27.

K. CONCLUSION

124. For the reasons identified above, the Respondents have failed to establish their serious allegation that Mr Roberts-Smith assaulted a person under control by kicking him off a cliff during the mission at Darwan and then entered into an arrangement or understanding with Person 11 to shoot dead that person.

⁵¹⁹ T964 L40-45 (Hanifa); T1087 L39-46 (Mangul); T1154 L24-26 (Shahzada).

SECTION VII: CHENARTU – 12 OCTOBER 2012

A. INTRODUCTION

1. This allegation of the execution of an unarmed PUC on a mission in Khaz Uruzgan on 12 October 2012 appears at particulars [118] to [122] of the PoT. The allegation depends entirely on the evidence of Person 14 who cannot be relied upon as a credible and/or reliable witness. For reasons which have not been explained by the Respondents, Persons 12 and 13 were not called to give evidence. It is to be inferred that their evidence would not have corroborated Person 14's version of events.
2. This allegation relies on Mr Roberts-Smith being guilty of the war crime of murder in pursuant to s.268.70 of the Code. The allegation concerns events which took place on or about 12 October 2012 involving Mr Roberts-Smith and the troop of which he was a member.
3. In summary, it is alleged that the troop was on a mission and towards the end of that mission, Mr Roberts-Smith, an interpreter Person 13 and members of the Afghan Partner Force including Person 12 were questioning an Afghan male in a compound.
4. While this was happening, it is alleged that Person 14 noticed something which looked like a wall cache. Person 14 kicked it and a number of weapons fell out. Mr Roberts-Smith is alleged to have seen this and then said to Person 13, in substance, "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, it is then alleged that a member of the Afghan Partner Force then shot the Afghan male four to six times ([119] PoT).
5. The Respondents' pleading suggests that Mr Roberts-Smith was able to detain the Afghan male and refers to circumstances which are said to support this inference ([120] PoT).
6. The legal basis for Mr Roberts-Smith's liability in relation to this alleged murder, based on the particulars, is unclear. The particulars of this allegation do not assign to Mr Roberts-Smith any form of joint criminal enterprise liability. The particulars contend that by his conduct with respect to the Afghan male, Mr Roberts-Smith was complicit in and responsible for murder ([121]-[122] PoT). However, the basis of complicity is not particularised at all. The Respondents' pleading fails to satisfy the first essential element of the offence under s 268.70.
7. Aside from the deficiency in the pleading of what is a serious criminal allegation, the Respondents have failed to establish the allegation on the balance of probabilities for fundamental reasons including:
 - (a) The contemporaneous documents are inconsistent with Person 14's allegation.
 - (b) Each of the three other persons whom Person 14 alleged to have been present at the incident and who gave evidence in this trial (being Persons 11, 32 and Mr Roberts-Smith) each said no such incident occurred.
 - (c) Mr Roberts-Smith would have had to have ordered this summary execution in front of not just at least one of his own patrol members, but Persons 32, 14 (not a friend or supporter), two engineers, an interpreter and about a half dozen NDS soldiers. The only motivation posited for this peculiar action is Mr Roberts-Smith's annoyance at Person 14's discovery of a cache outside the compound in which the execution occurred.

8. However, a proper analysis of Person 14's allegations, as compared with the official documentary records, reveals that the allegation is in fact highly improbable and indeed untenable:
- (a) If Person 14's evidence is to be accepted, then the Court would have to accept that two engineers who inspected the cache discovered by Person 14, failed to report the cache, failed to photograph it, or otherwise acknowledge its existence in any way in circumstances where they had reported upon, photographed and exploited a nearly identical cache earlier in the mission. Person 14 was adamant that the cache he found was not the one referred to in the official documents.
 - (b) If Person 14 is correct, the engagement captured in the official documents at 1405DE – including particularly the linked discovery of the cache and the presence of the engineers – must have been fabricated. This is because there is no doubt that the cache located in the compound where this engagement occurred was photographed and reported upon. It is not plausible that Mr Roberts-Smith himself (even if he was enthusiastically propounding falsehoods) could have managed such dishonest manipulation of the records without several other actors, including the troop commander and the engineers. There would need to have been a conspiracy involving a number of persons and the Respondents have entirely failed to explain how this could have happened.
 - (c) If Person 14 is correct, the time of the relevant engagement must have been moved from when he says it actually happened (shortly before wheels up at about 1539DE) back to 1405DE (just minutes after wheels down) in a series of official documents. Once again, even if Mr Roberts-Smith was providing false information, it is not plausible that the records could have been manipulated to such an extent without the co-operation of several other persons. The Respondents at RS Section VII [4] assert that a false account was inserted into the OPSUM which brought forward the engagement. RS Section VII [46] describes the relevant part of the OPSUM as a “*cover up*”. The Respondents do not explain how Mr Roberts-Smith managed single handedly to produce this result, or if other persons were involved, their identities and the acts they undertook. For instance, there is no evidence as to what he said at the post mission debrief. To make good their case, the Respondents would have to prove that Mr Roberts-Smith provided this false account and that all those present simply acquiesced and that accordingly the falsity was incorporated into the official records. There has been no attempt to do this.
 - (d) If Person 14's account is correct then after he received notification that the helicopters were inbound (at about 1534DE) he would have had to have travelled to the TQ area, travelled to the next compound up the hill, observed Mr Roberts-Smith undertake questioning of a PUC, spoken with Person 32, discovered the cache and handed it over to engineers and witnessed the execution, all within five minutes because the same time chat records that the second EKIA was reported at 1539DE. The timeline is not feasible.
9. Approximately half of the Respondents' submissions on this alleged murder RS Section VII [47]-[89] – are devoted to the issue of whether Person 12 was in Chenartu. That issue is dealt below with at the end of this section. For present purposes, it is suffice to note that it is not clear based on the evidence before the Court that Person 12 was present in Chenartu. However, to some extent the issue is a distraction. Even if Person 12 was present on the mission that day the Respondents have failed to discharge their onus on this allegation for the reasons outlined above.

B. THE DOCUMENTARY EVIDENCE CONCERNING EVENTS ON 12 OCTOBER 2012

10. The “*TF 66 OPSUM*” for the mission (Ex. A 10 Tab 46) was completed at 2010DE that evening.⁵²⁰ In the summary on the first page it referred to “*2 EKIA*”. In the summary at the top of the second page it referred to 28 ISAF personnel and 16 ANSF (partner force) deployed on the mission. The target was “*Stolen Idea*” or the insurgent Zindani.
11. The OPSUM provides the following chronology:
 - (a) Turn 1 had wheels down at 1329DE and Turn 2 had wheels down at 1353DE.
 - (b) At 1353DE a military working dog was injured.
 - (c) At 1405DE (that is within 36 minutes of the first turn landing and 12 minutes of the second turn) an engagement is recorded. The key features of this description of this engagement include the following:
 - (i) A partner force team makes entry into a compound of interest and identifies an insurgent armed with an AK 47.
 - (ii) The OPSUM records that “due to the immediate threat to force, the NDS-W member engaged the INS with SAF resulting in 1 EKIA, BDA of the compound recovered 1 x AK-47, 1x Binoculars, 3 x RPG-7 rockets and 4 x RPG Rocket motors.”

That is, the document is clear that a substantial cache was recovered from the site of the same compound in which this EKIA was engaged.
 - (d) At 1408DE the OPSUM records that the objective compound of interest has been secured and that “*wider area clearance and SSE ongoing, a number of POI being screened*”.
 - (e) At 1410DE the OPSUM records a second engagement. This engagement began with the use of small arms fire against an insurgent armed with an AK-47. The insurgent took cover in a nearby compound. A fragmentation grenade was then used to kill the insurgent before entry was made. The grenade detonation is recorded as having started a small fire.

This engagement at 1410DE – with the grenade and the fire – plainly does not appear to be the incident that is the subject of the allegation of Person 14. If this OPSUM records anything resembling the allegation of Person 14, the only engagement or incident that qualifies is the one at 1405DE.
 - (f) At approximately 1530DE the OPSUM records that clearance, SSE and KLE is complete. It refers to a rummage search producing minor damage to property resulting in a KLE and compensation of US \$60 being paid. The OPSUM also records that 2 x POI had been detained based on behaviour, association with compounds of interest and prevailing circumstances at time of capture. Finally, the entry for 1530DE records that the FE have moved to extraction locations.
 - (g) The OPSUM records the departure of Turn 1 for Tarin Kowt at 1551DE (carrying the two prisoners) and the departure of Turn 2 at 1617DE. Turn 1 is recorded as wheels down at Tarin

⁵²⁰ See the second entry in the first column on the first page.

Kowt at 1601DE. Following this the OPSUM records, at 1621DE two detainees are handed over to “ISA”. Turn 2 is recorded as wheels down at Tarin Kowt at 1628DE

12. The section of the OPSUM headed “*Significance*” describes the target, a Mr Zindani, as a mid-level commander.
13. The section of the OPSUM headed “*OP Summary*” relevantly contains the statement “*Clearance resulted in 2 EKIA and INS weapons recovered to MNB-TK*”. It also records that the NDS-W “*significantly assisted during the operation ... CF mentors worked closely with NDS-W throughout all phases with no issues whilst on the OBJ.*”
14. The section of the OPSUM headed “*Commanders Comments*” discusses the purpose of the operation. It records that EKIA 2 has been identified as a name match for Objective Stolen Idea. The Commander also comments that the NDS performed “*to a very high standard during the operation conducting effective COI clearances and engaging the enemy*”.
15. See Applicant’s Closed Court Submissions at paragraphs C1 to C6.
16. As to the photographic evidence:
 - (a) Ex. R37 contains photographs of the two EKIA from 12 October 2012.⁵²¹ Ex. R101 is the declassified version of the same photographs.
 - (b) Ex. R38 contains six photographs of the cache which also appear in the Exploitation Report (a sensitive document) at Tab 50 of Ex. A10. Ex R100 is the declassified version of the same photographs. The metadata suggests the photographs were taken between 3.24 and 3.26 pm, (that is before the call for extraction that day).
 - (c) Ex. R39 contains two photographs (with metadata) taken on 12 October 2012 from the air.

C. THE EVIDENCE OF PERSON 14

Person 14’s allegations at the trial

17. According to Person 14 the mission that afternoon unfolded in the following manner:
 - (a) His patrol, including Mr Roberts-Smith and Persons 4, 11 and 27 was tasked as a “*cordon cut off/reserve element.*”⁵²²
 - (b) At the time the patrol was about to exit the helicopter he thought he heard Mr Roberts-Smith say “*Fuck the cordon – We will head for the VRF*”. Person 14 asked Person 27 if this is what Mr Roberts-Smith said and he replied that he did not know.⁵²³ Person 14 conceded that it was not clear if Mr Roberts-Smith actually said that he was moving the cordon up to the compound of interest.⁵²⁴
 - (c) Upon disembarking Mr Roberts-Smith and the others began to run. Person 14 ran after them. As the other patrol members passed a large compound, Person 14 observed 3-4 males of fighting age in a room through an open door. He called for support from Person 27. He called

⁵²¹ Closed Court Transcript 23 June 2021 T38 L1-22 (BRS) (confirming the nature of the production).

⁵²² T1430 L25-42, T1431 L6-17 (P14).

⁵²³ T1431 L28-44, T1742 L24-44 (P14).

⁵²⁴ T1743 L1-9 (P14).

out to the men who behaved compliantly. Person 14 went through the PUC procedure but he did not handcuff the men.⁵²⁵ Person 14 stopped to kick at a barn door but received no response. He and Person 27 lined the PUCs up and led the PUC train to the TQ area.⁵²⁶

- (d) On the way they met another Australian soldier. Person 14 could not recall his name. They also met Person 13, an interpreter. Person 14 asked the Australian soldier to take the prisoners to the TQ room. Person 14 was not sure if Person 27 went with the PUCs or otherwise left at this point. Person 14 remained “*hanging out*” and chatting with Person 13.⁵²⁷ He did this for about 15 minutes.⁵²⁸
- (e) Next, Person 14 recalled he received a request on the radio to proceed to the TQ area. The walk took about a minute and a half. He walked up the hill to the TQ area and observed multiple Australian soldiers, including Mr Roberts-Smith. Mr Roberts-Smith appeared to be leading the conduct of the TQ. Mr Roberts-Smith asked Person 14 about the identity of one of the prisoners and Person 14 confirmed he had found him earlier.⁵²⁹
- (f) Person 14 then proceeded back down the hill to where he had been speaking with Person 13. Person 13 was no longer there. Person 14 remained sitting in the shade. After some time – perhaps 10-15 minutes – he heard that the first turn had left Tarin Kowt (see Applicant’s Closed Court Submissions regarding same time chat at paragraph C7). Person 14 believed there was 20-30 minutes left and that it was time to move to the landing zone and extraction point.⁵³⁰
- (g) Person 14 walked back up the hill (“*back up this hill, just trudging along there*”) to the TQ area. His patrol was not present. He asked after their whereabouts and was directed further up the hill. Person 14 recalled thinking “*Geez, okay. Like it was quite a steep hill. So I just kept walking up this hill and it’s kind of left the, it left the village area and turned into the dash, or you know more open terrain up an – up a steep incline. And there was a compound in the distance maybe 100-80 to 100 metres.*”⁵³¹

18. The critical allegations made by Person 14 commence upon his arrival at this compound higher up the hill. According to Person 14:

- (a) He arrived at the alcove to a compound. Person 32 was outside, leaning against a cut out and looking through a window. Two combat engineers were also outside in the courtyard, one of who was Person 34. Person 14 believed at this point the helos were perhaps 15-20 minutes away. He looked inside the compound and saw Mr Roberts-Smith, Persons 11, 12 and 13 and at least four partner force plus one Afghan male. Person 14 described him as having a beard, a white robe and a grey waist jacket. The male faced Person 14. Person 32 told Person 14 that “*they’re just questioning – questioning this bloke.*”⁵³²
- (b) Person 14 turned around and leaned back and looked out at the perimeter wall of the compound. He noticed a “*massive discolouration*” in the wall like it had recently been plastered with mud. He thought “*there’s a cache.*” He walked up to it and gave it two kicks. It was probably a metre wide and a half metre high. The wall disintegrated and revealed a weapons cache with

⁵²⁵ T1432 L 12-38 (P14).

⁵²⁶ T1432 L 32-T1433 L19 (P14).

⁵²⁷ T1433 L23-32, T1434 L26-39 (P14).

⁵²⁸ T1659 L36-43 (P14).

⁵²⁹ T1434 L34 -T1435 L19, T1661 L1-34 (P14).

⁵³⁰ T1435 L19- 27 (P14).

⁵³¹ T1435 L29-38 (P14).

⁵³² T1438 L39-T 1440 L 40 (P14).

other equipment. Two bags resembling rice bags contained bullets, binoculars, two RPG warheads with separated boosters, binoculars and rifles. Person 14 began pulling the material out but then the engineers took over.⁵³³ He definitely recalled them working on the cache.⁵³⁴

- (c) Person 14's evidence was that the photographs of a cache taken that day which appeared in the Defence documents were not photographs of the cache he had discovered.⁵³⁵ His evidence was that he had never seen photos of the items in the cache he discovered.⁵³⁶
- (d) Person 14 returned to the window. He heard Mr Roberts-Smith say to Person 13 in English "Tell him to shoot him or I will." Person 14 believed Mr Roberts-Smith had become aware of the discovery of the cache. As Mr Roberts-Smith spoke these words, Person 14 observed Mr Roberts-Smith point at Person 12. Person 13 did not relay the statement and looked at Mr Roberts-Smith insinuating "what?". Mr Roberts-Smith repeated the words. Person 13 in an Afghan dialect other than Pashtun told Person 12 something. Person 12 then turned to his soldiers and said something. One of the partner force soldiers, who had a balaclava around his nose, trained his suppressed M4 on the Afghan man and unloaded 5-8 rounds into the torso or chest of the Afghan prisoner. The Afghan dropped, and then two more rounds were fired into his head or neck area.⁵³⁷

Person 14 identified one of the two photographs of the EKIA produced by Defence from that day as being the Afghan that was shot.⁵³⁸

- (e) Neither Person 14 nor the other Australian soldiers said anything. They moved out of the compound and back to the VRI compound area for extraction. On the way down Person 14 ran into Person 26. He said "What happened to the fucking PUC?" and something like "the PUC count has already gone in and the helos are – helos are coming in." See the Applicant's Closed Court Submissions at paragraph C8. The OPSUM records only two detainees returned to Tarin Kowt. The degree of not inconsiderable uncertainty as at 1530DE is inconsistent with the Respondents' submission that an unexpected reduction in prisoner numbers late in the mission caused Person 26 or any other person concern.

Account provided to Chris Masters

- 19. Person 14 met with Mr Masters prior to his first IGADF interview on 4 April 2018.⁵³⁹
- 20. Person 14 told Chris Masters in or about early 2018 that after he and Person 27 had cleared the compound.⁵⁴⁰

"Caught up 20 mins later, R-S Tqing. Suspicious about one bloke and wanted to blow him away. P14 told him he was one he had PUCed in "the compound you bypassed" so had an alibi.

Then spotted discolouration on the wall."

⁵³³ T1440 L42-T1441 L18, T1667 L18-39, T1754 L1-27 (P14). Person 14 did not refer to the rifles as being part of the cache in his cross examination on 8 February 2022.

⁵³⁴ T1668 L42-43 (P14).

⁵³⁵ T1444 L16-45 (P14). See Ex. R100 as well as Ex. A10 Tab 50.

⁵³⁶ T1669 L11-18, T1755 L38-42 (P14). Closed Court Transcript 10 February 2022 T28 L23-36 (P14) (redacted).

⁵³⁷ T1441 L 19-1443 L 15 (P14).

⁵³⁸ T1445 L35-39 (P14). Ex. R101.

⁵³⁹ T1724 (P14).

⁵⁴⁰ Ex. A63 p. 2.

21. In other words at that time – the first time he made the allegation – Person 14 believed the discovery of the cache and the execution to have occurred only some 20 mins after he and Person 27 cleared the compound, which according to Person 14 occurred immediately or very shortly after alighting from the helicopter. The account also places the discovery of the cache and the execution at the TQ area itself and not at some other compound further up the hill. Person 14 seemed uncertain as to whether he told Masters about that other compound up the hill.⁵⁴¹ Person 14 denied telling Mr Masters that he spotted the discolouration at the place where Mr Robert-Smith was TQ-ing but the note is plain in its terms.⁵⁴² Mr Masters did not give evidence to confirm his note was inaccurate.
22. There is no mention in the notes of Mr Masters of there being two visits to the TQ area, or discussions with Person 13, or rests in the shade. There is no suggestion (and indeed the impression is clearly to the contrary) that the alleged execution happened towards the end of the mission.
23. The account has significant inconsistencies with the version given at trial. In particular the implication is that the discovery occurred earlier in the day.

Timing

24. Serious chronological problems afflict the evidence of Person 14 and in particular his evidence that the chain of events resulting in him leaving the shade (before moving to the TQ compound and then to the next compound where the cache discovery and alleged execution occurred) began after he found out the first turn had left Tarin Kowt. See the Applicant's Closed Court Submissions at paragraph C9.
25. It is clear that it would have taken some time – considerably more than just five minutes – for the following to occur:
 - (a) Person 14 to walk from the shade down the bottom – up to the TQ area – have a short conversation – and then walk further up the hill to the next compound. This is confirmed by Ex R102 (a closed court exhibit) where Person 14 marked the distance from Point C (the place where he spoke with Person 13 and relaxed in the shade) to Point D (the TQ area) to Point E (the compound where the alleged execution took place). The distances are not inconsiderable with a timeframe so short.
 - (b) Person 14 to have his conversation with Person 32 and observe Mr Roberts-Smith questioning the Afghan.
 - (c) Person 14 to discover the cache and hand it over to the engineers to exploit (he 'definitely' observed them working on the cache);
 - (d) Person 14 to hear the conversation preceding the execution and to observe the execution itself; and
 - (e) For Mr Roberts-Smith to report the execution.
26. See the Applicant's Closed Court Submissions at paragraph C10 Counsel for the Respondents suggested to Mr Roberts-Smith that the engagement recorded in the documents as having occurred at 1405DE in fact happened shortly before 1539DE.⁵⁴³ Putting aside the fact that Person 14's evidence is inconsistent with this because he said he discovered the cache and not the engineers, the Respondents'

⁵⁴¹ T1793 L15-22 (P14).

⁵⁴² T1792 L45-47 (P14).

⁵⁴³ Closed Court Transcript 23 June 2021 T42 L32-34 (BRS) (redacted).

case must be that somehow Mr Roberts-Smith managed to shift the time of the engagement (which he says he was not involved in at all but was undertaken by another patrol) in the official documents – that somehow the other patrol commanders and the ground commander present at the debrief just accepted this piece of deception – and that the engineers themselves also duly went ahead and prepared a report with an incorrect time. That is a highly improbable development.

The reliability of Person 14 as a witness

27. Person 14's account of this alleged incident is so inconsistent with the documentary records and so implausible that it cannot be relied upon by the Court to make the findings which the Respondents agitate in these proceedings. In particular it is highly improbable that Person 14 discovered a cache almost identical to one discovered earlier that day – yet the engineers who worked on the cache he discovered failed to report on it or photograph it – when they had reported upon and photographed the earlier cache and done a report on it. The clear probability is that there was only one cache.
28. Of course, (contrary to RS [90b]) Person 14 had a clear motive to invent his story about the cache. The Defence documents record (see the Applicant's Closed Court Submissions at paragraph C11). Accordingly, he has invented a story about the discovery of another cache. Given that the Respondents' Counsel put to Mr Roberts-Smith at the trial in June 2021 that the photographs of the cache discovered that day were photographs of the cache discovered by Person 14⁵⁴⁴ (something completely inconsistent with the evidence of Person 14 at the trial) it is likely the invention is fairly recent.
29. Even if Person 14 is not lying about the cache it is plain that at the minimum he is seriously wrong about the timing and mode of its discovery. This infects his whole allegation – indeed according to Person 14, it is the cache itself that so angers Mr Roberts-Smith as to influence him to order the execution of the prisoner.
30. Person 14's identification evidence as to the EKIA should not be accepted. Person 14 claimed to be able to identify the man who was shot in the compound. Yet he had seen this man for only second, through a window in October 2012. He could not recall the first time he had seen the relevant photograph but suggested it was on a storyboard in 2012 before amending this to the post-op.⁵⁴⁵ He could not recall if anyone was present when he was shown the photographs in 2012.⁵⁴⁶ The next time he saw the photographs was in 2022, in the week prior to him giving evidence.⁵⁴⁷ He thought the second photograph (of the body damaged by the fragmentation grenade) looked more familiar (despite identifying the other body as the person whose execution he actually witnessed)⁵⁴⁸. In the circumstances his identification is seriously compromised. It is not plausible that he could recall the face, clothing and features of this particular deceased Afghan when he had seen so many such bodies and photographs during his rotations (see the section dealing with memory below). In circumstances where the Respondents showed him the particular photograph in the week before the trial (and there is no evidence that this was done in any particular manner which might have made his view less compromised by suggestion), his evidence on identification of the body is next to worthless. The fact that he claimed to be 100% certain of his identification of the person in the photograph as the person shot in the compound⁵⁴⁹ only underscores the unreliability of Person 14's evidence generally.

⁵⁴⁴ Closed Court Transcript 23 June 2021 T41 L1-11 (BRS) (redacted).

⁵⁴⁵ T1763 L1-10 (P14), Closed Court Transcript 10 February T9 L41-T10 L15 (P14) (redacted).

⁵⁴⁶ Closed Court Transcript 10 February 2022 T10 L38-46 (P14) (redacted).

⁵⁴⁷ T1763 T15-45 (P14), Closed Court Transcript 10 February 2022 T11 L4-10, 41-46 (P14) (redacted).

⁵⁴⁸ T1763 L 40-45 (P14).

⁵⁴⁹ T1764 L1-12 (P14).

31. Other aspects of Person 14's account are doubtful. For instance:
- (a) The notion that he and/or Person 27 handed off three-five unhandcuffed PUCs to be transported to the TQ by a single Australian soldier is not probable.⁵⁵⁰
 - (b) It is not probable that Person 14 was contacted by his nickname on the radio when the standard operating procedure was to use call signs.⁵⁵¹
 - (c) See Applicant's Closed Court Submissions at paragraph C12.
32. There are other reasons to doubt the credit of Person 14. Chief among those reasons his account of W108 told to Chris Masters in February 2018 means he cannot be relied upon. He told Masters (as recorded about half way down the note which is Ex. A63 "*Whiskey 108/109 well remembered.*") Person 14 went on to described his patrol's advance and an engagement where he shot a man through a cornea. There follows this paragraph:
- E Troop went in. Person 5's patrol seen though the doorway of the next compound. RS had an M-14 and Person 4 a Minimi. Understood Person 4 had shot an old guy with a prosthetic leg.*
33. That is, four years before he gave evidence, when giving an initial account of these events at W108, Person 14 said nothing to suggest he had seen Mr Roberts-Smith throw down an object or a man and then shoot at it. He said nothing to suggest Mr Roberts-Smith had shot anyone, or directed Person 4 to shoot anyone. Indeed at that time he had believed Person 4 shot the man with the prosthetic leg! Person 14 denied saying these words to Mr Masters⁵⁵² but the record is stark and unambiguous and despite being a party, Mr Masters did not give evidence to explain away any error. The evolution in Person 14's evidence since that time is so dramatic that he simply cannot be relied upon.
34. Otherwise, the Applicant relies on Person 14's admission that he dishonestly signed a formal document which falsely claimed he had no contact with the media.⁵⁵³

Failure to Report

35. Person 14 accepted that in 2012 he had an obligation to report breaches of the ROE and that he regarded the obligation as serious.⁵⁵⁴ Person 14 agreed he did not report the incident to chain of command or his troop commander, troop sergeant, the sergeant major or to Person 6 with whom he was friendly. He first made the allegation in about April 2018 after his meeting with Mr Masters and Mr McKenzie.⁵⁵⁵
36. This is another matter that makes the account less probable. If such a cold blooded murder had occurred it is likely Person 14 would have told someone and his failure to report substantially increases the probability that the allegation is fabricated. It is also inescapable that after the passing of so many years his recollection becomes progressively more unreliable.

⁵⁵⁰ T1745 L 15-37 (P14).

⁵⁵¹ T1745 L 40 -T1747 L 10 (P14).

⁵⁵² T1794 L19-35 (P14)

⁵⁵³ Ex. A 59, Closed Court 9 February 2022, T9 L14-T10 L29, T12 L14-34. T14 L1-31 (redacted).

⁵⁵⁴ Closed Court Transcript 10 February 2022 T20 L36-40 (P14) (redacted).

⁵⁵⁵ T1760 L28-41, Closed Court Transcript 10 February 2022 T20 L42-T21 L9 (P14) (redacted).

Memory

37. Person 14 had participated in 8-10 strike missions during Rotation 18, including two with Mr Roberts-Smith.⁵⁵⁶ He agreed he had seen hundreds if not thousands of photographs of dead Afghan males during his deployments, including ones of the up to 20 kills resulting from his own engagements.⁵⁵⁷
38. Person 14's Outline of Evidence stated there was three-five fighting aged males in the first compound he approached with Person 27.⁵⁵⁸ At this trial he stated there were just three-four persons but it was plain his memory of this aspect of the mission was poor.⁵⁵⁹ Person 14 had told Mr Masters in early 2018 that he and Person 27 had found six men in this compound.⁵⁶⁰
39. Otherwise, Person 14 said in this trial that he did not go in the compound. Mr Masters' note taken in February 2018 records Person 14 saying he and Person 27 had "*cleared*" the compound. Person 14 denied saying this to Mr Masters.⁵⁶¹
40. Person 14 had told Mr Masters that he "chipped" at the opening in the wall prior to discovering the cache. He could not remember if he told Mr Masters that he kicked the wall as was his evidence in this trial.⁵⁶²
41. Once again, there have been substantial changes in Person 14's version of events since he spoke with Mr Masters in early 2018. Whether Person 14 is honest or otherwise, those changes suggest the Court should exercise caution before accepting his evidence on these issues.
42. Person 14 also could not recollect:
 - (a) The identity of the Australian soldier/s to whom he says he passed custody of the three, four, or five unhandcuffed PUCs.⁵⁶³
 - (b) What happened to Person 27 and whether he accompanied the PUCs with the other un-named Australian soldier to the TQ area.⁵⁶⁴
 - (c) The identity of the Australian soldiers present in the TQ area on his first visit other than Mr Roberts-Smith, nor the number of prisoners being held in the TQ area on that occasion.⁵⁶⁵
 - (d) The identity of the soldier who advised that Mr Roberts-Smith was in a compound further up the hill when he visited the TQ area for the second time.⁵⁶⁶
 - (e) When he had first told any person that Person 11 was present for the alleged shooting. He conceded it may have been during the course of his evidence in this trial.⁵⁶⁷ His Outline of

⁵⁵⁶ T1640 L380, T1641 L43 (P14).

⁵⁵⁷ Closed Court Transcript 10 February 2022 T12 L1-29 (P14) (redacted **but subject to a NPO**).

⁵⁵⁸ T1657 L15-37 (P14).

⁵⁵⁹ T1655 L8, 41. T1657 L5-6, T1658 L7-11 (P14).

⁵⁶⁰ Ex. A 63 p. 2.

⁵⁶¹ Ex. A 63 page 2, T1795 L33-43.

⁵⁶² Ex. A 63 page 2, T1793 L3-10.

⁵⁶³ T1658 L32-42, T1659 L1-3, 18 (P14).

⁵⁶⁴ T1659 L20-24 (P14).

⁵⁶⁵ T1661 L43-T1664 L11 (P14).

⁵⁶⁶ T1750 L40-T1751 L9 (P14).

⁵⁶⁷ T1762 L6-10 (P14).

Evidence did not specifically refer to Person 11 being present but instead referred to “*members of his patrol.*”⁵⁶⁸

43. Person 14 claimed in his evidence in this trial that two engineers were present at the time of the discovery of the cache. In his Outline of Evidence he had referred to only one engineer.⁵⁶⁹
44. In the course of his cross-examination, Person 14 amended his description of the PUCs clothing. A white robe became a cream robe and grey waistcoat became a dark grey waistcoat with light pinstripes. Person 14 explained this by saying “*Yes I’m remembering. My memory is unlocking during these four or five days.*”⁵⁷⁰ That evidence does not inspire confidence as to the reliability of his evidence generally at the trial. Person 14 could not recall telling anybody about the description of this Afghan male before a meeting with the Respondents’ solicitors in 2018.⁵⁷¹

D. THE EVIDENCE OF THE APPLICANT

45. Mr Roberts-Smith believed the mission was a targeting operation and recollected his team was the reserve assault team. In particular (his memory jogged by the documents) he recalled the fragmentation grenade had done significant damage to a body he had observed.⁵⁷² He also recalled that close to the landing of the helicopter he leaned over to say the patrol needed to move in a direction closer to the compound of interest.⁵⁷³
46. Mr Roberts-Smith did not recall detaining any person on the mission. His patrol had no engagements that day.⁵⁷⁴ Nor did he recall if Person 12 was present.⁵⁷⁵ He did not recall seeing a cache that day and did not know when any cache was found.⁵⁷⁶
47. Mr Roberts-Smith denies killing an unarmed prisoner.⁵⁷⁷ He did not recognise the photographs of the two insurgents killed that day.⁵⁷⁸ He did not recall going to the target compound but recalled passing the compound in which the insurgent had been killed by a grenade.⁵⁷⁹ He did not recall calling for Person 14 over the radio.⁵⁸⁰ At the debrief post the mission he found out about the second EKIA (having previously been aware of the insurgent killed by the grenade).⁵⁸¹
48. Mr Roberts-Smith's evidence was that the OPSUM would have been prepared following a meeting or debrief of patrol commanders as well as the troop and squadron hierarchy (including operations and intelligence officers). The same time chat is confirmed by the patrol commanders. Further, each person has to explain what happened to their patrol that day. The operations officers go back and write up the report.⁵⁸²

⁵⁶⁸ T1752 L14-T1753 L14 (P14)

⁵⁶⁹ T1754 L34-T1755 L23 (P14).

⁵⁷⁰ T1756 L39-T1757 L30 (P14).

⁵⁷¹ T1759 L44-45 (P14)

⁵⁷² Closed Court Transcript 15 June 2021 T32 L45-T33 L5 (BRS) (redacted).

⁵⁷³ T463 L8-21 (BRS).

⁵⁷⁴ Closed Court Transcript 15 June 2021 T33 L4-5, T462 L31, T465 L35-41 (BRS).

⁵⁷⁵ T252 L26-44, Closed Court Transcript 15 June 2021 T30 L1-3 (redacted), T462 L25-29 (BRS).

⁵⁷⁶ Closed Court Transcript 23 June 2022 T37 L24-46 (BRS) (redacted).

⁵⁷⁷ T254 L12-14 (BRS).

⁵⁷⁸ Closed Court Transcript 23 June 2021 T38 L5-7 (BRS) (redacted).

⁵⁷⁹ T465 L14-21 (BRS).

⁵⁸⁰ T465 L43-46 (BRS).

⁵⁸¹ T466 L15-19 (BRS).

⁵⁸² Closed Court Transcript 15 June 2021 T20 L27-43, T32 L1-16 (BRS) (redacted), Closed Court Transcript 23 June 2021 T39 L4-23 (BRS) (redacted).

49. Mr Roberts-Smith could not recall specific circumstances that day that would explain why an EKIA was called in approximately 1.5 hours after an engagement. However, his evidence was that generally this could be explained if clearances were ongoing or if the team commander did not pass information on.⁵⁸³ The precise time an EKIA was called in would depend upon both the patrol commander and the ground force commander (“*the boss*”) but Mr Roberts-Smith did not know what had happened that day (his evidence being his patrol had not been involved in an engagement.)⁵⁸⁴ The submissions at RS[44] propound the implausibility of an engagement at 14:05DE. However those submissions ignore not only the evidence of timing from the exploitation report at Ex. A10 Tab 50 (closed court) but also do not even attempt to explain how Mr Roberts-Smith at the post mission debrief managed single handedly to corrupt the documentary record by moving an engagement (which of course he says was not even one completed by his patrol) forward by 90 minutes from the tail end of the mission to the early part of the mission. That is improbable.
50. Mr Roberts-Smith also gave evidence that incident reports would be made by the watchkeeper of the day and based on what was passed to him by the troop commander.⁵⁸⁵
51. It was explicitly put to Mr Roberts-Smith (who had no recollection) that Person 14 had discovered the cache that is recorded in the photographs taken that day (see for instance Exhibit R38).⁵⁸⁶ That is, as at June 2021 those were the instructions provided to the Respondents’ Counsel. Mr Roberts-Smith disagreed that the EKIA attributed to the NDS soldiers (at 1405DE in the post mission recording) in fact occurred at or shortly before 3.39pm and to his understanding the content of the debrief that day was accurate.⁵⁸⁷

E. THE EVIDENCE OF PERSON 11

52. Person 11 recalled the mission insofar that he recalled the injury of a dog shortly after insertion in the course of attempting to round up an individual who fled the scene. The dog was evacuated to Tarin Kowt and Person 11 re-joined his team.⁵⁸⁸ That is consistent with the timing in the OPSUM. Person 11 could not recall seeing either Persons 14 or 27 during the mission, nor could he recall who was on the helicopter on the return journey. He did not recall any details concerning the mission after the incident with the dog.⁵⁸⁹ He did not observe any member of his patrol have engagements on that mission.⁵⁹⁰
53. Person 11 denies witnessing Mr Roberts-Smith tell an interpreter to order the NDS commander to shoot a prisoner and denied observing any execution.⁵⁹¹

F. THE EVIDENCE OF PERSON 32

54. Person 32 did not recall the mission to Chenartu on 12 October 2012. He denied being present when Person 14 had discovered a cache. He denied seeing or hearing Mr Roberts-Smith order a member of the Partner Force to shoot a prisoner.⁵⁹²

⁵⁸³ T466 L38-44 (BRS), Closed Court Transcript 23 June 2021 T36 L1-21, L40-47 (BRS) (redacted).

⁵⁸⁴ Closed Court Transcript 23 June 2021 T36 L34-38 (BRS) (redacted).

⁵⁸⁵ Closed Court Transcript 15 June 2021 T20 L45-T21 L 8 (BRS) (redacted).

⁵⁸⁶ Closed Court Transcript 23 June 2021 T41 L1-11 (BRS) (redacted).

⁵⁸⁷ Closed Court Transcript 23 June 2021 T42 L26-34 (BRS) (redacted).

⁵⁸⁸ T5686 L 27-29, T5686 L39-T5687 L10 (P11).

⁵⁸⁹ T5698 L31-T5688 L6, T5813 L9-13, T5818 L11-19 (P11).

⁵⁹⁰ T5687 L24-25 (P11).

⁵⁹¹ T5818 L36-T5819 L6, T5819 L37-40 (P11).

⁵⁹² T5581 L24-T5582 L5, T5920 L8-15, T5923 L43-47, T5924 L45-T5925 L15 (P32).

55. Person 32 recalled being present when two caches were discovered by persons other than Person 14 – he described such an event as “*quite a big thing*.”⁵⁹³ This evidence points to the improbability of Person 14 discovering a cache that day, a matter that is borne out by the official documents.

G. THE EVIDENCE OF PERSON 27

56. Person 27 did not recall a mission to Chenartu in October 2012 and could not recall what occurred in the helicopter prior to insertion, and whether he and Person 14 then moved to clear a compound.⁵⁹⁴

H. THE EVIDENCE OF PERSON 35

57. Person 35 did not receive any report that a member of the NDS Partner Force had executed a PUC at Chenartu in 2012 nor did he hear rumours to this effect.⁵⁹⁵
58. RS[C3] purports to identify the NDS member responsible for a shooting on 12 October 2012. He is said to have been a member of Person 35’s patrol. The first time this theory was advanced was when Person 35 was in the witness box.⁵⁹⁶ The evidence goes nowhere:
- a. the OPSUM confirms that an NDS member was responsible for an EKIA in the 1405 engagement;
 - b. See Applicant’s Closed Court Submissions at paragraph C13. No witnesses ever suggested Mr Roberts-Smith or any members of his patrol had this role. Indeed the evidence suggested it was predominantly Person 6.⁵⁹⁷ It stretches credulity that this entry, rather simply recording what happened, is part of an organised deception propounded by Mr Roberts-Smith. This entry in this document is just further corroboration that the incident alleged by Person 14 did not happen.
 - c. RS[45] contains a submission alleging that because Person 32 and 35 agree their patrol had no engagement that day, this means the OPSUM is implausible. In fact, Persons 32 and 35 had essentially no memory of the mission and they could not be definite about whether NDS members attached to their patrol had any engagements.⁵⁹⁸ Five patrols, including the two NDS led patrols, were operating that day.⁵⁹⁹ There is no evidence as to which of the two patrols was involved in the engagement involving the NDS soldier. One of those patrols was headed by Person 31 who gave no evidence as to his memory of the mission.⁶⁰⁰

I. THE ALLEGED PRESENCE OF PERSON 12 AT THE KHAZ ORUZGAN MISSION ON 12 OCTOBER 2012

59. Person 14 recalled that he had been on missions or jobs on the ground with Person 12 prior to October 2012. He recalled Person 12 was tall – six four or six five. His evidence was that he knew his name but he could not recall the names of any other Wakunish soldiers nor meeting any other Wakunish commander.⁶⁰¹

⁵⁹³ T5519 L39 L5920 (P32).

⁵⁹⁴ T5384 L37-45, T5409 L36-T5411 L14 (P27).

⁵⁹⁵ T5358 L34-347 (P35).

⁵⁹⁶ 2 May 2022 Closed Court Transcript. T28 L7-22 (P35) (redacted, the name of the NDS soldier remains closed court).

⁵⁹⁷ 4 April 2022 Closed Court Transcript T2 L13-30 (P31) (redacted).

⁵⁹⁸ T5922 L10-12, 2 May 2022 Closed Court T24 L 22-34 (P35) (redacted).

⁵⁹⁹ See for instance T5686 L 33 (P11).

⁶⁰⁰ See for instance T4639 L33-44 (P31).

⁶⁰¹ T1644 L5-T1646 L11 (P14).

60. Person 14 identified the person in the photograph (Ex. R41, Closed Ct) as Person 12. He could not identify the other person in the photograph.⁶⁰² He initially claimed to have seen other photographs of Person 12 in 2012 before saying he only recollected seeing “Wacker photos”.⁶⁰³
61. The helicopter load plan for the mission⁶⁰⁴ records 13 partner force attending. It was prepared at 1132DE which is less than two hours before departure of Turn 1 at 1317DE. None of the partner force names listed are Person 12. There is also reference to three interpreters.
62. Mr Roberts-Smith concluded from the absence of Person 12’s name on the load plan for that day that Person 12 was not on the mission.⁶⁰⁵ He disagreed that helicopter manifests often contained inaccuracies. He acknowledged that the manifest incorrectly recorded Person 56 as having been present on the mission and that it contained references to 10 additional Australians who had not ultimately gone on the mission⁶⁰⁶.
63. See Applicant’s Closed Court Submissions at paragraphs C14 to C17.
64. Person 31 identified Person 12 as appearing in a number of photographs and a video.⁶⁰⁷ However Person 31 was unable to say whether the person appearing in these photographs was the same as the person appearing in the photographs on pages 2 and 3 of Ex A34.⁶⁰⁸ Person 31 also agreed that it was possible his memory of Person 12 as a person appearing in the video was also incorrect.⁶⁰⁹ Person 31 was unable to comment on the accuracy of the load plan for the mission on 12 October 2012.⁶¹⁰
65. See Applicant’s Closed Court Submissions at paragraphs C18 to C23.

The allegation in relation to “the Person 12 lie”

66. Under the heading “[a] co-ordinated attempt to mislead the Court”, the Respondents submit that Mr Roberts-Smith, Person 27, Person 32, Person 35 and Person 39 have at various times and to varying degrees perpetuated the lie that Person 12 was responsible for shooting the dog and was removed on 31 July 2012 (RS Section VII [52]). That submission should be rejected. It presupposes, wrongly, that each of Mr Roberts-Smith, Person 27, Person 32, Person 35 and Person 39 have always known that Person 12 was not responsible for shooting the dog and yet notwithstanding such knowledge, have deliberately misrepresented the true position to the Respondents and to the Court. There is no objective evidence to which the Respondents can point, other than Person 57’s differing recollection about the identity of the person who shot him, that establishes the existence of any false or dishonest intention on the part of Mr Roberts-Smith, Person 27, Person 32, Person 35 and Person 39 to propound false outlines of evidence in reply. It also fails to address the fact that at the time the Outlines of Evidence were prepared, the Applicant was responding to an allegation that Person 12 executed Ali Jan.⁶¹¹ Persons 32 and 35 said that they did not recall Person 12 being present at Darwan on 11 September 2012⁶¹². The Respondents now accept that this was correct. Person 12 was not at Darwan. Person 39 said in his Outline of Evidence that Person 12 did not appear on any operational manifests

⁶⁰² Ex R41. Closed Court Transcript 10 February 2022 T26 L19-T27 L20 (P14) (redacted).

⁶⁰³ Closed Court Transcript 10 February 2022 T27 L41-T28 L10 (P14) (redacted)

⁶⁰⁴ Ex. A10 Supplementary Tab 8 records.

⁶⁰⁵ Closed Court Transcript 15 June 2021 T31 L9-13 (BRS) (redacted). Ex. A 10 Supplementary Tab 8.

⁶⁰⁶ Closed Court Transcript. 23 June 2021 T22 L1-10, T 28 L1-21, T29 L29-31 (BRS) (redacted).

⁶⁰⁷ Exhibits R168-R171, Closed Court Transcript 4 April 2022 T8-T10, T11-T13 (redacted).

⁶⁰⁸ Closed Court Transcript 5 April 2022 T7 L10-43, T9 L43-T10 L7 (P31) (redacted).

⁶⁰⁹ Closed Court Transcript 5 April 2022 T11 L35-T12 L8 (P31) (redacted), Ex R172.

⁶¹⁰ Closed Court Transcript 5 April 2022 T14 L13-T15 L17 (P31) (redacted).

⁶¹¹ Defences filed 9 October 2018.

⁶¹² Person 32 Outline of Evidence [26(a)] and Person 35 Outline of Evidence [66].

(load plans) after July 2012.⁶¹³ Person 12 has not been identified on any load plan for any of the 2012 missions the subject of these proceedings. Whether Person 32, 35 and 39 were mistaken in the reason why they did not recall Person 12 being present, is immaterial to the pleaded allegations of murder. Critically, the documents that the Respondents rely upon to establish that Person 12 did not shoot the dog and that Person 12 was present on the mission to Chenartu were only produced by the Department of Defence shortly prior to the commencement of the hearing in 2021. The submission that Mr Roberts-Smith, Person 27, Person 32, Person 35 and Person 39 have known all along that Person 12 did not shoot the dog is baseless.

67. It was reasonable for Mr Roberts-Smith, when confronted with a serious allegation that he had instructed Person 12 to execute a PUC at missions in 2012, for him to make inquiries about who Person 12 was.⁶¹⁴ Mr Roberts-Smith candidly explained that when preparing his answers to the interrogatories, he conflated his recollection of Person 31 informing him (and others) that a Wakunish soldier had been stood for shooting Person 57 with what he had been told by Person 35 and Person 68 about the identity of that Wakunish soldier.⁶¹⁵ That conflation was not deliberately dishonest. It was also entirely reasonable for Mr Roberts-Smith to prefer the recollections Person 35 and Person 68 over that of Person 57's on the basis that the person least likely to remember (the identity of the shooter) is the person who was shot.⁶¹⁶ The Court should reject the submission that his answers to the interrogatories were dishonest (RS Section VII [56]).
68. The attack on Person 27's credit is unfounded. He readily accepted that if Person 57 had confirmed that it was Person 12 who shot the dog, it would have been false for him to say he recalled it was Person 12.⁶¹⁷ He denied that was prepared to give false evidence to assist Mr Robert Smith.⁶¹⁸ Again the criticism relating to the reference to Person 12 in his outline is misplaced. No documents were available at the time it was prepared that contradicted Person 12 being the shooter. The failure to correct the reference to Person 12 in his outline of evidence, based on what he was told by Person 57, was neither dishonest nor a matter that warranted criticism.
69. Person 35's and Person 32's evidence about the identity of the person who shot the dog and/or the identity of the first Wakunish commander was not deliberately dishonest but based on their own recollection. The maintenance of a mistaken belief is not inconsistent with simultaneously holding an honest belief. Even if the Court forms the view that their evidence about who shot the dog was mistaken (which, it is submitted, is unnecessary), this would provide no foundation, without more, for a finding that those beliefs were dishonestly held and/or the product of collusion. Person 35's apprehension about the authenticity of Ex A-10, Tab 66 and Ex R-34 was based only upon his understanding of the identity of the author of those documents, who he clearly held in low regard.
70. Similarly, the attack on Person 39's credit, which relies substantially upon the existence of inconsistencies between his Outline of Evidence in Reply and his evidence to the Court, is misplaced. The change in position was immaterial; the critical issue was whether Person 39 honestly believed at the time the Outline of Evidence in Reply was prepared that Person 12 had been stood down, not whether he had acted dangerously. Person 39's recollection that it was Person 6 who informed him of the issue at the Sync brief and that Person 12 was replaced by a more junior officer on no view could amount to a "desperate attempt to salvage the lie [amounting to] dishonest recreation." (RS Section VII [85])

⁶¹³ Person 39 Outline of Evidence [18].

⁶¹⁴ T253 L8-17; T254 L1-8 (BRS).

⁶¹⁵ T518 L5-16 (BRS).

⁶¹⁶ T515, L3-5 (BRS).

⁶¹⁷ T5432 L30-32 (P27).

⁶¹⁸ T5432 L36 (P27).

71. The evidence to this Court on this issue demonstrated a clear absence of collusion. Mr Roberts-Smith and Person 27 readily conceded that it was not Person 12, whereas Person 35 and Person 27 did not.

Conclusion in relation to “the Person 12 lie”

72. There is no objective basis for the Court to find that Mr Roberts-Smith, Person 27, Person 35, Person 27 and Person 39 colluded at the time of the preparation of their outlines of evidence in reply to include a false account about the identity of the person who shot the dog. The witnesses had only their own recollections to rely upon concerning the identity of the person who shot the dog or the identity of the Wakunish commanders and the order in which they performed that role. In any event, whether or not the only documents relied upon to contravert their evidence can safely be taken as doing so is problematic given their source and the apparent circumstances of their creation.

SECTION VIII: FASIL – 5 NOVEMBER 2012

A. INTRODUCTION

1. The allegation appears at particulars [123]-[129] of the PoT. The allegation begins with the suggestion Mr Roberts-Smith told his patrol in late October 2012 that they needed to achieve “*two more*” EKIA to get their total number to 20. It is further alleged that at or about this time Person 15 had “*expressed concern to the troops that the number of persons killed in action during rotation 18 was too high*”.
2. The particulars simply allege that following the interdiction of four persons from a Hilux on 5 November 2012, an Afghan adolescent of 15-18 years of age “*together with the other occupants of the Hilux*” were handed over to Mr Roberts-Smith's patrol for questioning. Shortly after, Mr Roberts-Smith is alleged to have sent a radio communication “*two EKIA*s”. It is alleged that after the adolescent had been placed under control, but before he was photographed, Mr Roberts-Smith shot him in the head [125A PoT]. It is then alleged that Mr Roberts-Smith or an unidentified member of his patrol then placed a weapon on the deceased's body in an attempt to make the killing look legitimate [126A PoT]. It is then alleged that one or two days later Mr Roberts-Smith made a lurid statement to Person 16, which on the Respondents' case apparently functions as a confession to murder.
3. This allegation is another example of the Respondents alleging a war crime against a sliding factual substratum which they opportunistically attempt to adapt to whatever argument might advance their case.
4. Originally, it was alleged that the killing occurred on 21 October 2012. However in the circumstances outlined in the section of these submissions dealing with aggravated damages (see AS [131]-[138], the allegation was amended to 5 November 2012.
5. For the reasons advanced in the submissions on aggravated damages the Respondents have not come close to making out a case for murder on the balance of probabilities. In particular:
 - (a) There is no eyewitness who supports the allegation that Mr Roberts-Smith executed anybody;
 - (b) Person 11, the only other person who was in Mr Roberts-Smith's patrol that day who gave evidence in this trial about the events, said that the execution never happened;
 - (c) The photograph of the supposed victim depicts a man who is plainly older than 15-18 and has a beard;
 - (d) The contemporaneous documents – which confirm the release of the adolescent male prisoner - are so inconsistent with the allegations of Person 16 that they cannot be explained away even by a false report said to be made by Mr Roberts-Smith. The Respondents advance no evidence as to any misleading statement made by Mr Roberts-Smith at the post mission debrief, and no evidence as to how and why, if such a statement were made, all those present acquiesced to the statement.

B. DOCUMENTARY EVIDENCE

6. See Applicant's Closed Court Submissions regarding sensitive documents at [paragraph D1](#).

7. The OPSUM for the day is a sensitive document which appears at Tabs 61 and 63 of Ex. A10. A declassified version appears at Ex. R192, Tab 7. It is timed 2030DE on 5 November 2012 (see first page first column, second entry). The first page also refers to two EKIA's. Critical aspects of the chronology emerging from pages 1-3 are as follows:
- (a) Turn 1 is wheels down in Fasil at 0913DE.
 - (b) At 0920DE a Hilux vehicle is interdicted. It is said to contain three x POI (adult males) and one adolescent male. The vehicle is recorded as having been searched. Two RPG warheads were recovered and assessed as prepared for use as an IED. The OPSUM then records "*The 3 x POI were subsequently detained by FE-A. the adolescent male was released. The vehicle was destroyed...*".
 - (c) Turn 2 is wheels down at 0933DE;
 - (d) At 0945DE an engagement is recorded. Two insurgents are said to have been observed moving rapidly into cover within a compound of interest. One insurgent is described as wearing a chest rig and the other as carrying an AK-47. An explosive breach of the compound was conducted and the FE made entry. The OPSUM records:

"the FE made entry to conduct the clearance. The INS were PID and engaged using SAF resulting in 2 EKIA. BDA recovered 1 x AK 47, 3 x AK 47 magazines (full), 1 x grenade, 1 x chest rig and 3 x PCD.... Subsequent SSE of the compound also located 2 Pakistani passports that were also recovered to Tarin Kowt for exploitation. The compound owner was identified during KLE and paid a TPS of U\$600 for extensive structural damage to the compound and damage incurred to belongings during rummage search by FE".
 - (e) At 0950DE, 1100DE and 1215DE the OPSUM records the discovery of three separate weapons caches.
 - (f) At 1345DE it is recorded that clearance and SSE are complete. The discovery of further communication devices and identifying material is recorded along with two further TPS compensation payments. The screening of a POI by the NDS-W is recorded as is the discovery of a dried poppy cache.
 - (g) At 1350DE it is recorded that "*FE moved to extraction locations and adopted PZ posture. 4 x POI were detained (1 by NDW-W and 3 by FE-A) based on behaviour, association with compounds and vehicles of interest and all prevailing circumstances at the time of capture.*"
 - (h) Turn 1 is wheels up for Tarin Kowt at 1400DE and wheels down at 1410DE.
 - (i) Turn 2 is wheels up for Tarin Kowt at 1420DE and wheels down at 1431DE. At this point the NDS detainee is entered into NDS custody.
 - (j) At 1451DE the three other (FE-A) detainees are handed over to ISA.
8. The section of the OPSUM headed "*Significance*" deals with the background and role of the objective Qasid Saib.
9. The section of the OPSUM headed "*OP Summary*" records amongst other matters "*The FE conducted a RW insertion into the Obj area and established containment. NDS-W led the clearance and searched*

a number of COI IVO the Obj Area. Clearance resulted in 2 x EKIA. A significant amount of HME components destroyed and Insurgent weapons and equipment recovered. 4 x POI were detained.”

10. The section headed “*Commanders Comments*” relevantly records “*the clearance was conducted on 5 Nov 2012 and resulted in 2 x EKIA, 3 x ADF detainees with strong INS links and 1 x NDS (U) detainee, also with strong Ins links*” and “*Of note, NDS (U) WAK declined to detain 3 x FAMS who were detained in a veh containing lethal IED componentry. Due to the potential threat these facilitators present, they were detained by TF 66 and will be recommended for subsequent transfer to NDS (U) for prosecution.*” It is not expressly clear as to whether those three fighting aged males are the same three persons recorded as detained by the FE-A and handed over to ISA but this seems likely.
11. See Applicant’s Closed Court Submissions regarding same time chat at paragraph D2.
12. At Tab 62 of Ex. A10 is an incident report (now declassified). The report refers to the interdiction of a vehicle. It uses language consistent with the entry at 0920DE in the OPSUM. Paragraph 10 records “*Detailed Intelligence development of this target area justified the clearance. This incident is closed.*”
13. At Tab 65 of Ex A10/Tab 8 of Ex. 192 is another document, untitled but resembling an incident report (also now declassified). It refers to the 0945DE engagement, the explosive entry to the compound and two EKIA. It uses language consistent with the 0945DE entry in the OPSUM. At paragraph 8 it also records “*Detailed Intelligence Development of this target area justified the clearance.*”
14. As to the photographic evidence:
 - (a) Ex R32/R104 (declassified version) comprises photographs taken of three PUCs on 5 November 2021. The images of the three PUCs were taken at Tarin Kowt during processing.
 - (b) Ex R33 (closed court) comprises photographs of two deceased Afghans with SSE bags. The photographs appear to be taken indoors. Ex. R105 is a declassified version (with first three photographs of first male only).

C. EVIDENCE OF PERSON 16 – EVENTS ON 5 NOVEMBER 2012

15. Person 16 recalled inserting on the first turn. Shortly after disembarkation (perhaps 5-10 minutes) the Hilux approached. Person 16 and Person 34 stopped the vehicle with hand signals. Four male occupants got out of the car. Persons 16 and 34 gestured to the occupants to lift their robes so they could check for IEDs. By hand gestures Person 16 directed two of the males to a side wall of the compound where he patted them down and checked they were not carrying weapons. He then cuffed them.⁶¹⁹ He observed one to be middle aged, thick set with a full beard. He observed the other to be a younger Afghan male, not a full beard, a little bit chubby and shaking in terror.⁶²⁰
16. Person 16 stated he did not observe what happened to the other two persons in the car.⁶²¹
17. Person 16 recollected that Person 34 conducted a search of the Hilux and located IED componentry. A short time after, Person 16 recollected that Mr Roberts-Smith and Person 11 (and possibly others – he could not remember) approached him. They collected the two males Person 16 had cuffed. Person

⁶¹⁹ T1813 L32-T1833 L44, T1817 L14-17 (P16).

⁶²⁰ T1815 L5-10 (P16).

⁶²¹ T1815 L1-27 (P16).

16 did not remember what if anything was said.⁶²² Person 16 observed the males be walked to another compound. He assumed this was so they could be tactically questioned.⁶²³

18. After this Person 16 relocated to another patrol where tactical questioning was occurring. He recalled that Persons 57 and 86 were present. He did not see the two PUCs he had cuffed earlier. Person 16 rested in the shade. About 15 or 20 minutes later he heard a call over the radio by Mr Roberts-Smith saying “two EKIA”.⁶²⁴ He also recalled a call going out on the radio concerning an explosive breach but was not certain of the time.⁶²⁵

D. PERSON 16 AND THE PHOTOGRAPHIC EVIDENCE

19. Person 16 did not recognise any of the PUCs in Ex. R32 (Ex. R104 is the declassified version) and was unable to say if any of these persons had come from the Hilux. He observed that the initials “GB” which appear on the tapes attached to the prisoners was the callsign of Person 26. He understood the word “driver” on the tape to refer to the driver of a vehicle.⁶²⁶
20. Person 16 gave evidence in chief that the younger deceased male in Ex. R33 (sensitive)/R105(NPO) “*looks like the young male I detained from the Toyota Hilux.*” He did not recall that the man had carried an AK-47 (which is depicted next to him in the photograph).⁶²⁷ Person 16 expressed that he had a high degree of confidence that it was the same person but acknowledged he could be incorrect.⁶²⁸
21. Person 16 agreed he had been shown a number of photos of Afghan males by the Respondents in order to ascertain the identity of the Afghan male he handed over to Mr Roberts-Smith’s patrol.⁶²⁹ He had first been show the photographs in maybe early January 2022 and then again shortly before the trial (although his memory on this topic was particularly hesitant). His evidence was that he had seen the photograph of the dead Afghan male for the first time in 2018.⁶³⁰
22. The Applicant submits Person 16’s identification of the individual in Ex. R33/R105 as the person he handed over to Mr Roberts-Smith's patrol on the morning of 5 November 2012 is unreliable:
- (a) Person 16 could not recall how many times he had observed dead Afghan males during his 2012 deployment.⁶³¹ He accompanied patrols on some 90 missions that year.⁶³² It is not probable that 10 years later he could recall the face of the man he searched and cuffed from a photograph.
 - (b) The body identified by Person 16 as fitting the description of the Afghan male he handed over to the Applicant is most probably older than 15-18 years old.
 - (c) Person 16 said he had never provided a description of the Afghan male until giving evidence at this trial.⁶³³ That is, some 9.5 years had passed before he gave his description (and just days

⁶²² T1815 L31-T1816 L19 (P16).

⁶²³ T1816 L21-27 (P16).

⁶²⁴ T1816 L29-T1817 L10 (P16).

⁶²⁵ R1865 L41-T1866 L3, T 1868 L 30-T1869 L 4 (P16).

⁶²⁶ T1817 L32-T1818 L25, T1872 L18-24 (P16).

⁶²⁷ T1819 L9-20 (P16).

⁶²⁸ T1875 L 8-43 (P16).

⁶²⁹ Closed Ct 11 February T20 L46-T21 L6 (P16) (redacted).

⁶³⁰ T1871 L15-T1872 L16, T1873 L1-25 (P16).

⁶³¹ T1836 L1-9 (P16).

⁶³² T1842 L45- T1843 L14 (P16).

⁶³³ T1855 L11-29, T1874 L9-11 (P16).

after he had seen the photographs). In the circumstances, it is likely that Person 16's viewing of the photograph substantially compromised that identification evidence.

- (d) Contrary to RS Section VIII [47], the alleged conversation where Mr Roberts-Smith confesses to murder (dealt with below) has nothing to do with identification evidence.

E. EVIDENCE OF PERSON 16 – CONVERSATION AFTER 5 NOVEMBER 2012

23. According to Person 16, a day or two after the mission back in Camp Russell he crossed paths with Mr Roberts-Smith in the hallway. He asked Mr Roberts-Smith “*what happened to that young fellow that was shaking like a leaf?*”. He alleged Mr Roberts-Smith replied.⁶³⁴

“I shot that cunt in the head.” [And he said] Person 15 “told me not to kill anyone on the last job, so pulled out my nine mill, shot the cunt in the side of the head, blew his – blew his brains out, and it was the most beautiful thing I’d ever seen.”

24. Person 16 did not report the remark. He said the reason was a “*code of silence*” and a “*fear of retribution*”. He felt a report would have ended his career “*So I thought I just best keep quiet and move on with life.*”⁶³⁵
25. Person 16 agreed he was aware of procedures within the Australian Defence Force for dealing with grievances or issues he wished to raise.⁶³⁶ He personally reported to the troop sergeant Person 26.⁶³⁷ He agreed that he did not report the incident to the troop commander, sergeant major or to Person 26. The first time he told anyone about his alleged conversation with Mr Roberts-Smith was in 2018.⁶³⁸ It is not known whether the alleged conversation was suggested to him in 2018 or what prompted him to make this allegation in 2018. Mr Roberts-Smith was unable to explore any of this because of the prohibitions enforced by the Commonwealth in relation to what was said during interviews with the Assistant Inspector General of the Australian Defence Force. It is also not clear on the evidence whether Mr McKenzie's discussion with Person 16 in which Mr McKenzie told Person 16 that he knew about his alleged conversation with the Applicant occurred before or after Person 16's interview with the IGADF.⁶³⁹
26. Person 16's explanation is essentially that he was scared to make a report and that it was against the culture. The Court will be aware from the evidence relating to the 2012-2013 period it was scarcely unknown for soldiers to make complaints about each other. If Person 16 had genuinely believed that he had been the recipient of a genuine confession to murder by Mr Roberts-Smith, the probability is that he would have reported this or at least informally told someone. In any event, the direct consequence of the failure to report, is that no contemporaneous documentation evidencing the allegation exists and the Court is instead left with the memory of a single person – who himself went on hundreds of missions over many years – who did not even verbalise his allegations for some six years.
27. Further, the form of words that Person 16 attributed to Mr Roberts-Smith is lurid and sensational. It is improbable that Mr Roberts-Smith used such words particularly a phrase like “*beautiful thing*”. That sort of lyrical remark is inconsistent with this his demeanour in this Court and even with the sort of

⁶³⁴ T1823 L38-T1824 L14, T1883 L1-21 (P16).

⁶³⁵ T1824 L18-24 (P16).

⁶³⁶ T1842 L9-19 (P16).

⁶³⁷ T1842 L21-38 (P16).

⁶³⁸ T1888 L13-32 (P16).

⁶³⁹ T1873 L20-32 and T1875 L25-36 (P16).

remarks attributed to him by his staunchest detractors. It is particularly improbable that such words were used as part of a confession to the murder of a young and terrified prisoner. The lapse of time is so considerable, that it is entirely possible that Person 16 has confused different conversations with different people and contexts. The absence of any contemporaneous record means the allegation cannot be properly tested.

28. The absence of any evidence that Person 15 ever expressed any concern about the number of killings to Mr Roberts-Smith means a fundamental plank of the supposed remark is uncorroborated. Why would Mr Roberts-Smith say that about Person 15 if it never happened? Of course, even if Person 15 had made the remark, then it would not explain why Mr Roberts-Smith would immediately proceed to disobey the order he had been given.
29. The observations of McClelland CJ in Eq in *Watson v Foxman* (1995) 49 NSWLR 315 at 319 are apposite:

“...Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience”.

30. The fact that these observations were made in the context of a case concerning the former section 52 of the *Trade Practices Act 1974* (Cth) does not render them any less pertinent to a consideration of the consequences of a lengthy passage of time on the reliability of oral evidence that is being relied upon by the Respondents to prove an allegation of a war crime.

F. UNRELIABILITY OF PERSON 16’S MEMORY

31. Person 16’s recollection of events from November 2012 was patchy, inconsistent and generally unreliable. For example:
 - (a) Person 16 had no real memory of the date of the mission at which he said the interdiction of the Hilux took place. At various points in cross-examination he claimed he had never said or suggested to anyone that 21 October 2012 was the correct date.⁶⁴⁰ At another stage, when confronted with his earlier Outline of Evidence (which contained the October date) he claimed the date was “*an oversight on the proofread.*”⁶⁴¹ His further explanation was that he simply remembered the last mission but not its date and that he had been told by others that 5 November 2012 was the date.⁶⁴² It is with respect obvious that he had both proffered the date to the Respondents and approved its inclusion in the Outline of Evidence. There is no other plausible candidate in terms of responsibility for this error.
 - (b) He could not recall the number or identity of persons on the helicopter at insertion (other than Persons 26 and 34).⁶⁴³

⁶⁴⁰ T1843 L33-T1844 L20, T1900 L42-T1902 L16 (P16).

⁶⁴¹ T1878 L12-29 (P16).

⁶⁴² T1886 L29-T1887 L32 (P16).

⁶⁴³ T1844 L27-41 (P16).

- (c) He could not recall where the helicopter landed nor who disembarked first (this occurring seconds before the interdiction).⁶⁴⁴
- (d) He could not recall from which direction the Hilux came.⁶⁴⁵
- (e) He could not recall where the persons in the Hilux were sitting, nor the order in which they disembarked.⁶⁴⁶
- (f) While he agreed that standard operating procedure required him to be covered whilst conducting his search of the two individuals, he had no memory of who covered him.⁶⁴⁷
- (g) He could not recall what happened to the other two individuals from the Hilux. Person 34 may have searched them and may have handed them over but Person 16 was not sure.⁶⁴⁸
- (h) He could not recall in which vehicle Mr Roberts-Smith's patrol arrived. He assumed they had inserted with him but did not recall.⁶⁴⁹
- (i) He could not recollect which members of Mr Roberts-Smith's patrol were present when he handed over the PUCs (other than Person 11). He believed there were most likely other persons present but had no recollection.⁶⁵⁰
- (j) He could not recall the names of the Australians present at the compound to which he went after the interdiction. He initially thought maybe five or six but could only identify Person 57 and Person 86. Later he identified three other named soldiers plus the incoming Alpha whose name he could not recall. At this point he said he definitely recollected those six persons being present but that there were more.⁶⁵¹
- (k) He also could not recollect the number of PUCs in that compound. "*I would be taking a stab, but there – there was a few. I - I would say you know, maybe up to 10 or so.*"⁶⁵²
- (l) He could not recall how long he spent waiting in the shade at the compound with multiple prisoners and other Australian soldiers. He stated that it could have been longer than an hour.⁶⁵³
- (m) He was inconsistent on the time that elapsed between the handing over of the prisoners and Mr Roberts-Smith's radio call. At this trial he said 15-20 minutes and stated that this had always been memory.⁶⁵⁴ In his Outline of Evidence he had said 30-60 minutes. When confronted with the anomaly he stated that he may potentially have had a different recollection at an earlier time but that his present recollection was 15-20 minutes.⁶⁵⁵

⁶⁴⁴ T1844 L43-T1845 L10 (P16).

⁶⁴⁵ T1845 L17-31 (P16).

⁶⁴⁶ T1847 L26-T1848 L4 (P16).

⁶⁴⁷ T1851 L20-39 (P16).

⁶⁴⁸ T1855 L30-T1856 L14 (P16).

⁶⁴⁹ T1850 L27-45 (P16).

⁶⁵⁰ T1851 L1-18, T1856 L42-44, T1858 L1-19 (P16).

⁶⁵¹ T1859 L13-34, T1860 L25-T1861 L11, T1862L1-36 (P16).

⁶⁵² T1858 L41-T1859 L 11 (P16).

⁶⁵³ T1863 L5-30 (P16).

⁶⁵⁴ T1867 L18-32, T 1869 L13-29 (P16).

⁶⁵⁵ T1880 L 9-24 (P16).

- (n) He could not recall whether Mr Roberts-Smith used his name or call sign during the radio call.⁶⁵⁶
- (o) He could not recall whether he found out about the explosive breach before or after the radio call from Mr Roberts-Smith.⁶⁵⁷
- (p) Person 16 claimed he “*had a strong index if suspicion*” that one of the PUCs he had handed over to Mr Roberts-Smith had been killed.⁶⁵⁸ This was based on the radio call about the EKIA. However, that makes little sense when at a roughly similar time, Person 16 agrees he heard a radio call about an explosive entry – that is, he knew an engagement had occurred.
- (q) He could not recall which helicopter he left on, nor who accompanied him, nor the number of helicopters.⁶⁵⁹
- (r) His accounts at the trial of the conversation with Mr Roberts-Smith a day or two later varied from the version which appeared in his Outline. In particular the version in the Outline of Evidence omitted the reference to the PUC being shot “*in the side of the head*” and included an expletive attributed to Person 15 that Person 16 was unsure of in this trial.⁶⁶⁰
- (s) Person 16 could not explain a number of other deviations between his Outline of Evidence and his oral evidence at the trial including the absence of any reference to Person 11 in the Outline as a person who accompanied Mr Roberts-Smith in collecting the prisoners, the omission of any reference to the cuffing of prisoners in the Outline of Evidence and the fact that the Outline of Evidence did not refer to the second prisoner cuffed by Person 16 as being collected by Mr Roberts-Smith at all.⁶⁶¹
- (t) Person 16 claimed that when he spoke to Mr McKenzie in 2018, that Mr McKenzie already knew about the Hilux and in particular about the conversation between Person 16 and Mr Roberts-Smith where Mr Roberts-Smith said a death was a “*beautiful thing*.” However, if as he says, Person 16 had never told anyone about that conversation, it is not possible for Mr McKenzie to have known about it. Mr McKenzie has not been called to give evidence in this case. It is to be inferred that his evidence would not have corroborated Person 16’s version of the conversation. Either Person 16 is not telling the truth, or is very confused. It is also clear that Mr McKenzie told Person 16 of his alleged conversation with Mr Roberts-Smith and it is possible that Person 16 has come to believe that such a conversation occurred. Either way, the evidence of Person 16 is unreliable. Person 16 claimed to be aware of his obligation not to speak to the media but claimed as he had not told Mr McKenzie anything he did not already know, that he had no obligation to report the conversation.⁶⁶² The evidence is not clear whether Mr McKenzie spoke to Person 16 before or after his interview with the IGADF.

32. There is a possible explanation for difficulties with the memory of Person 16. Person 16 had suffered emotional trauma. He recalled feeling upset as to the loss of human life in Afghanistan and believing that senseless deaths were occurring.⁶⁶³ He found it difficult to observe the bodies of those killed in

⁶⁵⁶ T1867 L37-T1868 L 16 (P16).

⁶⁵⁷ T1868 L30-41 – T1869 L4 (P16).

⁶⁵⁸ T1882 L16-20 (P16).

⁶⁵⁹ T1863 L34-T1864 L7 (P16).

⁶⁶⁰ Ex. A65 paragraph [23]. T1884 L13-T1885 L33 (P16).

⁶⁶¹ T1878 L25-T1880 L8 (P16).

⁶⁶² T1892 L35- T1894 L21 (P16).

⁶⁶³ T1836 L21-25 (P16).

combat.⁶⁶⁴ He had experiences flashbacks and nightmares concerning his time in Afghanistan for which he had at times been prescribed medication.⁶⁶⁵ See Closed Court Submission regarding evidence of Person 16 at paragraph D3.

33. Contrary to the submission at RS Section VIII [21]-[22] the cross-examination did traverse Person 16's account of the events that day, including his recollection of passing prisoners to the applicant's patrol.⁶⁶⁶

G. MR ROBERTS-SMITH'S EVIDENCE

34. Mr Roberts-Smith recalled that his patrol was the aerial fire support and reserve assault team and that they had used an explosive charge in the course of assaulting a compound on the mission of 5 November 2012.⁶⁶⁷ The members of his patrol included Persons 4, 11, 56 and another person.⁶⁶⁸ He had nothing to do with the interdicting of the Hilux and did not take prisoners from the Hilux. After landing his patrol moved to the compounds and were never closer than 100 metres to the Hilux.⁶⁶⁹ He became aware later in the day that something had been found in the Hilux and that the people in the Hilux were brought into the PUC area because of this.⁶⁷⁰ He recalled seeing 10-20 PUCs in the PUC area in total.⁶⁷¹
35. The compound in which his patrol used the explosive was approximately three away from the one they initially entered.⁶⁷² Prior to the entry they had identified two fighting aged males. They performed a call-out but the insurgents ran back into the building and accordingly Mr Roberts-Smith decided an explosive breach was necessary.⁶⁷³ Mr Roberts-Smith did not recall if the two insurgents were engaged separately or the particular room in which the engagements occurred but he recalled they displayed hostile intent.⁶⁷⁴ He agreed it was possible he had killed one of the two but did not recall which member/s of the patrol had engaged.⁶⁷⁵ He recalled finding equipment but could not recall the specific location.⁶⁷⁶ He could not recall whether the bodies were moved during the SSE but gave evidence that bodies could be moved for various reasons including intelligence gathering.⁶⁷⁷
36. Mr Roberts-Smith did not recall if his patrol took prisoners in the assault but was certain none were handed over to them.⁶⁷⁸ Indeed, as Person 16 agreed, an assault team would not be handling PUCs whilst an assault was in progress.⁶⁷⁹
37. Mr Roberts-Smith agreed that the information on the tape suggested that the prisoners photographed in Ex. R32 came from the interdicted vehicle.⁶⁸⁰ Mr Roberts-Smith's evidence was that it was possible

⁶⁶⁴ T1839 L16-30 (P16).

⁶⁶⁵ T1840 L1-7, T1840 L41-T182X L5 (P16).

⁶⁶⁶ See in particular T1887L5-6 (P16).

⁶⁶⁷ T254 L4-42, T471 L20-24 (BRS).

⁶⁶⁸ T470 L17 – T471 L5, Closed Ct 15 June 2021 T39 L33 – T40 L17 (BRS) (redacted).

⁶⁶⁹ T471 L26-34 (BRS).

⁶⁷⁰ T475 L1-11 (BRS).

⁶⁷¹ T475 L13-22 (BRS).

⁶⁷² T471 L35-46 (BRS).

⁶⁷³ T472L1-12 (BRS).

⁶⁷⁴ T472 L21-34 (BRS).

⁶⁷⁵ T472 L46-T463 L9 (BRS).

⁶⁷⁶ T473 L14-22 (BRS).

⁶⁷⁷ T473 L37-T474 L18 (BRS).

⁶⁷⁸ T255 L1-6 (BRS).

⁶⁷⁹ T1869 L45-T1870 L4 (BRS).

⁶⁸⁰ Closed Ct 22 June 2021 T64 L35-T65 L16 (BRS) (redacted).

that the adolescent had been treated differently, particularly if he had been a passenger in the vehicle but that he had no knowledge of this.⁶⁸¹

38. Mr Roberts-Smith believed the 1000DE entry on the same time chat referring to a single EKIA was an error.⁶⁸² He believed his patrol would have reported the two EKIA after the engagements. See Applicant's Closed Court Submission regarding evidence of Mr Roberts-Smith at paragraph D4.
39. Mr Roberts-Smith agreed that the information on the SSE bags near the bodies in Ex. R33 suggested that he had performed one SSE and the third member of his team (Person 56) had performed the other SSE. Likewise he agreed it appeared the engagements happened in the same room.⁶⁸³
40. Mr Roberts-Smith denied saying any part of the words alleged to Person 16 one to two days after the mission. He also gave evidence that Person 15 never told him not to kill insurgents. He never received such an order from any person in a superior position.⁶⁸⁴ He also denied the supposed remark about the need for the kill board to display more kills.⁶⁸⁵ The Respondents adduced no evidence to support either of these allegations.
41. Mr Roberts-Smith believed (as is obviously the case on an objective viewing) that the person depicted in the first three photographs in Ex R33 was not an adolescent but a person in his twenties.⁶⁸⁶

H. EVIDENCE OF PERSON 11

42. Person 11 had no specific recollection of this mission.⁶⁸⁷ He denied that Mr Roberts-Smith went inside a room with the adolescent handed over by Person 16 and shot him.⁶⁸⁸ He denied that an AK-47 was placed upon the body to give the impression that the prisoner was armed.⁶⁸⁹
43. Person 11 denies hearing Mr Roberts-Smith say in relation to the kill board "*Only two to get to 20*".⁶⁹⁰

I. THE IMPROBABILITY OF THE ALLEGATIONS

44. The theory advanced to Mr Roberts-Smith in the course of his cross-examination was that his patrol had made explosive entry before 10 am and that one person had died and that this was the EKIA reported at 10am. See also RS Section VIII [31]. See Applicant's Closed Court Submission regarding timing at paragraph D5. A significant problem with this theory is that it is quite inconsistent with Person 16's evidence that he heard the radio call just 15-20 minutes after he passed the two prisoners to Mr Roberts-Smith after the interdiction (at 0920DE). Indeed, the chain of events on the Respondents' hypothesis is bordering on the absurd:
 - (a) Mr Roberts-Smith and his patrol escort the two prisoners after collecting them from Person 16 (shortly after 0920DE);

⁶⁸¹ Closed Ct 22 June 2021 T65 L 35 – T 66 L8 (BRS) (redacted).

⁶⁸² Closed Ct 22 June 2021 T70 L1-7 (BRS) (redacted).

⁶⁸³ Closed Ct 22 June 2021 T67 L17-T68 L18 (BRS) (redacted).

⁶⁸⁴ T255 L24-40 (BRS).

⁶⁸⁵ Closed Ct 15 June 2021 T40 L27-45 (BRS) (redacted). Closed Ct 23 June 2021 T54 L19-22 (BRS) (redacted).

⁶⁸⁶ Closed Ct 23 June 2021 T53 L23-37 (redacted).

⁶⁸⁷ T5691 L41-43, Closed Ct 10 May 2022 T5 L22-23 (P11) (redacted), T5820 L17-18 (P11).

⁶⁸⁸ T5822 L 37-40, T5823 L4-6 (P11).

⁶⁸⁹ T5823 L 8-10 (P11).

⁶⁹⁰ T5822 L 29-30 (P11).

- (b) Mr Roberts-Smith then passes over the adult prisoner to some unknown person who organises for him to be PUCd in the usual fashion (and he becomes one of the three persons photographed back at Tarin Kowt in Ex R32/R104);
 - (c) Mr Roberts-Smith somehow finds another place to park the adolescent prisoner while he and patrol go off and have a legitimate engagement resulting in one EKIA;
 - (d) After that legitimate engagement, they retrieve the adolescent, murder him and then manipulate the scene in the compound to make it look like the two men were killed at the same time.
45. On the timing issue, the submission advanced at RS Section VIII [28] to the effect that explosive entry had been made prior to Person 16 handing the prisoners to Mr Roberts-Smith's patrol is inconsistent with the evidence. The OPSUM records the interdiction at 920DE and the explosive entry engagement at 945DE.
46. There is also no explanation as to what happened to the second PUC allegedly handed over to Mr Roberts-Smith by Person 16. It is not suggested that he was the other body in the photograph comprising Ex. R33, or that he was otherwise killed in the engagement recorded in the OPSUM at 0945DE. Indeed, the references to “driver” and “veh” in the three photographs of PUCs at Ex. R32 tends to suggest this prisoner was PUCd by the Bravo with the other adult occupants of the Hilux. This was the theory advanced by the Respondents.⁶⁹¹ The fact that Person 16 says he did not see this individual in the compound with the other PUCs⁶⁹², suggests either that questioning was also taking place elsewhere or that Person 16 simply did not realise or has forgotten that this prisoner was present.
47. RS[17d] contains a submission that fourth (unphotographed) individual from the Hilux would have received the designation “GB-2”. RS Section VIII [24]-[25] focused on the absence of any photograph of a prisoner with the designation “GB-2”. The obvious explanation for the absence of a photograph of the adolescent is that he was, as the documents record, released on target and the three adult males were taken back to Tarin Kowt and photographed there. As to the absence of a photograph in the sequence of a ‘GB-2’, there is simply no evidence, let alone evidence connecting this to Mr Roberts-Smith (on any view of it Mr Roberts-Smith had no responsibility for photographing and recording PUCs that day). Person 16’s version only becomes more improbable given that he says Mr Roberts-Smith was handed two prisoners. It is not probable that one of them was processed, returned to Tarin Kowt and photographed in an orthodox manner, while the other prisoner according to the Respondents was processed (in the sense of being given the designation GB-2) then taken away again and murdered.
48. RS Section VIII [39] goes so far as to say that the only plausible explanation for the absence of a photograph of the adolescent PUC’d from the Hilux is that he was unlawfully murdered. That submission fails to appreciate ordinary human behaviour, particularly during a war. It is possible the adolescent was briefly processed before being released without being photographed. It is possible GB-2 designated a prisoner other than the adolescent. Perhaps there is another explanation. Without evidence from any person involved in the processing and photographing of the prisoners, it is not possible to hypothesise, let alone prove on the balance of probabilities.
49. As to the questioning of the integrity of the official documents:

⁶⁹¹ Closed Ct 22 June 2021 T64 L35-T65 L16 (BRS) (redacted).

⁶⁹² T1866 L5-T1867 L3 (P16).

- (a) RS Section VIII [42] contains an allegation that the inclusion of a reference to the release of the adolescent male in the OPSUM was part of a cover up.⁶⁹³ This carries with it the implicit allegation that the documents have been falsified as part of some conspiracy. It would not have been possible for Mr Roberts-Smith to destroy photographs and/or to fake the release of a prisoner all by himself. He was not involved in processing or transporting PUCs that day. The Respondents never actually put to Mr Roberts-Smith that he had any role in the falsification of any part of the documents. There was for instance no evidence as to what was said in the debrief by him or anyone else.
- (b) There is no basis to allege Mr Roberts-Smith is responsible for a simple error as to the number of EKIA as reported by the Alpha on the same time chat – which in any case was corrected shortly after it was made. Contrary to RS Section VIII [40], the fact that 1 EKIA was reported on the chat at 1000DE, two additional EKIA at 1029DE and that at 1458DE this was corrected to a total of two, is not evidence that Mr Roberts-Smith’s evidence is false, still less that a prisoner was murdered. This is particularly the case given at 1029DE there was reference to two EKIA (and Person 16 himself recalls nothing more than a radio call by Mr Roberts-Smith confirming two EKIA). It is evidence of no more than some momentary confusion.
- (c) In one critical respect Person 16’s account is consistent with the documents and in fact corroborates them. He agrees he heard a radio communication about an explosive breach.⁶⁹⁴ This can only have been a reference to the engagement at 0945DE recorded in the documents. This tends to corroborate the documents. It seems highly unlikely that such a communication would be fabricated and still less likely that the Alpha and the other patrol commanders would permit such a false report to be written up in the post operation documentation.
- (d) RS Section VIII [43] contains a submission that the payment of US\$600 for damage to the compound in which the engagement occurred is “*inconsistent with the circumstances of the engagement set out in the OPSUM and with Mr Roberts-Smith’s evidence that military equipment was found in the compound.*” It is not clear why this would be the case, given the OPSUM describes the engagement commencing when insurgents took cover in the compound. The owner may not have been involved. In any event, the submission only underscores the difficulties the Respondents have in attacking 111fficial records – not for containing routine errors or mistakes – but as being part of a cover up. There was no evidence Mr Roberts-Smith had anything to do with the KLE. If the engagement as recorded and the KLE were as inconsistent as the Respondents allege, then it seems most improbable that Mr Roberts-Smith was in a position to manipulate all of this without anyone else realising or commenting.

50. As to the photographs of the bodies:

- (a) It was put to the Applicant that the photographs in Ex. R33 indicated that the “*two bodies had been staged to look like an engagement*”.⁶⁹⁵ The support for this proposition appeared to be lay conclusions drawn by the Respondents about the extent of blood loss visible in the photographs of one of the bodies, the comparative absence of blood on the photographs of the other body, the appearance of a boot and the fact that the body’s lay close together. These propositions were unsupported by expert evidence. They do not accord with common sense. Mr Roberts-Smith’s denial of the proposition should be accepted.

⁶⁹³ See also Closed Ct 22 June 2021 T66 L34-42 (BRS) (redacted).

⁶⁹⁴ T1865 L38-T1866 L3 (P16).

⁶⁹⁵ Closed Court Transcript 22 June 2021 T70 L30-35 (BRS) (redacted).

(b) It was also put to Mr Roberts-Smith that he had placed the gun on the body of the person holding the AK-47. Mr Roberts-Smith denied this but agreed the gun would either have been with the deceased or somewhere in the vicinity.⁶⁹⁶ There was no evidence that corroborated the Respondents' proposition or bore one way or the other on the existence or otherwise of weapons in that compound.

51. Finally, Person 16's account is also critically undermined by the photograph of the EKIA in Ex. R33/105 which depicts a man who is older than 15-18 years old.

⁶⁹⁶ Closed Court Transcript 22 June 2021 T72 L37-40 (BRS) (redacted), Closed Court Transcript 23 June 2021 T50 L21-T51 L2 (BRS) (redacted).

SECTION IX: UNLAWFUL ASSAULTS ON PUCS

A. INTRODUCTION

1. The first relevant imputation arises from the 11 August 2018 publications:

Imputation 13(d)/15(d) (Fairfax) *The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and so doing alarmed 2 patrol commanders to the extent they ordered him to back off.*

2. The imputation is specific. The particulars said to justify this allegation of unlawful assault appears at [56]-[63] of the PoT (**2010 unlawful assault**). The particulars allege that on or about 15 May 2010, during a mission in Deh Rafshan targeting a media value Taliban leader, while Person 7 and Person 8 were attempting to arrest an Afghan male, the Applicant entered the room wearing Kevlar gloves. The Applicant, got down on one knee and drove several punches hard into the Afghan male's face around his cheek bone and eye. A lump/swelling appeared around the Afghan's cheek bone and eye socket almost instantly. The Applicant then drove his knee into the Afghan's abdominal area two to four times. As this occurred the Afghan made a sound as though the wind had been knocked out of him and Person 7 said to the Applicant in substance, "*Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!*". The Applicant left the room.
3. Person 8 was not called. Mr Roberts-Smith denied the allegation. The allegation depends upon the evidence of Person 7.
4. The next relevant imputation, also arising from the 11 August 2018 publication is in the following terms:

Imputation 13(d)/15(d) (Fairfax) *The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan who was being held in custody and posed no threat.*

5. For context, the imputation primarily arises from paragraph [49] of Annexure F1 to the Fairfax Media Statement of Claim where there is reference to two incidents involving men under the control of a patrol led by the Applicant (suggesting 2012). One of those incidents is said to involve a man in custody posing no threat who was "*badly assaulted*". At RS Section IX [3] the Respondents refer to their Defence's reliance on the Applicant's authorisation of the killing of EKIA 56 in 2009, the killing of Ali Jan in 2012 and the Chenartu killing on 12 October 2012. The difficulty with that position is that the elements of the relevant imputation involve the Applicant authorising (not actually performing) an assault (not an execution) on a prisoner in 2012. None of those events if established would justify this particular imputation (although obviously the position would be different with various other imputations and contextual imputations).
6. The next relevant imputation, also arising from the 11 August 2018 publication is in the following terms:

Imputation 13(o)/15(h) (Fairfax) *The Applicant assaulted an unarmed Afghan in 2012*

7. At RS Section IX [6] the Respondents refer to their reliance on the killing of EKIA 57 in 2009, the 2010 assault discussed above, the kicking of Ali Jan off the cliff in 2012 and a further assault in late August to early September 2012 which is the subject of these submissions.

8. The particulars said to justify this second stand-alone allegation of unlawful assault appear at [86]-[92] of the PoT (**2012 unlawful assault**). The particulars allege that in the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah. One of the detainees was a civilian who had a young girl with him. The Applicant asked the detainee what her name was. The Afghan male is said to have responded in substance that the girl was his daughter but hesitated giving her name. The Applicant is then alleged to have grabbed the Afghan male by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
9. Once again the allegation depends entirely upon the evidence of Person 7. No other witness was called.
10. For the reasons set out in this section, the Respondents have failed to establish either of the alleged unlawful assaults on the balance of probabilities. The Court should find, consistently with the evidence of Mr Roberts-Smith that no such assaults took place.

B. THE EVIDENCE OF MR ROBERTS-SMITH

11. Mr Roberts-Smith gave evidence in examination in chief that both the 2010 and 2012 unlawful assault allegations were false.⁶⁹⁷
12. In relation to the 2010 allegation, when cross-examined Mr Roberts-Smith said that while he could not recall any occasion during which Person 7 and Person 8 were trying to detain an Afghan male, he denied that Person 7 ever said “*Whoa, whoa, whoa, what are you doing? Get out of here?*”⁶⁹⁸ and denied that he assaulted any PUC.⁶⁹⁹
13. Mr Roberts-Smith also denied the 2012 unlawful assault and the alleged conversation with Person 7.⁷⁰⁰

C. THE PHOTOGRAPHIC EVIDENCE CONCERNING THE PUC IN 2010

14. The sole documentary record relied upon by the Respondents is closed court Ex. R82.
15. Person 7 gave evidence that he recognised the man in the Ex. R82 photograph as the Afghan Mr Roberts-Smith had assaulted in March 2010.⁷⁰¹ He stated that the prisoner did not have the injuries visible on his nose and left cheek prior to the assault.⁷⁰²
16. The images comprising Ex. R82 do not support the Respondents’ pleaded case. There is no sign of any lump and/or swelling around the individual’s cheek bone and eye socket. There appears to be some injury to his nose. Even if the photographs do demonstrate injury, such injury could have occurred in a myriad of different ways including prior to or during arrest. When confronted with the photograph, Mr Roberts-Smith unsurprisingly did not know whether it was the man he is alleged to have assaulted.⁷⁰³ Person 7 observed that soon after the assault the Afghan “*had significant swelling to his face, and he also had swelling around his nose*”.⁷⁰⁴ That observation accorded more with the photographs at Ex. R82 than the injury contained in the particulars and there was no explanation for

⁶⁹⁷ T183 L25-42 and T341 L28-34, L46 (BRS).

⁶⁹⁸ Closed Court Transcript 25 June 2021 T14 L26-27 (BRS) (redacted).

⁶⁹⁹ Closed Court Transcript 25 June 2021 T14 L37 (BRS) (redacted).

⁷⁰⁰ T831 L1-29 (BRS).

⁷⁰¹ Closed Court transcript 16 March 2022 T3 L10-18 (P7) (redacted).

⁷⁰² Closed Court transcript 16 March 2022 T3 L21-25 (P7) (redacted).

⁷⁰³ Closed Court Transcript 25 June 2021 T14 L35-47 (BRS) (redacted).

⁷⁰⁴ T3598 L11-14 (P7).

the shift.. In any case it seems extraordinary that Person 7 could recall a prisoner from a mission in March 2010.

D. THE EVIDENCE OF PERSON 7

2010 Assault

17. Person 7 stated that he and Person 8 entered a room, and observed at the back of the room, a single Afghan individual sitting with his legs crossed. According to Person 7, Person 8 assessed that there was no threat. No one else was in the room. Person 7 and Person 8 attempted to detain him. The Afghan male began to make a whimpering sound. Person 7 went to grab one his arms and could tell he was in serious fear, and he had retreated into a foetal position.⁷⁰⁵ Person 7 let the man go and he and Person 8 decided to give the man a moment to settle before attempting to detain him again.⁷⁰⁶
18. Mr Roberts-Smith (wearing Kevlar gloves) walked into the room, didn't say a word, got down on one knee, then punched about three or four quick-fire punches "*into the side of the Afghan's head*" and then he did two knees to the Afghan's chest/stomach area. Person 7 said to Mr Roberts-Smith "*Whoa, whoa, whoa. What are you doing? We're looking after this. Get out of here.*" Mr Roberts-Smith walked out of the room without speaking.⁷⁰⁷ After leaving the Afghan alone for a brief period Person 8 lifted him up and detained him.⁷⁰⁸
19. Shortly thereafter Person 7 said he believed the PUC was one of four of five detainees taken back to Tarin Kowt.⁷⁰⁹
20. Person 8 was not called to give evidence. Further, Person 8 was a member of Person 5's patrol in 2010.⁷¹⁰ There is no reason he would have been clearing compounds with a patrol commander from another patrol.
21. Person 7 did not report the assault in 2010. His evidence was that considering he was senior to Mr Roberts-Smith "*I felt that what I said in that point in time was enough.*" It may be observed, that even if contrary to the Applicant's submissions that some incident had occurred, it could not have been that serious if Person 7 felt that saying "*Whoa whoa whoa What are you doing? We're looking after this. Get out of here*" was sufficient to discharge his obligation as a senior non-commissioned officer to deal with the situation.
22. Person 7 claimed to have first reported the incident to Person 100 in 2013.⁷¹¹ That claim was not put to Person 100. In any event it is still three years after the alleged assault. Given that Mr Masters' notes of some years later do not record any mention of the incident, it seems improbable it would have been reported in 2013. That issue is discussed further in the credit section below.
23. Even before Person 7's credit is considered, the Respondents have not discharged their onus. Two witnesses gave evidence with diametrically opposed versions some 11 years after the alleged event. The third person the accuser alleged was present as a witness did not appear. The accuser made no contemporaneous report. There is no corroborative documentary evidence and the photographs merely depict an unknown prisoner with an injury that could have been acquired anywhere.

⁷⁰⁵ T3596 L15-42 (P7).

⁷⁰⁶ T3596 L14 - T3597 L22 (P7).

⁷⁰⁷ T3597 L24-35, T3598 L7-9 (P7).

⁷⁰⁸ T3597 L 37-46 (P7).

⁷⁰⁹ T3598 L32-34 (P7).

⁷¹⁰ T4886 L30 (P5).

⁷¹¹ T3910 L35 (P7).

24. In addition, returning to the terms of the imputation, there is no evidence that two patrol commanders “ordered” Mr Roberts-Smith to back off. The highest the evidence rises in terms of that imputation is the “*whoa*” statement by Person 7.

2012 Assault

25. According to Person 7 he arrived at the main PUC area in search of the troop sergeant. There were 15 to 20 PUCs sitting in an outdoor area. He observed Mr Roberts-Smith holding an Afghan by the shirt. Mr Roberts-Smith was “*punching the Afghan up against a wall*”. He described this as resembling a “*football punch*.” He noticed another Afghan squatting with the other PUC’s and holding a little girl. The little girl cried as she looked at the Afghan being punched by Mr Roberts-Smith. She then ran over to the Afghan against the wall who picked her up. They returned to sit next to the squatting Afghan and the girl calmed down.⁷¹²
26. Person 7 asked Mr Roberts-Smith what was happening. Mr Roberts-Smith said to Person 7 “*He’s a fucking bad cunt...when I was questioning him, I asked him if that was his daughter. He said ‘yes’, and the I asked him what his name was*”. Mr Roberts-Smith then indicated that the Afghan hesitated. Person 7 said “*Yes and?*”. Mr Roberts-Smith responded “*Well, I’ve got two daughters and I know what their names are.*” Person 7 says he then said “*RS, you ragged on this bloke, you’ve just gone and asked him what this girl’s name is, of he’s going to be – you know why do you think he’s hesitating?*”⁷¹³
27. It follows that according to Person 7, the basis for the assault was nothing more than the alleged hesitation.
28. Person 7 said that he did not see any interpreter and that this conversation with the PUC did not occur via an interpreter.⁷¹⁴ In circumstances where Mr Roberts-Smith does not speak Pashto, it is unknown how the alleged conversation is purported to have occurred.
29. Person 7 also said that in addition to himself and Mr Roberts-Smith, he had a recollection of some members of Mr Roberts-Smith’s patrol being present at the time of the unlawful assault.⁷¹⁵ The Respondents did not ask Person 4, Person 11 or Person 56 whether they recalled any such event.
30. Person 7 despite being a senior non-commissioned officer in 2012, said that he did not tell anyone about the alleged assault at the time.⁷¹⁶ That in and of itself suggests, that even if some kind of incident had occurred, Person 7 did not view it as serious.
31. Person 7 also claimed to have raised this allegation with Person 100 in 2013.⁷¹⁷ As with the alleged 2010 assault, that claim was also not put to Person 100. Once again, given that Mr Masters’ notes of some years later do not record any mention of the incident, it seems improbable it would have been reported in 2013. That issue is discussed further in the credit section below.
32. As with the alleged 2010 assault, even before Person 7’s credit is considered, the Respondents have not discharged their onus. Two witnesses gave evidence with diametrically opposed versions some nine years after the alleged event. The accuser made no contemporaneous report. The accuser’s version depends upon Mr Roberts Smith’s being able to have a conversation in Pashto with a prisoner

⁷¹² T3607 L 19 – T3608L16 (P7).

⁷¹³ T3608 L20-29. T4001 L7 suggests the term is “*rag dolling*” (P7).

⁷¹⁴ T3608 L31-32 (P7).

⁷¹⁵ T4000 L27-31 (P7).

⁷¹⁶ T4000 L33-37 (P7).

⁷¹⁷ T4001 L28-37 (P7).

when he could not speak that language (and certainly not to that extent). There is no corroborative documentary evidence. No questions were put to potential witnesses.

Credit of Person 7

33. There is no firm evidence that Person 7 told anyone of either the 2010 or the 2012 unlawful assaults until 2018 until shortly prior to those allegations appearing in the newspapers.
34. The lack of any reference to either of these alleged assaults in Mr Masters' extensive notes of his meetings with Person 7 is telling. Person 7 maintained he had told Mr Masters about the assaults in 2015 or 2016.⁷¹⁸
35. However, the notes Mr Masters took (Ex. R142/R143) disclose a very considerable array of topics related to Mr Roberts-Smith upon which Person 7 was prepared to expound. Person 7 saw fit to tell Mr Masters:
 - (a) that an old lady from Perth had said that Mr Roberts-Smith was a bastard of a kid;⁷¹⁹
 - (b) that on an occasion Mr Roberts-Smith and his wife split up, she moved in with a friend, and was saying that he bullies her but she puts up with it for the sake of a good life;⁷²⁰
 - (c) that Mr Roberts-Smith bullied people when he was in 3RAR;⁷²¹
 - (d) that Mr Roberts-Smith bashed someone in Malaysia;⁷²²
 - (e) that Mr Roberts-Smith was not a "bright bloke";⁷²³
 - (f) that Mr Roberts-Smith was flat out writing a report for his soldiers and now he's supposed to be running Channel 7 in Queensland. Person 7 could not imagine him writing an annual report;⁷²⁴
 - (g) that Mr Roberts-Smith's father had resigned from an inquiry for personal reasons not long after Person 10 put his bullying complaint in;⁷²⁵
 - (h) that before he was awarded the Victoria Cross Mr Roberts-Smith "*did not give a shit about charities*";⁷²⁶
 - (i) that Mr Roberts-Smith was known as bully from his school days;⁷²⁷
 - (j) that Mr Roberts-Smith had only been to one football match and function held annually in memory of his friend the late Sergeant Locke;⁷²⁸
 - (k) that on rotation 9 he Mr Roberts-Smith "*snotted Person 3*" because Person 3 had "*put the bounce on his wife*";⁷²⁹

⁷¹⁸ T3688 L42 – T3689L5, T3906 L22-39, T3911 L20-32. A slightly more equivocal answer appears at T3669 L1-3 (P7).

⁷¹⁹ T3719 L1-6 (P7).

⁷²⁰ T3655 L22-28 (P7).

⁷²¹ T3655 L39-40 (P7).

⁷²² T3655 L42-43 (P7).

⁷²³ T3683 L1-13 (P7).

⁷²⁴ T3683 L19-34 (P7).

⁷²⁵ T3684 L13-26 (P7).

⁷²⁶ T3684 L 30-40 (P7).

⁷²⁷ T3686 L35-42 (P7).

⁷²⁸ T3710 L24-39 (P7).

- (l) that Mr Roberts-Smith was an average soldier and out of his depth as a patrol commander;⁷³⁰
 - (m) that in 2012 Mr Roberts-Smith shot a dead body and claimed he killed him;⁷³¹
 - (n) that the Victoria Cross citation was “*lies and embellishment*”;⁷³² and
 - (o) that Mr Roberts-Smith told his wife not to speak to Person 44’s wife again.⁷³³
36. After offering that buffet of bile to Mr Masters (which even Person 7 felt obliged to admit was “*petty, immature, childish gossip*”⁷³⁴), it is simply not probable that Person 7 would have somehow failed to make any mention of not one, but two unlawful assaults he claims to have been an eyewitness to in 2010 and 2012. Similarly, it is not probable, to the extent Person 7 suggested this, that Mr Masters failed to document either event. In any event Mr Masters did not give evidence and it can be assumed his evidence would not have assisted on this point.
37. To similar effect is the evidence concerning the 2014 letter of complaint, prepared by Person 6 and signed by Person 7.⁷³⁵ Although a function of the letter is to attack Mr Roberts-Smith’s 2012 citation, the letter ranges over a number of topics including training incidents, the improper mentoring of Person 10, the blue on blue incident and an allegation Mr Roberts-Smith deliberately compromised his patrol for the sake of a gunfight. It is difficult to conceive of how such a letter could miss the alleged assault of a prisoner in 2012 – unless that is, such an allegation had not yet been invented.
38. According to Person 7, the 2012 assault was not included in the letter because it was based only on the citation.⁷³⁶ That explanation founders in the face of the wide-ranging content of the letter as discussed above. It is highly unlikely that in 2014, Person 7 would fail to suggest to Person 6 that the complaint letter, the purpose of which was to challenge the decision to award a CDS to Mr Roberts-Smith for his leadership during the 2012 deployment, should contain a reference to the unlawful assault of PUCs during that rotation had it occurred. The omission of the allegation from the 2014 letter of complaint is another factor suggesting the allegation is invented.
39. Also troubling is Person 7’s evidence concerning his attitude to Mr Robert Smith’s Victoria Cross. Person 100 suggested that in the meeting in 2013, Person 7 had said he had concerns about whether Mr Roberts-Smith was a “*fit and proper person to be awarded the Victoria Cross.*”⁷³⁷ Person 100 further stated that Person 7 said at the meeting that Mr Roberts-Smith was not entitled to the Victoria Cross “*because I had engineered a reason to go back and visit the battle site at Tizak and had measured our the ground where the citation said that it was 80 metres, and I measured it at 50 metres*”. Person 7 called for the Victoria Cross to be rescinded.⁷³⁸ It was not put to Person 100 that any of this was false, and Person 7 agreed he had revisited Tizak to compare the citation with his view of the ground.⁷³⁹ The evidence highlights Person 7’s obsession with Mr Roberts-Smith’s Victoria Cross.

⁷²⁹ T3720 L18-43 (P7).

⁷³⁰ T3721 L46 – T3722 L 3 (P7).

⁷³¹ T3724 L6-11 (P7).

⁷³² T3725 L24-28 (P7).

⁷³³ T3731 L1-23 (P7).

⁷³⁴ T3707 L 42 – T3708 L2 (P7).

⁷³⁵ Ex A51

⁷³⁶ T3999 L44-T4000 L8, T4001 L20-40 (P7).

⁷³⁷ T5597 L28-30 (P7).

⁷³⁸ T5598 L 10-16, T5599 L 9-12 (P7).

⁷³⁹ T3878 L37-47, T 3963 L 2-26 (P7).

40. Person 7 denied being angry and frustrated that Mr Roberts-Smith had been recognised for the battle at Tizak in 2010.⁷⁴⁰ However he agreed he did not believe Mr Roberts-Smith earned or deserved a Victoria Cross.⁷⁴¹ Mr Masters notes recorded Person 7 as saying “*Anger and frustration when mentioned one bloke’s name. Incredible weight of evidence re Tizak.*” Person 7 did not recall saying this but in the absence of evidence from Mr Masters it must be assumed that he did.⁷⁴²
41. Person 7 claimed he did not deserve recognition for Tizak⁷⁴³ however the extent of his obsession belies this. For instance, his evidence about his suspicion arising from a sighting of Mr Roberts-Smith and the Troop Commander at night near a computer shortly after the battle, was sadly indicative of a paranoid obsession.⁷⁴⁴ So was his evidence that Mr Roberts-Smith and Person 5 “*stole the credit that belonged to others in relation to the citation for the Victoria Cross.*”⁷⁴⁵
42. Person 7’s evidence vacillated between denials of jealousy on the one hand, and obsession and lengthy explanations of his particular objections concerning Mr Roberts-Smith’s Victoria Cross on the other hand. He professed a belief in the bravery of Person 5’s patrol at Tizak but at the same time claimed Mr Roberts-Smith’s citation contained “*lies and embellishments*”.⁷⁴⁶ Ultimately it is a matter for the Court, but the Applicant submits Person 7 had an unhealthy obsession with Mr Roberts-Smith’s Victoria Cross and that this substantially diminishes his credibility as an accuser of Mr Roberts-Smith. The reason is that Person 7 only took steps to make his serious allegations public (in 2018-2019) after he failed in his efforts to attack Mr Roberts-Smith’s awards.
43. Other issues reflected adversely on the credit of Person 7:
- (a) See paragraph E1 of the Applicant’s Closed Court Submissions.
 - (b) Person 7 stated that when he appeared on 60 Minutes in September 2019, he wished to let the Australian public to know about the allegations and wanted Mr Roberts-Smith to be made accountable. He knew an investigation was underway at the time.⁷⁴⁷ At another point he described his motive (given an investigation already existed) as to “*reaffirm the allegation so it was kept – so that the Australian people understood it and certainly knew about it and took it seriously.*”⁷⁴⁸ He further claimed that he pushed the Darwan allegation on 60 Minutes to ensure it was taken seriously by Australia.⁷⁴⁹ The evidence is not persuasive in circumstances where the allegations had already been widely circulated in the matters complained of in 2018 resulting in a defamation case and where the IGADF was continuing an investigation which the Respondents had widely publicised. Furthermore Person 7 was not an actual witness to the incident in Darwan about which he spoke on the program. RS Section IX [34] argues that “*it was greatly to his credit that he fought for serious allegations of misconduct to be investigated, even when it was unpopular to do so*”. However, by 2019 this was occurring in proper forums as widely reported by the Respondents. Person 7’s appearance on 60 Minutes that year was entirely gratuitous and the most plausible explanation is that the true purpose was to further his vendetta against Mr Roberts-Smith.

⁷⁴⁰ T3638 L 36-38 (P7).

⁷⁴¹ T3639 L 8-19 (P7).

⁷⁴² T3656 L 9-23, T 3813 L 19-30. See also T3769 L11-T3770 LL24 and T3771 L36 for other references in the notes to Tizak (P7).

⁷⁴³ T3767 L 43 (P7).

⁷⁴⁴ T3776 L 28 – T3778 L 15 (P7).

⁷⁴⁵ T3951 L 19-22 (P7).

⁷⁴⁶ T3966 L 20 – T3967 L 30 (P7).

⁷⁴⁷ T3689 L12-44, Closed Court Transcript 22 March 2022 T9 L10-17 (P7) (redacted).

⁷⁴⁸ T3695 L31-34. See also T3667 L 1-6, T3688 L 34-40, T3693 L3-4 (P7).

⁷⁴⁹ T3666 L19-23 (P7).

- (c) Person 7 passed information to Mr McKenzie in breach of the Defence Media Policy, prior to the IGADF concluding its investigation.⁷⁵⁰ RS Section IX [33] records that the contacts with Mr Masters were approved but ignores the evidence concerning Mr McKenzie. Person 7's willingness to act in such a manner also suggests a desire to harm Mr Roberts-Smith.

E. CONCLUSION

44. Once the credit of the sole accuser is weighed on the scales, the Applicant submits the Respondents have clearly failed to discharge their burden of proof. The Court should find that the 2 alleged assault in March 2010 and August-September 2012 never occurred.

⁷⁵⁰ Closed Court Transcript 22 March 2022 T8 L32-46 (P7) (redacted).

SECTION X: CHORA PASS AND THE BULLYING OF PERSON 1

A. INTRODUCTION

1. There are two relevant imputations relied upon by the Respondents in relation to the mission in the Chora Valley on 31 May to 2 June 2006, and the bullying of Person 1.
2. The first relevant imputation arises from the 9 June 2018 publications and is:

Imputation 5(c)/7(c) (Fairfax) *The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan.*⁷⁵¹

This imputation is also a contextual imputation alleged to have arisen from the 10 June 2018 and 11 August 2018 publications.⁷⁵²

3. The second relevant imputation arises from the 11 August 2018 publications and is:

Imputation 13(f)/15(f) (Fairfax) *The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence.*⁷⁵³

4. The PoT at paragraphs 17-36 put the Respondents' case on these issues in this manner:

- (a) Particulars 18-25 deal with incidents that occurred during the mission on the Chora Pass on 31 May to 3 June 2006. It is alleged that:

- (i) the Applicant and the late Sergeant Locke killed a 13-14 year old boy (PoT [21]);
- (ii) That in the subsequent battle "*The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.*" (PoT [24]);
- (iii) That the fact the OP was compromised because of the shooting of the teenage boy "*reflected poorly on the Applicant*" (PoT [25]).

- (b) Particular 26 alleges that the Applicant has falsely said Person 1 was unprepared for battle "*in order to detract attention from his own conduct on the mission*".

- (c) Particulars 27A-35 contains various allegations of bullying of Person 1 by the Applicant from 2006 to 2012.

- (d) Particular 36 is in these terms:

"It may be inferred that the Applicant's conduct in respect of Person 1 was, in part to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager."

5. None of these false particulars have been withdrawn. They survive to this day as allegations within the pleading despite:

⁷⁵¹ Statement of Claim Fairfax Proceedings paragraph 15(c), 7(c).

⁷⁵² Further Amended Defence 3 June 2021 paragraph 18(b)(i)(B).

⁷⁵³ Statement of Claim Fairfax Proceedings paragraph 13(f), 15(f).

- (a) Person 1’s evidence that the person who was shot was a fighting aged male and plainly a spotter and a legitimate target;
 - (b) Person 1 agreeing that the cause of his weapons malfunction was that he forgot the gun oil (this being nothing to do with a feed plate issue);
 - (c) It being plain that Mr Roberts-Smith had no authority whatsoever within the patrol and that when he followed the late Sergeant Locke out to engage the spotter he was only doing as Person 33 and the late Sergeant Locke wished.
6. The determination of whether conduct constitutes bullying in a workplace is not to occur in a vacuum, but must be determined by reference to objective elements. The matters alleged pre-date the enactment of the *Fair Work Amendment Bill 2013* (Cth) which introduced Part 6.4B to the *Fair Work Act 2009* (Cth) which includes a definition of bullying in s.789FD.
7. In determining whether the conduct of Mr Roberts-Smith constitutes bullying, the Court would need to be satisfied on an objective basis that the conduct of Mr Roberts-Smith was **repeated** behaviour that was unreasonable or inappropriate in the particular circumstances of each matter pleaded by the Respondents.⁷⁵⁴
8. The real matter of significance that emerges from these particulars is that the Respondents directly link the incidents in the Chora Pass to the bullying of Person 1. On their case, those incidents led, at least in part, to the alleged bullying. Once it is accepted that the engagement of the spotter and other events did not transpire in the manner originally put forward by the Respondents, the whole case founders. It also founders because much of the alleged conduct towards Person 1 simply did not happen, and those incidents that did occur cannot be construed as bullying. In particular, in circumstances when a soldier’s negligence has endangered the life another soldier, it is understandable if some anger erupts as a result of that negligence. That is not bullying.

B. DEPLOYMENT AT CHORA PASS 31 MAY – 3 JUNE 2006

The Patrol

9. The patrol consisted of the following members:⁷⁵⁵
- (a) Person 33, the patrol commander. He carried an M4 assault rifle. He was a highly experienced British soldier. Person 1 described him as an “*absolute gentleman*”;
 - (b) the late Sergeant Locke, the 2IC. He also carried an M4 assault rifle;
 - (c) Mr Roberts-Smith. He carried a suppressed SR 25. It was his first deployment;
 - (d) Person 1. He carried a Para Minimi belt fed machine gun (which he agreed amounted to some 25% of the firepower of the patrol). It was his first deployment. He also had the medic role;
 - (e) Person 2. He carried a suppressed SR 25. He also had a role as a radio operator; and
 - (f) Person 23, an American Joint Terminal Attack Controller (**JTAC**). His sole function was to co-ordinate the dropping of bombs from aircraft.

⁷⁵⁴ Des Butler, *Employer Liability for Workplace Trauma* (Ashgate Publishing 2002) 24.
⁷⁵⁵ T136 L39-44; T 2159 L43 - T 2160 L3; T 2220 L17; T 2226 L4-6; T 2264 L20-22.

C. MISSION AND INSERTION

10. The mission was to establish an Observation Post (**OP**) over the Chora Valley. The OP would be used to report on enemy dispositions preceding a large-scale assault by American forces.⁷⁵⁶
11. The patrol infiltrated by foot on the evening of 31 May 2006. They walked approximately 10 hours through the night up a mountain range (Khoran Gar) to reach the designated position. They wore night vision goggles. They were carrying packs weighing approximately 70kg, containing water, ammunition, medical kits, radios and camouflage netting.⁷⁵⁷
12. On the morning of 1 June 2006, the patrol was able to sight the vehicles that dropped them off. Those vehicles had moved further up the Chora Valley in view of the OP. The vehicles were attacked with RPGs and machine gun fire as they reached the edge of the green belt within the valley. Person 70 was wounded and then medically evacuated. Person 23 helped to control aircraft and direct munitions at the enemy.⁷⁵⁸

D. POSITION (OP AND LUP)

13. According to Mr Roberts-Smith, the OP and Laying up Position (LUP) were located on a saddle. The OP was on the northern side of the ridgeline and the LUP was about 10 metres behind on the southern side of the ridgeline.
14. Person 1 placed the LUP as approximately 20 metres behind the OP. He also stated that the LUP was approximately 15-20 metres higher in elevation than the OP.⁷⁵⁹ Person 1 stated that it was possible to see down at least parts of the face of the hill on the side closest to Chora from the LUP.⁷⁶⁰ He agreed that persons in the OP could not see what persons in the LUP could see or what they were doing. He also agreed that persons in the LUP would have had a different view of things.⁷⁶¹
15. According to Person 2 the LUP was 30 metres from the OP.⁷⁶² Person 2 gave evidence (contrary to all other witnesses) that the LUP had no line of sight to both the cliff face north of the OP and the cliff face to the north.⁷⁶³ The effect of his evidence was that the OP had been situated where it could not be seen (at all) from the LUP.⁷⁶⁴ That is not probable and Person 2 could not possibly have known what persons in the LUP could see from whichever position they stood or sat within the LUP. Person 2 stated that whilst in the OP he couldn't observe or hear what was going on the LUP.⁷⁶⁵
16. The Applicant submits the overwhelming probability is that it is not possible for persons in the OP to be able to specify with any confidence what those in the LUP could or could not see. It is also plain that persons in the OP would not have been able to hear those in the LUP (unless they were shouting or speaking loudly and wished to be heard).

⁷⁵⁶ T137 L9-13 (BRS).

⁷⁵⁷ T137 L3-47 - T139 L2 (BRS). See also Ex. A11; T2160 L5-41.

⁷⁵⁸ T142 L16-44 (BRS).

⁷⁵⁹ T2222 L25-43 (P1).

⁷⁶⁰ T2161 L30 - T2162 L7 (P1).

⁷⁶¹ T2223 L11-25 (P1).

⁷⁶² T2481 L29-36 (P2).

⁷⁶³ T2482 L18-22; Ex. R124 (P2).

⁷⁶⁴ T2508 L29-33; T 2509 L1-6 (P2).

⁷⁶⁵ T2508 L40-47; T 2509 L8-13 (P2).

E. THE ENGAGEMENT WITH THE SPOTTER

Introductory

17. The allegations as framed by the Respondents' Senior Counsel on this topic were of an exceptionally serious kind. It was put to Mr Roberts-Smith that "*you didn't want the public to think you had won a medal of gallantry for shooting an unarmed teenager.*"⁷⁶⁶ Further that Person 1 "*had the misfortune to be on the observation on Chora Pass where you and Matt Locke shot an unarmed teenager and compromised the mission*"⁷⁶⁷ and "*the real problem you had with Person 1 is because from that point onwards he knew the truth of the engagement with an unarmed teenager.*"⁷⁶⁸ It was expressly put to Mr Roberts-Smith that he had killed a young adolescent.⁷⁶⁹
18. Propositions of this kind should not have been put to Mr Roberts-Smith considering the admissions made by Person 1 himself:⁷⁷⁰
- (a) the person who was shot had a beard and was aged between 15 and 20;
 - (b) the person who was shot retrieved a bag prior to his change of direction and it was possible that the bag contained ammunition;
 - (c) it was a live possibility that the person who was shot recognised there was an anti-Taliban patrol sitting at the top of the ridge;
 - (d) the likelihood is that the person who was shot was a Taliban spotter;
 - (e) if the person was a Taliban spotter he was a completely legitimate target for Mr Roberts-Smith and the late Sergeant Locke to kill;
 - (f) that he had always viewed the assessment by the late Sergeant Locke and Mr Roberts-Smith that the person should be killed as an assessment they were entitled to come to in those circumstances; and
 - (g) that if the Taliban became aware that the patrol was in that position they would have taken steps to hunt down and kill the members of the patrol.

Age of the Spotter

19. Mr Roberts-Smith described the spotter as "*definitely a fighting aged male*" and "*definitely over 20*".⁷⁷¹ As discussed above, Person 1 described him as 15-20 and as having a beard. According to Person 2 the spotter was 14-15 years old.⁷⁷² Accordingly, the suggestion at RS [10] that Persons 1 and 2 agreed on this issue is slightly overstated. However, notes of a conversation between Person 2 and Mr Masters from prior to 21 April 2016 were produced in the course of the evidence of Person 2 (Ex. A266) cast the evidence of Person 2 in a different light. They included this reference:

"About lunchtime our patrol was compromised. Person 1 and I spotted a FAM, a teenager. Moving along a steep hill covered with goat trails. He was definitely a spotter."

⁷⁶⁶ T728 L25-26 (BRS).

⁷⁶⁷ T737 L21-23 (BRS).

⁷⁶⁸ T737 L25-26 (BRS).

⁷⁶⁹ T724 L30-31 (BRS).

⁷⁷⁰ T2163 L17-19; T2219 L1-6; T2224 L40 - T2225 L45 (P1).

⁷⁷¹ T145 L43-45 (BRS).

⁷⁷² T2483 L20-21; T2506 L26-27(P2).

20. The document shows that for Person 2 the actual age of the spotter had not been an important issue. The salient point was he was a spotter and a fighting-age male. This document had been in the possession of the Respondents for many years but even knowing the contents of this document, and, it must be assumed, also knowing the evidence Person 1 was likely to give on this topic, they still put the propositions to Mr Roberts-Smith recorded above and maintain their justification particulars.
21. Person 2's evidence on this issue at the trial should be rejected. It is inconsistent with the evidence of all the other witnesses. Most critically, it is inconsistent with the Observation Log that he and Person 1 maintained at the time. That log is Ex. R46. Item 16 records an incident at 0441 zulu time (which was 9.11am local time). It says, "*I ACM spotted from OP moving NE along ridge (see Incident RPT)*". ACM stands for "Anti Coalition Militia". It is significant that another entry on the log, Item 3, refers to "*1 boy carrying launcher and rocket, 2nd boy carrying rocket walking with older male*". It follows that if a "boy" was being observed as opposed to an "ACM" that this would have been recorded.
22. The relevant evidence as to the log included the following:
- (a) Mr Roberts-Smith's evidence concerning the manner in which the team operated the log is contained at paragraphs F1 to F4 of the Applicant's Closed Court Submissions.
 - (b) Person 1 agreed that the log contains entries made by someone who was in the OP at that time.⁷⁷³ He could not recall whether he or Person 1 made the relevant entry (Item 16).⁷⁷⁴ Person 1 did not recall using a spotting scope but did recall that he had been using binoculars.⁷⁷⁵ When asked whether, given the fact that he had been using the binoculars, it was probably Person 1 who described the person and Person 2 who recorded the description in the log, Person 1 replied "*not necessarily*".⁷⁷⁶ The Applicant submits that it is substantially probable that this is what occurred.
 - (c) Person 2 claimed he was using binoculars and Person 1 was scribing in the log.⁷⁷⁷ He claimed to have observed the spotter through his natural eyesight out of the corner of his eyes.⁷⁷⁸ He was not sure who made the entry in the log but later said he would assume it was Person 1 if he was holding the binoculars.⁷⁷⁹ He ultimately agreed that if Person 1 was the scribe he must have told him the contents of Item 16 (and vice versa).⁷⁸⁰
23. The contents of Item 16 in the log are corroborated by the After Action Report (AAR) which is Ex. R48. It contains the words "*K23 and K24 were on OP and identified 1 ACM approximately 100m NE of the OP as he moved East ...*" The AAR does not record the age – the salient point is the person is an ACM.
24. The Court should find that the spotter was not a "boy" or a "young adolescent" but a fighting aged male and a spotter. Not a single member of the patrol gave evidence that his age somehow affected his legitimacy as a target.

⁷⁷³ T2166 L35-36 (P1).

⁷⁷⁴ T2168 L1-6 (P1).

⁷⁷⁵ T2162 L40; T2221 L 38 - T2222 L20 (P1).

⁷⁷⁶ T2222 L21-22 (P1).

⁷⁷⁷ T2480 L18-29; T2503 L1-2 (P2).

⁷⁷⁸ T2483 L1-11; T2503 L1-20 (P2).

⁷⁷⁹ T2486 L27; T2504 L19-28 (P2).

⁷⁸⁰ T2506 L1-15 (P2).

Movements of the Spotter

25. There was general agreement that the spotter was sighted moving in one direction. He disappeared and then re-appeared moving in another direction. When he reappeared, he was carrying something.
26. Mr Roberts-Smith, located in the LUP, recalled a radio transmission from the OP to the effect that a male was approaching. He observed the spotter to be perhaps 50-60 metres past the observation post. He believed he was wearing chest webbing. At some point Mr Roberts-Smith recalled the spotter making a hard left turn and breaking off to his left. At that point Mr Roberts-Smith recalled another transmission from the OP advising of a change in direction. He believed the individual had seen the patrol.⁷⁸¹ At that point Person 33 made an indication and Mr Roberts-Smith and the late Sergeant Locke left.⁷⁸² Those events are dealt with below.
27. Person 1 recalled that the spotter was first observed 76 or 78 metres from the OP. He was looking in the direction of the OP. He stepped into the open and walked in front of the OP.⁷⁸³
28. Person 1 did not believe that that the spotter had seen the patrol as he did not observe a change in body language or “dinner plate” eyes.⁷⁸⁴ He did not observe chest webbing.⁷⁸⁵ The spotter disappeared behind some rocks. When he re-appeared, he was carrying a satchel. Person 1 conceded the bag may have contained ammunition and that the person was a spotter.⁷⁸⁶ He moved back across in the opposite direction.⁷⁸⁷ It was at this point that he recalled the late Sergeant Locke approaching the OP.
29. Person 2 recalled that the spotter was walking towards the OP from right to left. He recalled making a radio transmission confirming this movement. He did not observe chest webbing. He lost sight of the spotter at a distance when the spotter was about 70 metres below the OP. After 30 seconds to a minute the spotter re-appeared now carrying a small bag like hessian sack. The spotter walked back the way he had come.⁷⁸⁸ This movement was again the subject of a radio transmission. He did not believe the spotter had seen the OP because of his body language.⁷⁸⁹ The late Sergeant Locke and Mr Roberts-Smith then moved quickly from the LUP to the OP.
30. The notes taken by Mr Masters of a conversation with Person 2 prior to 21 April 2016 record Person 2 as saying “*He was definitely a spotter. Saw him recover a cache.*” Person 2 claimed he would have said to Mr Masters that he observed the spotter “*retrieve a bag, a sack of some sort most likely from a cache, and then move back away from the OP*”.⁷⁹⁰ That is not likely given the explicit language of the note. In any event the use of the word “*cache*” makes it perfectly plain that at all times Person 2 assumed that the spotter was engaged in supporting the enemy.
31. There is no doubt that the spotter, in retrieving the bag and/or in changing direction, acted in a manner that at the very least could be reasonably regarded as suspicious. That would be alone sufficient to justify the steps taken by Person 33 and/or the late Sergeant Locke (Mr Roberts-Smith not being a decision maker on this mission).

⁷⁸¹ T143 L17-31 (BRS).

⁷⁸² T143 L35-37; T 144 L35-40 (BRS).

⁷⁸³ T2162 L44 - T 2163 L7 (P1).

⁷⁸⁴ T2163 L9-5 (P1).

⁷⁸⁵ T2163 L23 (P1).

⁷⁸⁶ T2225 L1-2 (P1).

⁷⁸⁷ T2163 L37 - T 2164 L13 (P1).

⁷⁸⁸ T2483 L27 - T 2484 L14 (P2).

⁷⁸⁹ T2484 L16-39 (P2).

⁷⁹⁰ T2518 L2-4 (P2).

32. As to the dispute over whether the spotter was wearing chest webbing, given that Mr Roberts-Smith had the opportunity to observe the spotter on two occasions (including during the engagement with the late Sergeant Locke) his evidence should be preferred on this issue.

Steps taken by the late Sergeant Locke and Mr Roberts-Smith

33. Mr Roberts-Smith recalled that following the spotters change in direction and the second radio transmission, Person 33 had said to him and the late Sergeant Locke, “go”. Mr Roberts-Smith followed the late Sergeant Locke out of the LUP. They turned right and, using the “caterpillar” motion, moved to where they had seen the spotter. The engagement occurred at a range of 70 to 80 metres. The late Sergeant Locke saw the spotter and engaged first. Mr Roberts-Smith then dropped to his stomach and also engaged although by this time the spotter was down. He noticed a flare up on the spotter’s chest webbing which he described as a translucent smoke. The late Sergeant Locke decided they would not exploit the body and they returned to the LUP. The late Sergeant Locke had a conversation with Person 33.⁷⁹¹
34. Person 33’s AAR, which is Ex. R48, recorded that as the spotter dropped to the ground during the engagement “*a smoke grenade was deployed it is unconfirmed whether he released this or whether it was hit by small arms shortly after hitting the ground he burst into flames, the burn was very similar to a red Phosphorous.*” The Applicant submits this record is broadly consistent with his recollection. While he did not recollect a smoke grenade, the late Sergeant Locke may have told Person 33 this. In any event it is not a surprising assumption for Person 33 to have made given the report of a flare up on the chest.
35. Person 1 recalled that after observing the spotter’s change of direction, the late Sergeant Locke approached the OP. He asked Persons 1 and 2 what happened, and they explained the manner in which the individual had moved. The late Sergeant Locke asked why no engagement had occurred and Person 1 recalled that he responded “*We’re in an OP*”, meaning the idea was not to compromise the position.⁷⁹² The late Sergeant Locke then moved back up to the OP and then he and the Applicant left to engage the spotter. Person 1 did not see the engagement but heard suppressed fire from two weapons. After the engagement, in the LUP he heard the late Sergeant Locke say that when the spotter was engaged “*he had some sort of device on him that let off – yes – they didn’t know whether it was a flare or whether it was smoke ...*”⁷⁹³ This tends to corroborate the Applicant’s account.
36. According to Person 2, after the spotter had changed direction and disappeared out of sight both the late Sergeant Locke and Mr Roberts-Smith approached the OP. The late Sergeant Locke said, “*Why the fuck didn’t you shoot him?*” and Person 2 replied “*Because we’re in an OP*”. The late Sergeant Locke then said, “*Which way did he go?*”. Person 2 pointed in response and the late Sergeant Locke and Mr Roberts-Smith began running in that direction.⁷⁹⁴ Person 2 stated that a minute or two later he heard four or five shots from two different weapons (being a suppressed MF and SR 25). The late Sergeant Locke and Mr Roberts-Smith returned walked back to the LUP. Person 2 did not have any conversation with them.⁷⁹⁵
37. The late Sergeant Locke’s performance review of Person 1, prepared later that month, records criticism of Person 1 for allowing the ACM to pass the position of the OP and position himself where

⁷⁹¹ T144 L44 - T145 L41; T731 L46 - T732 L7 (BRS).

⁷⁹² T2164 L20-40 (P1).

⁷⁹³ T2165 L6 - T2166 L16 (P1).

⁷⁹⁴ T2484 L41 - T2485 L26 (P2).

⁷⁹⁵ T2485 L 41-45 (P2).

he could be a threat to the patrol. In the late Sergeant Locke's view Person 1 had failed to react properly to the situation.⁷⁹⁶

38. The Applicant submits the Court should make the following findings on the evidence:

- (a) Neither Person 1 nor Person 2 could see or hear what was going on in the LUP (some 20-30 metres away).⁷⁹⁷ They could not have known what was going on between the late Sergeant Locke, the Applicant and Person 33. Accordingly, the evidence of the Applicant and Person 33 on this issue should be accepted. In particular, the Applicant left the OP with the late Sergeant Locke with the explicit permission and encouragement of Person 33.⁷⁹⁸ RS [14] contains a submission that Mr Roberts-Smith should be disbelieved because he claimed to have seen the spotter in his rifle scope – and would therefore have been able to shoot him without moving at all. That submission should be rejected. It was never put to Mr Roberts-Smith that he could have shot the spotter from the LUP and one can readily see that the mere fact that some vision could be obtained through a scope does not mean a shot was appropriate or even possible.
- (b) As to the alleged “*why the fuck didn't you shoot them comment*”, which at particular 22 in the Defence is alleged to have been said by both the late Sergeant Locke and Mr Roberts-Smith:
 - (i) Mr Roberts-Smith denied any such conversation at the OP.
 - (ii) Person 1 said only the late Sergeant Locke came to the OP and not Mr Roberts-Smith. He gave a less florid version of the late Sergeant Locke's alleged statement.
 - (iii) Person 2 said that both Mr Roberts-Smith and the late Sergeant Locke came to the OP but that the late Sergeant Locke spoke the (more florid) particularised words.

The Court should find that if the conversation did happen, it had nothing to do with Mr Roberts-Smith. He was not responsible for it, and in any event, there was nothing inappropriate in the late Sergeant Locke speaking words of this kind during a combat situation. The late Sergeant Locke had obviously formed the view that the spotter had seen the patrol and he was clearly entitled to come to that view.

- (c) Person 1's recollection of a contemporaneous conversation with the late Sergeant Locke concerning the flare up on the spotter's chest webbing is consistent with the version of Mr Roberts-Smith. The Court should find that an event of this kind did occur.

39. Finally on this point there is the evidence of Person 69. He gave evidence of hearing a man (who fit the physical description of Person 1) describe an engagement.⁷⁹⁹ According to Person 69, he heard the person, after describing the spotter's change in movement, say “*Shortly after that Ben Roberts-Smith and Matt Locke arrived. On arrival, Ben Roberts Smith started to yell and abuse me for not engaging the male.*” Contrary to RS [20] Person 69 did not record the late Sergeant Locke as the person who abused Person 1 at this point – it was the Applicant. That evidence cannot be relied upon in circumstances where Person 1 does not even say the Applicant came up to the OP in the course of the engagement – let alone shouted at him! Either Person 69 is mistaken in his recollection, or Person 1 was not providing an accurate account back in 2006. There are other anomalies in Person 69's account:

⁷⁹⁶ Ex. R121 Tab 4 [4].

⁷⁹⁷ T2223 L15-25 (P1).

⁷⁹⁸ T2508 L40-42; T2509 L8 (P2).

⁷⁹⁹ T2302 L34 - T2303 L17 (P69). See Closed Court Transcript 21 February 2022, T2 (P69) for the physical description.

- (a) Person 69 claims that the man (Person 1) said, that after the late Sergeant Locke and the Applicant returned from the engagement, the Applicant yelled at Person 1 again. Again, that is not consistent with Person 1's evidence before this Court. Contrary to RS [20] Person 69 did not allege that both the Applicant and the late Sergeant Locke yelled at Person 1 at this point – only the Applicant.
- (b) Person 69 claims that (Person 1) spoke of a weapons stoppage that he had cleared before the Applicant again shouted at him. Again, this is not consistent with Person 1's evidence before this court; Person 1 does not say the Applicant was even present at the time of the stoppage, let alone that he abused him. The account also leaves out the reason for the stoppage (being Person 1's failure to remember the gun oil). Once again, either Person 69's recollection is mistaken or exaggerated, or Person 1 was not giving an accurate account back at the time.
40. Person 69 also gave evidence of an encounter with the Applicant at or about this time in the Fat Lady's Arms. According to Person 69 he heard the Applicant say in reference to an engagement, "*I was watching the expression on the guy's face as the bullets crept closer*" and "*The enemy were all around us. There was an individual at long range.*"⁸⁰⁰ The Applicant, upon noticing that Person 69 was looking towards him, is alleged to have said "*What the fuck are you doing here? I should smash your face in.*" According to Person 69, two warrant officers dealt with this piece of insubordination by saying in the first case, "*Pull your fucking head in RS*" and in the second case, giving a menacing stare. The Applicant denied this encounter.⁸⁰¹
41. Person 69's evidence of this incident does not affect the assessment of the issues on the justification defence. Without context, even if such a conversation occurred, it is impossible to know what was actually being discussed (at this pub – with other soldiers – unwinding after a mission), including for instance whether it was the subsequent engagement in the later afternoon of 2 June 2006 where ACM approached the Applicant at the OP. Even if the engagement with the spotter was being discussed, the mere fact that the Applicant observed the expression on the spotter's face would not affect the propriety of the engagement or otherwise undermine his evidence. Finally, no other witness gave evidence suggesting the Applicant was insubordinate, and that is not an issue in the case.

Whether the OP was compromised and the right to engage

42. Person 1 frankly conceded the engagement of the spotter was legitimate.⁸⁰² Person 2 referred to the mission orders,⁸⁰³ and expressed the view that engaging the spotter compromised the OP and the patrol's ability to complete the mission.⁸⁰⁴
43. In any event, it is not clear that the engagement of the spotter itself compromised the OP. Person 2 recalled that Person 33 had declared the incident a "*soft compromise*" and continued with the mission.⁸⁰⁵ Person 33's AAR (Ex. R48) noted that the OP had not been compromised and that OP routine continued. An incident report (Ex. R47) recorded: "*unsure if OP is compromised*". The substantial battle occurred about 9 hours later at 1330 zulu (about 5pm). The OP log (Ex. R 46) records a few sightings of ACM and other suspicious characters in the hours between the 2 events, but the general tempo of activity does not appear to have increased. The somewhat vague and contradictory records concerning the "compromise" issue is not surprising. It cannot be known if the

⁸⁰⁰ T2304 L21 - T2305 L16 (P69).

⁸⁰¹ T704 L14-46 (BRS).

⁸⁰² T2225 L18-19 (P1).

⁸⁰³ See Ex. R76; Closed Court transcript 15 June 2021, T2 L44 - T3 L2.

⁸⁰⁴ T2520 L13-25 (P2).

⁸⁰⁵ T2488 L1-3 (P2). See also the Applicant's evidence at T146 L40 - T148 L25 (BRS).

spotter actually saw the OP. Aspects of his behaviour (the change in direction and the retrieval of a bag or object) suggest he did make visual contact – members of the troop had different views. Likewise it cannot be known if the engagement of the spotter compromised the OP – the battle that ensued some 8 hours later might have been causally connected. It might not have been. These assessments are not binary, they were made in real time on a mission and the Court should be slow to infer any dishonesty in the preparation of the records.

44. The Applicant submits that the decisions and actions of Person 33 and the late Sergeant Locke took in relation to the spotter were entirely justifiable. They plainly believed the spotter had seen or may well have seen the patrol. They were entirely within their right to decide to engage. As the Applicant said, *“what would be contrary to our mission objectives is if that individual got down to the bottom of the hill and, without us seeing through dead ground, we were overrun by enemy forces and killed. That would have been the worst result which is why our patrol commander made the decisions that he did that day.”*⁸⁰⁶ Person 2, a junior trooper, may have felt a different tactical judgment was appropriate but that is neither there nor there.
45. In any event, even if an incorrect decision had been made, blame for that decision cannot be sheeted home to the Applicant, who as a junior trooper was simply following orders.

F. THE BATTLE

Commencement of the Battle

46. Exs. R48 and R49 record that the next series of engagements began at 1330 zulu time (or 5pm).
47. The Applicant recalled that mid-afternoon he and the late Sergeant Locke were at the OP. They received a radio transmission suggesting voices were heard moving up behind the LUP on the southern side. He and the late Sergeant Locke moved back to the top of the LUP. The Applicant saw an insurgent breach a rock or the wall of the side of a ridgeline. He heard automatic weapons fire break out from at least 2 Taliban coming up the back of the LUP and engaged. He heard a burst of machine gun fire of about 2 or 3 rounds then it stopped. Members of the patrol were yelling target indications. The Applicant heard the late Sergeant Locke yell at Person 1 to keep firing his machine gun.⁸⁰⁷
48. The AAR (Ex. R48) is consistent with the Applicant’s version of the manner in which the battle commenced.
49. According to Person 1, he and Person 2 heard yelling from behind the LUP. He attracted the attention of the late Sergeant Locke who moved towards Person 1. The late Sergeant Locke engaged. The patrol then received small arms fire. The late Sergeant Locke climbed up some rocks and started engaging enemy positions there. The Applicant moved towards Person 1, and from a position 2-3 metres behind Person 1, began to engage. Person 1 observed splashes 10-15 metres in front of himself and Person 2. Person 1 says he turned to the Applicant and said, *“Stop firing you are – you are fragging us with your rounds.”* According to him, the Applicant replied, *“Shut the fuck up, cunt. That’s incoming rounds.”* After the late Sergeant Locke had moved back down closer to Person 1, Person 1 observed some movement and asked for permission to engage.⁸⁰⁸

⁸⁰⁶ T703 L4-10 (BRS).

⁸⁰⁷ T147 L25 - T148 L8 (BRS).

⁸⁰⁸ T2169 L44 - T2172 L19 (P1).

50. Person 2 gave no evidence about any situation where the Applicant had been “*fragging*” or firing his weapon at a point which was incorrectly proximate to Person 1 or himself.
51. The late Sergeant Locke’s performance review of Person 1 recorded that “*Person 1 was still in position providing rear security during the contact he said he could see the ACM which was engaged our location to the east moving around our position. He was ordered to engage the ACM with F89 which he should have done automatically.*”⁸⁰⁹ Person 33’s weekly review also criticized Person 1 for his failure to engage at this point, and for asking Person 33 to engage instead.⁸¹⁰
52. There is no documentary or other corroboration for Person 1’s allegation that the Applicant fired at an inappropriate or dangerous position early in the engagement and then swore at Person 1 after he complained. That evidence should be rejected. Even if the evidence is accepted, Person 1 agreed that he did not view the conduct as bullying, so it is difficult to see the relevance of the allegation.⁸¹¹
53. Otherwise, the reports of the late Sergeant Locke and Person 33 suggest that Person 1 was reacting poorly in the battle even before his weapons failure.

Person 1 Weapons Failure

54. There is no issue that Person 1 experienced a weapons failure with his Minimi machine gun during the battle on the late afternoon of 2 June 2006. There is also no issue that this was caused not by an issue with the feed plate, as alleged in the particulars, but by Person 1’s failure to bring the gun oil which would have enabled his weapon to be properly lubricated.
55. Person 1 admitted that he had multiple stoppages because his weapon was not correctly lubricated due to a failure to bring the gun oil.⁸¹² He agreed that his failure endangered the lives of everyone else in the patrol and that the failure was basic and elementary.⁸¹³ The weapons stoppage also meant he could not perform a target indication as ordered.⁸¹⁴
56. Person 1’s weapons stoppage and his failure to bring the gun oil was recorded in multiple contemporaneous documents, including the AAR, his weekly performance reviews and the more formal performance reviews prepared by both Person 33 and the late Sergeant Locke.⁸¹⁵
57. The only evidence suggesting the cause of Person 1’s weapons stoppage to be something other than his forgetting the gun oil, came from Person 2. According to Person 2 the reason for the stoppage was that “*it was most likely the belt – machine gun belt was not sitting correctly on the feed tray.*”⁸¹⁶ In the face of the evidence from Person 1 himself and the contemporaneous documents, that evidence should not be accepted. Indeed, it is so obviously incorrect that it also points to the general unreliability of Person 2 when he is not otherwise corroborated by other witnesses or documents. RS [18] simply records the evidence of Person 1 concerning his failure to bring the oil and is silent on the particularised case concerning the feed plate.

⁸⁰⁹ Ex. R121 Tab 4 [5].

⁸¹⁰ Ex. R121 Tab 3 [1].

⁸¹¹ T2245 L19-22 (P1).

⁸¹² T2172 L27 - T2173 L1 (P1).

⁸¹³ T2227 L29-43 (P1). See also the evidence of Person 69 at T2306 L45 - T2307 L3 (P69).

⁸¹⁴ Ex. R121 Tab 4 [6].

⁸¹⁵ Ex. R48 p. 3; Ex. R121 Tab 3 [1]; Ex. R121 Tab 4 [5]; Ex. R121 [4d].

⁸¹⁶ T2515 L30-31 (P2).

Applicant's Engagement at the OP and Person 2 Weapons Failure

58. After the late Sergeant Locke climbed the saddle above the LUP and gunfire broke out, Mr Roberts-Smith realised that the OP side of the patrol's position was not secure and he moved there. He began to receive fire from the enemy that the late Sergeant Locke had engaged with. He could also see enemy approaching the OP. He identified 16 ACM in an arrowhead formation. Even though they were beyond range, he began to engage them at about 800 or 900 metres distance because he wished to slow them down.⁸¹⁷
59. Mr Roberts-Smith's evidence was after he had been in this position for about 20 minutes, he yelled to Person 33 requesting support. Person 33 then ordered Person 2 to Mr Roberts-Smith's position. Person 2's weapon did not fire. He cocked the weapon and a round was ejected and he attempted to fire a second time before repeating the process. The Applicant picked up one of the rounds and assessed the back as soft struck, meaning that the firing pin is not properly striking the back of the round. He told Person 2 to go and strip his weapon. Person 2 moved back to the LUP and returned 10-20 minutes later. By this time his weapon was functioning and he was able to fight. Person 2 told Mr Roberts-Smith that the firing pin was loose in the bolt. This suggested to Mr Roberts-Smith that Person 2 had not correctly tested his weapon after assembly.⁸¹⁸
60. According to Person 2, after Person 33 directed him to support Mr Roberts-Smith, his rifle went click and he attempted to re-cock it twice with the same result. Mr Roberts-Smith told him to "*Fix it*". He thought, "*worst case I've got a broken firing pin*". He moved behind a rock, stripped his bolt and disassembled and re-assembled the weapon before returning to support the Applicant. Person 2 agreed that he had not assembled the bolt correctly and the bolt retaining pin was sitting on the wrong side of the firing pin. According to Person 2 that process took no more than a minute.⁸¹⁹
61. The AAR (Ex. R48) recorded that "*K 23 had a weapons failure. K23 continually cocked his weapon without identifying the fault K25 identified K23's rounds were soft struck K25 told him to move back into more cover and rectify the problem. K23 thought the problem was a faulty firing pin after he stripped his weapon he identified that he had incorrectly assembled the bolt.*"
62. There does not appear to be any genuine dispute that Person 2 suffered a weapons stoppage caused by his own failure to assemble the weapon correctly. The only real dispute seems to be the amount of time it took to rectify the problem. The Respondents put to Mr Roberts-Smith that his citation (which recorded him as holding a position for 20 minutes by himself) was incorrect by reason of the fact that Person 2 was only gone for 1-2 minutes. However, as the Applicant pointed out he had already been in that position for some 20 minutes prior to the arrival of Person 2.⁸²⁰

G. EVENTS AFTER THE BATTLE AND THE EXTRACTION

Person 1's Night Terror

63. During the night and after the battle an incident occurred involving Person 1. According to the Applicant, Person 1 woke up and began screaming "*I'm a friendly, I'm a friendly*" five or six times. The Applicant, startled by the volume, turned around to observe Person 1 pointing his Minimi at the

⁸¹⁷ T148 L10 - T149 L18 (BRS).

⁸¹⁸ T149 L40 - T150 L 25 (BRS). See T710 L15-35 for the Applicant's evidence that he was in position for 20 minutes prior to the arrival of Person 2.

⁸¹⁹ T2489 L28-34; T2509 L20-23, 38-39; T2509 L43 - T2510 L2 (P2).

⁸²⁰ T710 L10-35 (BRS).

Applicant. The Applicant believed Person 1 was experiencing a night terror. Person 33 stepped in between the Applicant and Person 1, and managed to calm Person 1 down.

64. It was put to the Applicant in cross-examination that Person 1 was not holding a gun and that instead the Applicant was pointing a weapon at Person 1. Indeed, senior counsel for the Respondents went so far as to put to the Applicant “*And you’ve lied about this story both to impugn Person 1 and to cover up your disgraceful act of pointing a loaded weapon at another SAS trooper.*” The Applicant denied these propositions.⁸²¹ RS Section X [19] blithely records that the Applicant accepted he was holding his weapon at the time. Apparently, the allegation that he pointed a loaded weapon at Person 1 is not pursued but concerningly has not been withdrawn. This is unsurprising as Person 1 himself did not give this evidence.
65. The evidence of the Applicant is corroborated by Person 33’s weekly report which contained the words “*He woke to the noise of another patrol member moving shouting ‘friendly, friendly’. He had woken from a state of deep sleep, but his state of mind was not on the task at hand. He had to be calmed down and controlled until he had gathered his senses again.*”⁸²²
66. At Ex. R121 Tab 4, in the late Sergeant Locke’s performance report of Person 1, he recorded: “*As another Patrol member approached his position from inside the perimeter he stood up and started shouting “friendly, friendly” and waving his weapon around*” (emphasis added). This is contemporaneous corroboration of the Applicant’s recollection that Person 1 held a weapon.
67. Person 1 recalled waking with his hand in front of him and saying “*friendly, friendly, friendly*”. He recalled the Applicant yelling at him and that Person 33 asked the Applicant to stand down. He denied holding a weapon himself. He said he did not recall whether the Applicant held a weapon at the time he was yelling.⁸²³
68. Person 2 gave no evidence as to this incident. The basis upon which Counsel for the Respondents put to the Applicant that he had pointed a loaded weapon at Person 1 is unknown.
69. The Court should accept the version of this incident given by the Applicant and Person 33. The significance is not so much that Person 1 behaved inappropriately, but that (unconscious or otherwise) he pointed a loaded weapon at the Applicant without justification.

Extraction

70. Persons 23 and 33 attempted to obtain air support to assist the patrol. Person 33 ordered the patrol to co-locate their packs in the centre of the LUP. The reason for the order was that if the patrol had to evacuate it would be easier to call in ordinance to destroy the packs so the enemy could not obtain the equipment. Person 33 asked Person 23 (the JTAC controller) to use a code word reserved for special forces about to be overrun. Aircraft were scrambled and the enemy positions bombed. The patrol exfiltrated on foot.⁸²⁴
71. The gravity of the situation is made plain in the AAR (Ex. R48) which records:

“It was assessed the enemy were determined to close with and clear our position until effective air support forced them to retreat it is believed if we had not withdrawn that position in the

⁸²¹ T735 L14-31 (BRS).

⁸²² Ex. R121 Tab 3 [1].

⁸²³ T2174 L1-13; T2243 L41-46 (P1).

⁸²⁴ T150 L40 - T151 L9; T152 L7 - T153 L27 (BRS).

hours of darkness and the subsequent lodgement of the 2/4th infantry company in Chora the ACM would have more than likely tried to make an approach and isolate us in position in the early hours of the following day.”

See also the slightly more colourful language used by Person 23 to describe the situation in his report, which is Ex. R52.

H. THE DOCUMENTARY RECORD

72. The Respondents rely upon inconsistencies in the documentary records including the Incident and After Action Reports.⁸²⁵ Allegations were put to the Applicant that these records had been fabricated or tampered with to try and bolster the late Sergeant Locke’s and the Applicant’s version of the engagement with the spotter. See for instance the suggestions of “*deliberately false reporting*” put to the Applicant at T 703 L22-34 and again at T 732 L20-30. There are two answers to these propositions:
- (a) As exposed by the summary of the evidence above, there was nothing to hide or conceal. The engagement of the spotter was legitimate. The only substantive objection is raised by Person 2 who says that the engagement should not have happened because of the character of the mission being to observe and surveil. The decision of whether the risk presented by the spotter justified taking the risk of engaging him and possibly compromising the OP, was not a decision to be made by Person 2, any more than it can be sheeted home to the Applicant. There was simply no motive to fabricate any statement in these documents and the anomalies are therefore best explained as accidental. As the Applicant said, “*we didn’t need to justify the engagement*”.⁸²⁶ This is particularly the case given the documents were being compiled by different persons at different times, in the midst of multiple actions (some involving large numbers of enemy) and in some cases under not inconsiderable stress.
 - (b) The Applicant had nothing to do with the preparation of any of these documents. They were in varying degrees the responsibility of Person 33, the late Sergeant Locke and those at headquarters.
73. The Applicant recalled that in 2006, After Action Reports were prepared by a patrol commander following a debrief with the patrol. An operations officer at headquarters at Tarin Kowt would “tidy” up the report and it would then be sent to headquarters at Kabul or Bagram.⁸²⁷ He recalled that at this time reports would be typed on a laptop and sent in Word document form to headquarters.
74. Ex. R47 was a sit-rep that recorded in relation to the 0441 zulu engagement, that the spotter was armed with an AK 47 and appeared to be “*aggressively patrolling*”. Otherwise (consistently with the Applicant’s version, the document recorded “*K22 (Locke) and K25 (Applicant) dispatched and neutralised ACM member ... K22 and K25 returned to OP and reported that the ACM either threw smoke or smoke canister was hit by small arms fire.*” The Applicant did not know how these errors occurred. His evidence was that the late Sergeant Locke as 2IC had reported back to Person 33 after the engagement and that he did not hear this conversation. He also pointed out that situation reports are typically done by the troop commander on the ground.⁸²⁸ Despite the insinuation in RS Section X [17] there is absolutely no evidence that the Applicant had anything to do with the composition or preparation of this record or any of the other records. As to Person 33, the fact that the AAR does not

⁸²⁵ See for instance Exs. R47; R48; R49 and R78.

⁸²⁶ T704 L4 (BRS).

⁸²⁷ T134 L25-45; T135 L17-22 (BRS).

⁸²⁸ T701 L17-46 (BRS).

allege the ACM was armed, really puts paid to the idea that there was some kind of organised attempt to deceive.

75. Ex. R47 also stated, “*Unsure if OP is compromised due to ACM in such close proximity.*” The Applicant submits this is not inconsistent with the reference to a “*soft compromise*” in the AAR (Ex. R48). It was a nuanced judgment. The language used by soldiers to describe their (difficult) situation at the time should not be parsed and analysed in the manner invited by the Respondents.
76. Additional Records are dealt with at paragraphs F1 to F4 of the Applicant’s Closed Court Submissions.
77. It was put to the Applicant that the late Sergeant Locke was responsible for the extra content included in the AAR, which is Ex. R48 (including for instance the reference to ‘red Phosphorous’) as opposed to the AAR, which is Ex. R49 (and which focuses on the role of Person 23). The Applicant did not know but his evidence was that the patrol commander would have written the reports possibly with the assistance of the 2IC.⁸²⁹
78. As discussed above, there was simply no motive for Person 33 or the late Sergeant Locke to have deliberately provided false information at an earlier stage for inclusion in other official documents such as incident reports or situation reports. There is no basis for drawing any inference against the Applicant for Person 33’s refusal to attend Court.⁸³⁰

I. SUBSEQUENT PUBLIC STATEMENTS BY THE APPLICANT

79. The Respondents criticise the Applicant for making incorrect statements about the events of 2 June 2006 during 2011.
80. The Applicant conceded that he had conflated a number of issues in the course of giving interviews after he was awarded the VC. He agreed that he had said in the past that the spotter was armed and that there were two spotters. His explanation was that he had conflated the earlier engagement with the spotter and the later battle.⁸³¹ His evidence was that after Mr Masters had brought this to his attention, he had written to the Australian War Memorial to correct the record. That letter is dated 11 July 2017 at Tab 26 of Ex. A1.⁸³²
81. It was suggested to the Applicant that his assessment during the 2011 interviews of the mistakes made by Persons 1 and 2 with respect to their weapon stoppages was more measured than his evidence in the case. The Applicant resisted this proposition and pointed out that he had no interest in publicly belittling either man.⁸³³
82. The point is that once the evidence in these proceedings as to the age and disposition of the spotter and the legitimacy of the engagement, as summarised above, is accepted, there was simply no reason for the Applicant to invent or exaggerate any details. Furthermore the Applicant’s citation for the Medal of Gallantry did not say the ACM was armed, so insofar as the Respondents submit this provided a motive for some kind of cover up that is also incorrect. To the extent he made errors, these should be considered not only in the light of the multiple events on 2 June 2006 (five years before he gave these interviews) but also his many other tours and other engagements. In a situation where he had not

⁸²⁹ T713 L42 - T715 L19 (BRS).

⁸³⁰ Ex. A292. See especially the email from 33 dated 20 May 2022 which is PVS 42.

⁸³¹ T156 L35 - T157 L46; T718 L16-37; T722 L16-36; T732 L32-39 (BRS); Exs. R50, R51.

⁸³² The Applicant stated the contents of the letter were accurate at T159 L21-22 (BRS).

⁸³³ T723 L1 - T 724 L19 (BRS).

consulted a document or refreshed his memory with a colleague and where he was focused on preparing to discuss the battle at Tizak for which he had recently been awarded a VC, there was nothing remarkable about the Applicant incorrectly recalling that the spotter he engaged earlier in the day on 2 June 2006 was armed, as opposed to the insurgents he engaged later the same day. The same goes for remarks relating to the smoke and the clearance of bodies.

J. CONDUCT ALLEGED BY PERSON 2

83. Person 2 made a number of allegations against the Applicant:
- (a) He alleged that the Applicant said (after the Chora mission) on an occasion on picket duty “*I just want to kill cunts. I don’t give a fuck. I just want to kill cunts.*” The Applicant denies saying these words.⁸³⁴
 - (b) He alleged that after a training session, the Applicant showed Person 29 or 49 photographs of dead insurgents from Rotation 3 on an iPod.⁸³⁵ The Applicant denied this, pointing out that such photographs were not available in 2006 (prior to the development of SSE) and that he did not have an iPod with a screen capable of performing this task in 2006.⁸³⁶
 - (c) He alleged that on a patrol at Gizab he had been cleaning his SR 25 by ejecting the mag, cocking and ejecting a round into his hand. The Applicant observed this and allegedly said “*If you do that – if I see you do that again, I’ll beat the shit out of you.*”⁸³⁷ The Applicant recollected that he had observed Person 2 do this with his weapon. In his view Person 2 was trying to show off like a cowboy and he only said to Person 2 words to the effect “*stop showboating*”.⁸³⁸ Person 2 agreed that he had not been trained to clean his weapon in this way and that it was “*probably unconventional*”.⁸³⁹ When asked if this was showboating, he replied “*not necessarily*”.
84. The allegations are peripheral. There is no contemporaneous record of the allegations having been made. They have no bearing on the particulars of justification that deal with 2006. Further, for the reasons discussed above in the sections dealing with the age of the spotter and the weapons stoppage of Person 1 (where in both cases Person 2’s evidence stands alone and apart from the other witnesses and records), Person 2 is not a witness of credit.

K. ALLEGED BULLYING OF PERSON 1

Conduct of Person 1 in April – June 2006

85. Person 1 was involved in a number of incidents in April-June 2006 that reflected poorly on his capabilities as a soldier. The incidents are relevant because they assist in putting the relationship between Person 1 and his fellow patrol members at this time in proper context. They are also in some cases relevant to the credit of Person 1.
86. The incidents include the following:

⁸³⁴ T829 L28-31 (BRS).

⁸³⁵ T2494 L8-12 (P2).

⁸³⁶ T829 L34-40 (BRS).

⁸³⁷ T2494 L43 - T 2494 L2 (P2).

⁸³⁸ T829 L7-26 (BRS).

⁸³⁹ T2510 L27-29 (P2).

- (a) During a patrol in the course of Operation Tindal, the ACM engaged the patrol with rockets. Person 1 had been preparing his lunch and whilst the rockets were in the air, the PC assessed the requirement for the vehicles to be moved. Person 1 had to be ordered 3 times to do this before discarding his lunch and taking position in the driver seat.⁸⁴⁰ It was suggested to the Applicant in cross-examination⁸⁴¹ that he had invented this incident, yet it appears in Person 36's contemporaneous performance review which substantially corroborates the Applicant's recollection.
- (b) During that same patrol later that night, the patrol was ordered to move into an overwatch position. A cross country move was required. Person 1 moved with a speed that would indicate a level of anxiety in a situation that remained benign at that stage.⁸⁴² Person 1 gave evidence that he was not sure what this meant.⁸⁴³
- (c) Person 1 failed to use the appropriate optical equipment during a 45 minute piquet at night and his attention was focused on rocks at his feet.⁸⁴⁴ Person 1 believed he didn't need his goggles at that time but accepted this was legitimate professional criticism.⁸⁴⁵
- (d) Person 1 was employed as a vehicle driver in the second vehicle of a patrol, tasked to provide flank and rear security. Person 1 was told to move his vehicle to the flank to support the lead vehicle of the patrol moving to suppress a spotter. Person 1 stated that he felt vulnerable in this position and decided he would move the vehicle, leaving the forward vehicle exposed to the flank and rear. Person 1 instead moved his vehicle to the right of the lead vehicle which placed the 2 cars of the patrol to the front directly into the line of fire.⁸⁴⁶ The MK gunner had to order him to hold the position.⁸⁴⁷ Person 1 did not recall the incident.⁸⁴⁸
- (e) Person 1 was ordered to prepare the 84mm Carl Gustaf while on a vehicle patrol. Vehicles to the left of the patrol began to receive RPG and SAF. Person 36 observed Person 1 still sitting in the driver's seat. Person 36 found the 84mm rounds had not been prepared for engagement. He personally removed the weapon and loaded a round and became aware that the dust covers had not been removed from the ends of the weapon. Person 36 began to engage before Person 1 assisted.⁸⁴⁹ According to the late Sergeant Locke, Person 1 had to be ordered to go to the action condition on his 84mm three times before carrying out his task.⁸⁵⁰ Person 1 denied having been given an order and claimed to have instead been given vague or cursory comments.⁸⁵¹ He also complained that he was not being given sufficiently clear direction as to a target indication.⁸⁵² He denied he had failed to prepare the weapon, failed to get out of the car and failed to fire.⁸⁵³ In the face of the evidence of the Applicant and Person 36,⁸⁵⁴ as well as the contemporaneous records, the Court should not accept the uncorroborated evidence of Person 1, nor the

⁸⁴⁰ Ex. R121 Tab 5 [3a] (Person 36 performance assessment); T154 L18-L30 (BRS).

⁸⁴¹ T736 L18-29 (BRS).

⁸⁴² Ex. R121 Tab 5 [3c] (Person 36 performance assessment).

⁸⁴³ T2180 L37-42 (P1).

⁸⁴⁴ Ex. R121 Tab 5 [3d] (Person 36 performance assessment); Ex. R121 Tab 6 [4e] (Person 33 performance review).

⁸⁴⁵ T2181 L13-22 (P1).

⁸⁴⁶ Ex. R121 Tab 5 [3e] (Person 36 performance assessment); T155 L8-39 (BRS).

⁸⁴⁷ Ex. R121 Tab 4 [2] (Locke performance review).

⁸⁴⁸ T2179 L11-15 (P1).

⁸⁴⁹ Ex. R121 [3f] (Person 36 performance assessment). See also T153 L32 - T154 L18 (BRS).

⁸⁵⁰ Ex. R121 Tab 4 [3] (Locke performance review).

⁸⁵¹ T2179 L30-44 (P1).

⁸⁵² T2181 L30-42 (P1).

⁸⁵³ T2237 L1-3 (P1).

⁸⁵⁴ T6041 L33 - T6042 L21 (P36).

submission at RS Section X [25] (once again not corroborated by the records) that the incident is simply an example of a lack of confidence felt by Person 1.

- (f) Contrary to direction, Person 1 positioned a car so that only one of the weapons was useful and exposed the flank of the vehicle, requiring further direction. He was subsequently unwilling to use his weapon to provide support for another patrol and another member of the patrol instead used his weapon.⁸⁵⁵
- (g) A range of incidents occurring during training.⁸⁵⁶ While RS Section X [5] includes a submission that Person 33 had a positive view of Person 1 during pre-deployment training, by as early as mid-May it is clear that Person 33 had a more equivocal view. After Chora he had a decidedly negative view.⁸⁵⁷

87. Further incidents are summarised in the performance reports prepared by Person 36, the late Sergeant Locke and Person 33 at Tabs 4-6 of Ex. R121. In addition to the incidents summarised in this section, other relevant incidents include the weapons stoppage during the battle on 2 June 2006 caused by the failure to bring the gun oil, and the night terror discussed in the sections above.

88. By the end of June 2006 the conclusions drawn by the late Sergeant Locke, Person 36, Person 33 and Person 37 (the CO) were seriously adverse for Person 1:

- (a) The late Sergeant Locke identified Person 1 as lacking the correct mindset to operate as an SAS Trooper. His view was that during the past month (June 2006) Person 1 “*has showed a lack of confidence, experience and maturity to achieve his tasks to an acceptable level*”. He assessed him as unsuitable for service and recommended his immediate removal from the patrol.⁸⁵⁸
- (b) Person 36 concluded in his review that Person 1 had little capacity for unsupervised work and achieved only the minimum standard when tasked for a duty. Person 36 believed that Person 1’s poor basic skills and awareness would put other patrol members at risk. He was also concerned about Person 1’s welfare, having observed him wake up screaming on several occasions at camp.⁸⁵⁹ He judged Person 1’s performance in the field as unacceptable and recommended his removal from operations.⁸⁶⁰
- (c) Person 33 believed that Person 36 did not have a true understanding of “*commander’s intent*” and was unable to assist without prompting and supervision. He also recommended Person 1’s removal from operations and suggested he gain experience in a non-operational environment.⁸⁶¹
- (d) Person 37, the troop commander, reviewed these reports, endorsed them and found Person 1 was not at the required standard for service. He recommended Person 1 be given an OC’s warning for unsatisfactory performance and be removed from operations.⁸⁶²

89. The process culminated in a meeting on 2 July 2006 attended by Person 1, Person 37 and Person 61. A document entitled “*Record of Conversation*” was records the events at the meeting.⁸⁶³ Person 1 was

⁸⁵⁵ T6031 L40 - T6032 L2 (P36); Ex. R121 [3h] (Person T36 performance assessment).

⁸⁵⁶ Ex. R121 Tab 4 [7] (Locke performance review); Ex. R121 Tab 6 [4a]-[4c] (Person 33 performance review).

⁸⁵⁷ Ex. R121 Tab 2 (May 2006 review by Person 33), Tab 3 (June 2006 post-Chora review by Person 33).

⁸⁵⁸ Ex. R121 Tab 4 [1a], [8] (Locke performance review).

⁸⁵⁹ T6032 L33-38 (P36).

⁸⁶⁰ Ex. R121 Tab 5 [4]-[6].

⁸⁶¹ Ex. R121 Tab 6 [4g], [5]-[9].

⁸⁶² Ex. R121 Tab 7 [15]-[18].

⁸⁶³ Ex. R121 Tab 8.

put on an OC's warning requiring him to improve his performance. He was not removed from operations and in effect was given another chance and moved to another patrol. In the course of this interview, when asked the reason for his performance problems, Person 1 replied:

"I don't know I have had some personality problems and clashes with certain members of my patrol. I know this is not an excuse but it's affected my work."

90. Person 1's evidence was that he did not recall reading any of the performance reviews, although he conceded he probably had done so.⁸⁶⁴ He also gave evidence suggesting that he did not recall his feelings after reading the reviews and learning of the removal recommendations.⁸⁶⁵ It is hard to reconcile that evidence with ordinary human experience. Person 1 had received 3 highly negative reviews directed at his performance. They included reflections on aspects of character, and it is hard to see how he could not have felt seriously hurt and impacted.

91. The Applicant, in response to a question suggesting that he was trying to establish his bullying of Person 1 was a mere professional opinion by raising these incidents, characterised his view of these incidents in the following manner:

"No I just didn't trust Person 1 with my life, and that's a dangerous thing when you're in Afghanistan."

92. Person 1 agreed that after his conduct in the Chora overlook position he could understand the Applicant not wanting to be his friend or have anything to do with him.⁸⁶⁶

93. The documentary record shows (see for instance Ex. R121 from Tab 9) that Person 1's performance improved following his move into Person 21's patrol in July 2006. Person 7 had a positive impression of Person 1's performance during the period they first worked together in 2007 or 2008.⁸⁶⁷ At RS Section X [31] it is suggested that this is somehow evidence of a poor culture in the patrol containing Person 33, Person 36, the late Sergeant Locke or the Applicant. In response, it cannot be known whether Person 1 himself underwent a change, or whether external conditions including the nature of the work and the operations changed. None of this affects the objective evidence of Person 1's performance in April-June 2006. Even if responsibility for that poor performance could be sheeted to Person 1's superiors (which in the circumstances seems unfair), it was certainly not the responsibility of the Applicant.

Alleged Bullying Incidents Prior to Deployment at Chora Pass 31 May – 2 June 2006

94. There appear to be three allegations of bullying conduct prior to the Chora deployment on 31 May – 2 June 2006:

- (a) During training at Lancelin, the Applicant is alleged to have slapped Person 1 on the back of the head when the vehicle hit a large bump. Person 1 alleged this occurred 2-3 times.⁸⁶⁸ The Applicant denied the conduct. There was no eyewitness and no contemporaneous record of such a complaint ever having been made by Person 1. Person 1 did not recall raising any allegation of physical assault when he prepared his complaint in 2013.⁸⁶⁹

⁸⁶⁴ T2259 L41-42; T2260 L41-42; T2262 L19-22; T2275 L1-4 (P1).

⁸⁶⁵ T2259 L38-39; T2262 L28-30; T 2275 L1-4 (P1).

⁸⁶⁶ T2273 L5-27 (P1).

⁸⁶⁷ T3591 L38 - T 3592 L27 (P7).

⁸⁶⁸ T2155 L5-43 (P1).

⁸⁶⁹ T2203 L27-29 (P1).

- (b) The Applicant is alleged to have been present when the late Sergeant Locke pulled Person 1 aside and stated that he did not have the required skills or ability to deploy to Afghanistan, and that he would do everything he could to have Person 1 removed from the patrol and replaced with Person 74.⁸⁷⁰ In cross-examination it was put to the Applicant that he himself said these words, which he denied.⁸⁷¹ Originally Person 1 claimed the Applicant made these statements but he ultimately gave evidence that the late Sergeant Locke had made the statements.⁸⁷² That shift in position (which is not picked up in the erroneous submission at the last sentence of RS Section X [4] which persists in attributing the conduct to the Applicant) reflects poorly on his credit and suggests that he was at least initially prepared to exaggerate the extent of the Applicant's involvement in incidents about which he complained order to inflict greater damage. In any event, the fact that the late Sergeant Locke as the 2IC made early criticisms of Person 1's aptitude (which did not turn out to be unwarranted) is not something for which the Applicant can be made responsible.
- (c) Person 1 also alleged that the Applicant raised his desire not to have Person 1 in the patrol with the team leader.⁸⁷³ The circumstances as to where and when this occurred are not clear. This was not put to the Applicant. Even if the Applicant had expressed a concern about Person 1's performance to a more senior person that would not have amounted to bullying.

Alleged Bullying Incidents on Rotation 3 following Deployment at Chora Pass 31 May – 2 June 2006

95. Following the deployment at Chora Pass (and during the period whilst he remained in the Applicant's patrol) Person 1 gave evidence of the following alleged instances of bullying by the Applicant:

- (a) Person 1 alleged the Applicant would exaggerate his mistakes and would spread rumours about him.⁸⁷⁴ There was no eyewitness and no contemporaneous record of such a complaint ever having been made by Person 1. It is made in a context where it is acknowledged and admitted that Person 1 in fact made very serious mistakes indeed. In those circumstances the Court should not find such conduct occurred and even if it did occur it would not amount to bullying without more context.
- (b) Person 1 alleged that the Applicant entered a shared team room and said to Person 1 "*If your performance doesn't improve on your next patrol you're going to get a bullet in the back of the head*".⁸⁷⁵ There was again no eyewitness. The Applicant denied making the statement and labelled it ridiculous.⁸⁷⁶ Person 21 recalled Person 1 complaining to him that the Applicant had said "*he would fuck me off out of the unit*" and that "*he threatened to kill me*" 2006. He gave no further detail.⁸⁷⁷

This allegation appears to have first been committed to writing in 2013. In the course of that year Person 1 prepared a statement intended to support his bullying complaint against the Applicant (the complaint is dealt with in more detail below).⁸⁷⁸ In the statement he described Person 2 as telling him such a comment had been made by the Applicant to another team

⁸⁷⁰ T2156 L13-34 (P1).

⁸⁷¹ T734 L23-27 (BRS).

⁸⁷² T2156 L19-31 (P1) (examination in chief); T2258 L15-40 (P1) (cross examination).

⁸⁷³ T2157 L8-11, 36-41 (P1).

⁸⁷⁴ T2178 L18-20 (P1).

⁸⁷⁵ T2184 L33-43 (P1).

⁸⁷⁶ T739 L26-28 (BRS).

⁸⁷⁷ T2291 L35-39 (P21).

⁸⁷⁸ T2245 L28-32 (P1).

member (other than Person 2).⁸⁷⁹ In that statement, Person 1 himself described another incident where the Applicant spoke to Person 1, whilst he was watching a film, stated he was not up to standard for an SAS operator and warned him he would get shot if his performance didn't improve.⁸⁸⁰ Nowhere in the statement is there any reference to Person 1 hearing the Applicant actually say that he would be shot in the back of the head. If such a statement had been made it would be consistent with a genuine warning and entirely warranted by the performance of Person 1 at this time. Person 1 agreed that given the events of 2 June 2006, it would be understandable if the Applicant expressed in strong terms that he was not up to the job.⁸⁸¹ It is also significant that Person 2 gave no evidence as to the conversation discussed in Person 1's statement. Indeed, despite being in the same patrol during the critical period, he gave no evidence that he ever observed any bullying of Person 1.

Person 1's evidence was that he seriously believed the Applicant would kill him.⁸⁸² That is, he really believed the Applicant would murder a fellow Australian soldier in Afghanistan (after having boastfully given forewarning he would do so). The Applicant submits such evidence represents an insight into the state of mind of Person 1 in June 2006. It shows he was troubled and having difficulties distinguishing fantasy from reality. It also bears upon the sheer improbability of the truth of the allegation because if Person 1 genuinely believed that he was about to be killed (and he had actually made such a report as he claimed), then it is difficult to believe that it would not have been committed to writing. At the minimum it would have resulted in a record of conversation.

- (c) Person 1 further alleged that after he had complained about the Applicant to Persons 37 and 61 (this matter is dealt with below) that the Applicant said to him in the lunch line "*If you're going to make accusations cunt you better have some fucking proof.*"⁸⁸³ Once again there is no eyewitness and no contemporaneous record of such a complaint ever having been made by Person 1. The Applicant denied saying these things. Again, context is important. If, (16 years ago) the Applicant, having been made aware of Person 1's allegations, had merely issued an angry denial, that would not be bullying.
 - (d) Person 1 also alleged regular intimidation by the Applicant, including attempts to make eye contact with him and spitting on the ground when he was nearby. Person 1 also said that if they were walking into a building the Applicant would hold the door for him and then let him slam it in his face.⁸⁸⁴ Again, there is no eyewitness and no contemporaneous record of such a complaint ever having been made by Person 1. The Applicant denied doing these things.
96. Otherwise, there is the evidence of Person 24 that at some point in 2006 the Applicant spoke poorly of Person 1 in front of the troop commander. According to Person 24, although he could not recall what the Applicant said, this conversation stuck with him in any event.⁸⁸⁵ Person 24's evidence was not corroborated by any witness or document. It was so imprecise and so shrunken of context that it could not amount to evidence of bullying.
97. Person 36, who spent very considerable amounts of time with the patrol members both in training and in Afghanistan never observed the Applicant threaten assault, spread rumours about or otherwise bully

⁸⁷⁹ Ex. R121 Tab 16 p. 1.

⁸⁸⁰ Ex. R121 Tab 16 p. 1.

⁸⁸¹ T2253 L44 - T2254 L8 (P1).

⁸⁸² T2256 L14-27 (P1).

⁸⁸³ T2185 L46 - T2187 L5 (P1).

⁸⁸⁴ T2186 L10-20 (P1).

⁸⁸⁵ T3549 L44 - T3552 L22 (P24).

Person 1. Person 2 was (rather pointedly) not asked any question by the Respondents about his own observations (or lack thereof) of any bullying.

98. There is no dispute that following the deployment from 31 May to 2 June 2006, the Applicant had a poor opinion of Person 1. Person 1's incompetence had risked his life and Person 1 had pointed a gun at the Applicant as he woke on a dangerous mission shouting loudly during the night. There seems little doubt that there would have been some unfriendly interactions between the pair. At a distance of 16 years, and in the absence of eyewitnesses, the Court should be slow to infer that such interactions had a bullying character, particularly given both soldiers were mere patrol members.

Complaints of Bullying by Person 1 in 2006 Concerning the Applicant and Others

99. According to Person 1, in or about July 2006 he raised with Persons 21 and 116 his allegation that the Applicant had threatened to shoot him in the back of the head. Person 21 confirmed this happened in July 2006 after Person 1 had joined his patrol.⁸⁸⁶ At their recommendation he then told Persons 37 and 61 (Troop commander and Troop bravo).⁸⁸⁷ Person 1 stated that in a conversation with Person 37 he was told that the Applicant denied the allegation. Person 1 then told Person 37 that he did not wish to pursue the complaint.⁸⁸⁸ The Applicant denied that he had been approached in relation to a bullying complaint.⁸⁸⁹ Even if Person 1's evidence is accepted, it is significant that he only raised the complaint after he was the recipient of a series of highly negative performance reviews dealing with his unsuccessful period in the applicant's patrol.
100. Person 1 alleged that Person 36 (an acting 2IC in the patrol during the relevant period and senior to the Applicant) was part of the bullying behaviour directed towards him (it is evident from the transcript that this answer was not expected by the questioner).⁸⁹⁰ Person 1 complained that Person 36 had been influenced by the Applicant to direct bullying behaviour to him.⁸⁹¹ Person 36 denied this.⁸⁹² The allegation that Person 36 (who was not even present with the patrol during the Chora engagement and was only an acting 2IC at an earlier stage) was driven by the more junior Applicant to bully Person 1 is highly improbable. It casts doubt on the reliability of Person 1's recollections and perceptions at that time. It shows that he did in fact believe that criticisms of his performance (including constant corrections in the field) amounted to bullying.
101. Person 1 also alleged that the late Sergeant Locke, who also played the role of 2IC in the patrol, was part of the bullying behaviour directed against him.⁸⁹³
102. Person 1 initially stated that he did not recall making a bullying complaint against either the late Sergeant Locke or Person 36.⁸⁹⁴ Later he stated he did make a bullying complaint against the late Sergeant Locke for a specific incident.⁸⁹⁵ No contemporaneous record exists confirming the complaint or incident. The late Sergeant Locke is obviously not here to defend himself.
103. Person 1 denied making a complaint against Person 33.⁸⁹⁶

⁸⁸⁶ T2289 L24-26; T2291 L17-38 (P21).

⁸⁸⁷ T2185 L8-37 (P1); T2266 L39-43 (P1); T2267 L33-47 (P1).

⁸⁸⁸ T2268 L1-8 (P1).

⁸⁸⁹ T738 L38-43 (BRS).

⁸⁹⁰ T2182 L4-6 (P1).

⁸⁹¹ T2262 L32 - T2263 L10 (P1).

⁸⁹² T6037 L 10-11; T6041 L23-24 (P36).

⁸⁹³ T2263 L45 - T 2264 L6 (P1).

⁸⁹⁴ T2231 L38-43; T2237 L43-45; T2238 L9-14 (P1).

⁸⁹⁵ T2264 L17-18 (P1).

⁸⁹⁶ T2238 L6-7; T2264 L20-29 (P1).

104. Person 1's allegations against both Person 36 and the late Sergeant Locke put his allegations against the Applicant in a different context. Person 1 had taken the view that his senior colleagues were bullying him, including by constant correction and criticisms which undermined his confidence. It appears likely that he took this view at or shortly after the time that those colleagues each prepared adverse performance reviews which led to him being reprimanded. All of this suggests that Person 1's state of mind in June 2006, insofar as it related to his being the victim of bullying, was unreliable.
105. Furthermore, no documentary record exists of the bullying complaints made by Person 1. If they were as serious as he claims (including for instance real death threats) it is improbable that such complaints could have been made orally but not recorded in any document, including even a mere record of conversation.

Events after 2006

106. After 2006 the Respondents alleged the following incidents of bullying against the Applicant in respect of Person 1:

- (a) In 2010 it was alleged that the Applicant pushed Person 1 outside of the ready room and said "*Get out of my way cunt or I will kill you*".⁸⁹⁷ The Applicant agreed that he and Person 1 had bumped into each other and that he had told Person 1 to get out of his way but otherwise denied the allegation.⁸⁹⁸ Person 7 said he was present but did not see a push (only a "lunge") and did not hear the words.⁸⁹⁹ The only alleged eyewitness was Person 51 who did not give evidence.⁹⁰⁰ There was no documentary evidence of any contemporaneous complaint, and there is not even a record of conversation referring to the event.

The allegation appears to have first been committed to writing in 2013 by Person 1 when he prepared his statement in support of his bullying complaint.⁹⁰¹ Person 1 also gave evidence that he believed this incident amounted to a genuine threat of death and that his life was seriously in danger.⁹⁰² For the reasons discussed above such evidence tends to suggest that Person 1's state of mind was unreliable and that he had a tendency to exaggerate. The Court should find this incident did not occur.

- (b) The next incident is alleged to have occurred in 2011 or early 2012 when the Applicant is alleged to have had a conversation with Person 7 at a gym concerning Person 1. Amongst other matters it is alleged the Applicant described Person 1 as cowardly and incompetent.⁹⁰³ The Applicant denied speaking the specific words alleged but agreed he had a conversation with Person 7 where he had criticized the performance of Person 1.⁹⁰⁴

The Applicant relies on the submissions concerning the credit of Person 7 which appear elsewhere in these submissions. It is notable that Person 7 agreed that this conversation (for which Person 1 was not present) was the only incident of bullying he actually observed or heard

⁸⁹⁷ T2212 L1-16; T2255 L18-20 (P1).

⁸⁹⁸ T160 L3-13; T739 L45 - T740 L3 (BRS).

⁸⁹⁹ T3743 L36 - T3744 L29; T4010 L21-29 (P7).

⁹⁰⁰ T2254 L46 - T2255 L1 (P1).

⁹⁰¹ Ex. R121 Tab 16.

⁹⁰² T2256 L8-9 (P1).

⁹⁰³ For Person 1's account, see T2196 L25-47; T2211 L1-13. For Person 7's account, see T3592 L29 - T3593 L31.

⁹⁰⁴ T160 L15-19; T 740 L5-21 (BRS).

(bearing in mind that even though he was present for the 2010 incident he did not see a push or hear any words).⁹⁰⁵

This incident, if it occurred, involved a discussion of Person 1's performance when Person 1 was not present. It is not bullying for one patrol commander to express doubts about the performance of a soldier to another patrol commander. The Applicant believed Person 1's failure of the sniper course to be relevant to the forthcoming deployment.⁹⁰⁶ A finding of the kind sought by the Respondents on this incident, would have a chilling effect on workplace communications generally, and particularly in an organisation like the military.

- (c) Finally, the Applicant is alleged to have made criticisms of Person 1 at a manning meeting where amongst other issues the possibility of promoting Person 1 to a 2IC role was being discussed.⁹⁰⁷ The Respondents called no witness who was actually present at this meeting. Person 43 (who Person 1 suggested had attended this meeting) gave evidence for the Respondents in these proceedings but said nothing about this meeting. Person 7 had not been present and his evidence was second hand only.⁹⁰⁸ The Applicant admitted he was present and agreed he had pointed out that Person 1 had failed a sniper course but denied referring to events in 2006.⁹⁰⁹ Person 1 himself agreed that he had failed this course in or about 2011.⁹¹⁰ He also agreed that as he had not been present at the meeting he could not know whether his failure of the course was relevant or not.⁹¹¹ The Applicant otherwise denied making the other criticisms and statements put by the Respondents.

In the absence of any evidence from a person present at the meeting other than the Applicant, the Court should accept the Applicant's evidence. In any event, the Court should not find an occasion of this kind involved any bullying behaviour on the part of the Applicant. If the Applicant merely expressed views on a more junior colleague's performance and accurately pointed out that Person 1 had failed a sniper course, these would be relevant matters to be raised at such a meeting. In such a situation it would have been quite wrong for the Applicant not to disclose his personal experience and knowledge of Person 1. Once again, a finding that private performance related discussions of this kind – at a meeting convened for this very purpose, could amount to bullying would have a chilling effect on communications inside workplaces.

107. RS Section X [37] raises an occasion about which Mr Hastie gave evidence, where there was allegedly a joke made amongst a group of SAS soldiers about the Applicant giving Person 1 depression. That of course is not evidence of bullying. It is rather evidence of how widely Persons 1 and 7 had circulated their bullying allegations.
108. Following a discussion with Person 7 in or about late 2012 or early 2013,⁹¹² in which Person 7 relayed criticisms made by the Applicant concerning Person 1 including at the manning meeting, Person 1 decided to make a complaint about the Applicant.⁹¹³ He prepared a statement in support of that complaint.⁹¹⁴ He obtained statement from Persons 7, 44 and 26 but was not able to obtain other

⁹⁰⁵ T4010 L38 - T4011 L29; T4012 L24-33; T4013 L5-8 (P7).

⁹⁰⁶ T740 L31-46 (BRS).

⁹⁰⁷ T2198 L32 - T2200 L7; T2246 L41-45 (P1).

⁹⁰⁸ T3593 L33 - T3594 L15 (P7). Person 7's evidence was that Person 26 relayed the allegation to him. He then told Person 1.

⁹⁰⁹ T753 L27 - T754 L10 (BRS).

⁹¹⁰ T2248 L18-26 (P1).

⁹¹¹ T2249 L1-9 (P1).

⁹¹² T2246 L8-27 (P1).

⁹¹³ For Person 1, see T2201 L20-29; T2270 L15-24. For Person 7, see T3594 L17-33.

⁹¹⁴ Ex. R121 Tab 16.

statements.⁹¹⁵ In the interim the Applicant became aware from the RSM of Person 1's complaint and made his own report.⁹¹⁶ This resulted in the quick assessment process⁹¹⁷ and the mediation.⁹¹⁸

109. The events at the mediation are recorded in a record of conversation. Person 1 admitted that he had forgotten to bring the gun oil on the mission in Chora Valley in 2006. The Applicant mentioned the events in 2006, and the failure of the sniper course and stated his belief that Person 1 had placed the lives of other patrol members at risk. He admitted expressing views to other members including Person 7 for professional reasons.⁹¹⁹ Both parties shook hands. The process, which occurred 7 years after the relevant events, does not materially affect the probability of the facts in issue in 2006. It does show, that in 2013, prior to the involvement of the media, that both the Applicant and Person 1 were prepared to reconcile and move on.
110. Finally, RS Section X [42] contains submission that the letters sent by the Applicant's solicitors to Person 1 are further evidence of animus. That matter is not particularised. Further, the submission that the reference to the AAR in the letter involved the Applicant's attempt to intimidate Person 1 "*into not revealing the truth that the ACM below the OP was unarmed*" is farfetched. The AAR did not even say the ACM was armed. The Applicant was at this time concerned by the claims about the ACM's age and the accounts of the later battle.⁹²⁰ As submitted above, there was simply nothing improper to conceal about this engagement.

L. CONCLUSION

111. The Respondents have failed to justify either of the relevant imputations. The evidence of the Chora deployment runs entirely contrary to the case put by the Respondents. The engagement of the spotter was legitimate – he was not a boy – the Applicant did not make the relevant decision in any event. It was Person 1 who performed poorly during the subsequent battle – in exactly the manner the Applicant has always alleged. The notion that the Applicant took to bullying Person 1 as a response to the events on this mission is completely unsupported by the evidence and lacks any rational basis. To the contrary, Person 1 began to complain about bullying only when he received devastating performance reviews dealing not only with his behaviour on the Chora mission, but a series of other incidents occurring during recent months.
112. Person 1, the subject of a warning and compulsory removal from the patrol, regrettably then lashed out not only at the Applicant but also at his seniors – including the 2ICs Person 36 and the late Sergeant Locke. On occasion, Person 1's allegations of bullying conflate genuine performance criticisms or negative interactions with his colleagues who had been obliged to endure his poor performance on duty. The more serious allegations lack any contemporaneous documentary corroboration and eyewitnesses. The Court should reject the assertions of the Respondents in these circumstances.

⁹¹⁵ T2201 L31 - T2202 T2270 L29 - T2272 L20 (P1).

⁹¹⁶ T160 L20 - T161 L4 (BRS); T754 L16-18 (BRS); T2272 L25-40 (P1).

⁹¹⁷ Ex. R118; T2202 L41 - T2205 L1.

⁹¹⁸ Ex. A1 Tab 23; T161 L26 - T162 L5 (BRS); T2213 L9-16, L32-46 (P1); T2247 L1 - T2248 L16 (P1); T2249 L16-40 (P1).

⁹¹⁹ Ex. A1 Tab 23; T2250 L36-45.

⁹²⁰ T729 L34 - T730 L17 (BRS).

SECTION XI: BLUE-ON-BLUE AND THREAT TO PERSON 10

A. INTRODUCTORY

1. There are two relevant imputations relied upon by the Respondents in relation to the mission in the Chora Valley on 15 July 2012, and the bullying of Person 1.
2. The first relevant imputation arises from the 9 June 2018 publications and is:

Imputation 5(c)/7(c) (Fairfax) *The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan.*⁹²¹

This imputation is also a contextual imputation alleged to have arisen from the 10 June 2018 and 11 August 2018 publications.⁹²²

3. The second relevant imputation arises from the 11 August 2018 publications and is:

Imputation 13(g)/15(g) (Fairfax) *The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's.*"

4. The allegations appear at particulars [70]-[85] of the PoT. The allegations crystallise in the form of the alleged threat (PoT [83] and an allegation Mr Roberts-Smith bullied Person 10 (PoT [84]). Particular [85] attributes a motive to Mr Roberts-Smith for both forms of conduct being a desire to detract attention from his responsibility for the blue on blue incident.
5. The particulars unfold in this manner:
 - (a) Relevantly it is alleged at PoT [75] that on a mission planned by Mr Roberts-Smith on 15 July 2012 a friendly fire incident occurred. It is alleged that Gothic 3 patrol fired at Gothic 2 Mr Roberts-Smith's patrol. It is then alleged that "*Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot bursts of two to three shots from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.*" Particular [77] records that shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions.
 - (b) Critically particular [79] contains the following allegation:

"As the patrol commanded responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant."

In fact no documentary or oral evidence (save for the subjective opinion of the hostile Person 7) supports the notion that Mr Roberts-Smith had any responsibility for the blue on blue incident.

- (c) Particular [80] alleges that after the mission, at a patrol meeting at the base, the Applicant punched Person 10. Mr Roberts-Smith has admitted this and expressed his regret. The evidence of Mr Roberts-Smith, corroborated by Persons 22 and 11, is that Person 10 far from appreciating the gravity of his actions of shooting at a woman and child, seemed to be inclined to make light of the situation. Nonetheless, that is no excuse for Mr Roberts-Smith's assault.

⁹²¹ Statement of Claim Fairfax Proceedings paragraph 15(c), 7(c).

⁹²² Further Amended Defence 3 June 2021 paragraph 18(b)(i)(B).

- (d) Particular [81] alleges that “*in debriefing meetings and in an investigation into the blue-on-blue incident the Applicant falsely alleged in substance that Person 10 was overwhelmed by the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.*” That particular has not been withdrawn despite very clear evidence from contemporaneous documents and from Person 22 and Mr Roberts-Smith that Person 10 did become overwhelmed, did fire in an uncontrolled manner and did ignore Mr Roberts-Smith’s orders.
- (e) Particular [83] alleges that Mr Roberts-Smith threatened to report Person 10 to the Hague if he did not report Mr Roberts-Smith’s preferred version of the blue-on-blue incidents. Mr Roberts-Smith denied this and the manner in which the evidence emerged from Person 10 strongly suggested that at the very least he had exaggerated Mr Roberts-Smith’s words in the conversation.
- (f) Particular [84] contains an allegation of bullying. Critically, particular [85] states that “*the Applicant’s conduct in respect of Person 10 was to detract attention from the Applicant’s own responsibility for planning a tactically flawed mission which contributed to the blue-on-blue incident.*” That is Mr Roberts-Smith’s motive is said to depend upon his consciousness of his responsibility for the blue-on-blue incident. As discussed above, that motive is without evidentiary support. Person 55 made the mistake. There is no evidence that anything Mr Roberts-Smith did even contributed to the error.
6. These allegations in part appear to allege that Person 10 was made a scapegoat for the alleged inadequate planning of a mission by Mr Roberts-Smith. This allegation is baseless and should be rejected by the Court. Further, it is suggested that the conduct of Mr Roberts-Smith towards Person 10 constituted bullying in circumstances where no attempt is made by the Respondents to explain how as a matter of law the conduct of Mr Roberts-Smith constituted bullying either as a matter recognised by the common law or statutory law.⁹²³ Punching a person on one occasion cannot constitute bullying behaviour.

B. THE EVIDENCE – THE MISSION ON 15 JULY 2012

The Applicant

7. The patrol for the mission comprised Mr Roberts-Smith, Person 4, Person 11, Person 22 and Person 10.⁹²⁴ Mr Roberts-Smith agreed he prepared the patrol orders and was the lead planner.⁹²⁵ He denied saying at the planning meeting “*We are going to kill every one of those bastards. These are the bastards that killed Wayne Diddums*”⁹²⁶ and only Person 7 gave evidence that such a remark had been made.⁹²⁷ The purpose of the mission was to establish a blocking position to limit the movement of the enemy prior to an assault. The blocking force involved Mr Roberts-Smith’s patrol and Person 55’s patrol with other patrols led by Persons 7, 31 and 57 to arrive subsequently.⁹²⁸

⁹²³ Des Butler, *Employer Liability for Workplace Trauma* (Ashgate Publishing 2002) 24, and Part 6.4B of the *Fair Work Act 2009* (Cth) the enactment of which post dates this incident.

⁹²⁴ T218 L 25-26 (BRS).

⁹²⁵ T219 L4 Ex. A 17 (BRS). Closed Court Transcript 25 June 2021 T15 L35-36 (BRS) (redacted).

⁹²⁶ Closed Court Transcript 25 June 2021 T16 L8-11 (BRS) (redacted).

⁹²⁷ Person 22 specifically denied the proposition T6071 L41-44. Person 10 stated at T4517 L1 the Applicant had said before the mission “*We’re going to look for fighting aged males and kill them.*” The falsity of this version was put to Person 10 at T4605 L35. Person 7s evidence is at T3603 L32-36

⁹²⁸ T219 L23-43 (BRS).

8. Mr Roberts-Smith recalled that his patrol and Person 55's patrol moved into position and made contact. They then sent 10 figure grids to ensure mutual awareness of their respective positions.⁹²⁹ They waited through the night as planned. Around dawn Person 22 received incoming fire.⁹³⁰ Mr Roberts-Smith, concerned his patrol could be flanked moved with Person 10 and 22 to the east. Mr Roberts-Smith heard machine gun fire and turned and observed Person 10, lying down, engaging.⁹³¹
9. Mr Roberts-Smith could not identify Person 10's target. He was concerned as he had seen a woman and child drop into an aqueduct. Mr Roberts-Smith asked for a target indication and Person 10 continued to fire. Mr Roberts-Smith yelled "*what are you shooting at?*" He repeatedly yelled for a target indication but received no reply from Person 10.⁹³² It was not possible Person 10 did not hear Mr Roberts-Smith as he moved back towards him at this time.⁹³³ Mr Roberts-Smith ordered him to cease firing after some 5-6 bursts. Person 10 didn't speak and looked visibly shaken. Mr Roberts-Smith formed the view that Person 10 did not know what he was shooting at. Mr Roberts-Smith asked "*What's going on? What are you shooting at?*" and Person 10 did not know. At or about this time Person 55's team discharged blue smoke.⁹³⁴
10. After the assault commenced, back at the creek line, Mr Roberts-Smith's evidence was that he heard Person 10 who say "*I think I was shooting at the woman and child.*"⁹³⁵ Mr Roberts-Smith formed the view that Person 10 had lost control and situational awareness. He did not believe he was actually intending to kill the woman and child.⁹³⁶
11. At the extraction point Mr Roberts-Smith recalled Person 55 admitting that "*the first shots were mine.*"⁹³⁷

Person 22

12. Person 22 substantially corroborated Mr Roberts-Smith's evidence. There was no substantial attack on his credit. Mr Roberts-Smith submits his evidence should be accepted.
13. Person 22 recalled that the patrols arrived at their positions early and separated. Mr Roberts-Smith's patrol took up a defensive position at a building. They understood Person 55's patrol to be approximately 200-300 metres to the southwest. The patrol then took a blocking position along a dry creek bed and Person 22 was close to Person 55's patrol.⁹³⁸
14. About the time the helicopters were inserting a round impacted next to Person 22's head. It came from the general direction of Person 55's patrol. Mr Roberts-Smith and Person 10 came to Person 22's position. Person 22 recalled a communication from Person 55's patrol stating that somebody was between the two patrols. The three men moved into cover.⁹³⁹ Person 22 recalled scanning the ground and assessing it was likely the fire had come from the area in which the other patrol was located. Given the communication from Person 55's patrol he felt there was confusion and after failing to see a threat he felt the most likely option was the shot had come from Person 55's patrol.⁹⁴⁰ Mr Roberts-

⁹²⁹ T220 L21-T221 L19 (BRS).

⁹³⁰ T221 L19-28 (BRS).

⁹³¹ T221 L30-45 (BRS).

⁹³² T221 L45 - T222 L11 (BRS).

⁹³³ Closed Court Transcript 25 June 2021 T21 L24-29 (BRS) (redacted).

⁹³⁴ T222 L11-21 (BRS).

⁹³⁵ T222 L 42-46, Closed Court transcript 25 June 2021 T22 L13-16 (BRS) (redacted).

⁹³⁶ T223 L15-25. (BRS).

⁹³⁷ TT223 L3-10 (BRS).

⁹³⁸ T6063 L49-T6064 L26 (P22).

⁹³⁹ T6064 L44 – T6065 L28 (P22).

⁹⁴⁰ T6072 L35 -T6073 L25 (P22).

Smith issued battle orders. They broke out into an extended file moving towards the cleared ground in front. Person 22 was in the middle.⁹⁴¹

15. Person 10 began to engage with his machine gun. Person 22 could observe no threat to the front. Person 22 tried to ascertain what Person 10 was shooting at and Mr Roberts-Smith yelled at Person 22 to find out what Person 10 was firing at. Person 10 did not respond and did not break from looking directly to his front. Person 10 had a stoppage and then re-engaged. Mr Roberts-Smith ordered them to peel back.⁹⁴²
16. After they moved back Mr Roberts-Smith questioned Person 10 (*“What were you firing at? What were you firing at?”*) and Person 10 still could not respond. Afterwards (Person 22 was not sure how long) the blue smoke appeared. At about the time the blue smoke appeared Person 22 observed a small group of women and children, one of whom was carrying a birdcage, appearing from the general direction of the blue smoke.⁹⁴³
17. Mr Roberts-Smith continued to press Person 10 about the identity of his target. Person 10 was muddled and tried to say *“No I wasn’t shooting at that patrol, I was shooting in the general direction where the women and children appeared.”* At that stage Person 22 recalled *“It was pretty obvious that it was potentially blue on blue and there is no enemy to our front.”* The patrols returned to their blocking commissions and awaited completion of the mission.⁹⁴⁴

Person 11

18. Person 11 recalled hearing on the radio that Person 22 had received incoming fire. Shortly afterwards he heard sustained machine gun fire coming from the direction of the rest of his team.⁹⁴⁵ Person 4 and Person 11 moved to their position and observed Person 10 firing his machine gun. Person 11 could not identify the target. Mr Roberts-Smith was yelling at Person 10, trying to obtain target information. Person 10 had a stoppage which he rectified before recommencing firing. Mr Roberts-Smith gave an order to cease fire and about that time Person 11 observed green smoke come from a position about 100 metres away (being a friendly call sign).⁹⁴⁶
19. Person 11’s evidence corroborates the evidence of Mr Roberts-Smith and Person 22 that Person 10 continued to fire in circumstances when he could not indicate a target.

Person 10

20. According to Person 10 after they moved into the blocking positions following the arrival of the helicopters, three shots were fired at Person 22. Mr Roberts-Smith made a plan to move across open ground towards Person 55’s patrol. Mr Roberts-Smith and Person 22 moved whilst Person 10 took cover behind a mound. He saw something in his peripheral vision moving into the wadi and started *“Drake shooting”* in that direction. He fired his shots towards the southwest (Gothic 3 being to the south).⁹⁴⁷ He agreed there were no shots being fired at the time he engaged and he had not seen an identified target firing at him.⁹⁴⁸

⁹⁴¹ T6065 L28- L45 (P22).

⁹⁴² T6066 L2-39 (P22).

⁹⁴³ T6066 L43-6067 L13 (P22).

⁹⁴⁴ T6067 L15-33 (P22).

⁹⁴⁵ T5657 L41-T5658 L4 (P11).

⁹⁴⁶ T5658 L4-20 (P11).

⁹⁴⁷ T4520 L1-42 (P10).

⁹⁴⁸ T4552 L38-43, T4578 L4-14 (P10). Closed Court Transcript 1 April 2022 T6 L36-37 (P10) (redacted).

21. According to Person 10 he did not take his eyes off the engagement area and continued to give target indications whilst shooting. He had a few stoppages. After firing up to 5 bursts he was ordered to ceasefire. According to Person 10 he was “*firing at an area*” rather than a person.⁹⁴⁹ Person 10 stated he was “*shouting*” his target indications which included information on direction, distance and type. Specifically he claimed to be shouting “*two enemy*.”⁹⁵⁰ RS Section XI [12] contains a submission that Mr Roberts-Smith and Person 22 did not hear Person 10’s target indications because of the sound of the machine gun. Given the physical proximity of the men, and the stoppages, that is most improbable.
22. After Person 10 ceased to fire, Person 55’s patrol threw blue smoke. He then observed a woman with a birdcage and a child emerge from the wadi. Mr Roberts-Smith asked him to identify his target but said “*You don’t have to tell me now.*” Prior to extraction, Person 10 told Mr Roberts-Smith he had shot at a woman and child, but his evidence was he only became aware of this after he saw them come out of the aqueduct.⁹⁵¹ His evidence vacillated between an admission of a mistake and a position that his decision to engage was justifiable. At one stage he agreed he was wrong when he “*fired at what I thought was an enemy insurgent.*”⁹⁵² RS Section XI [31] records that “*it may readily be accepted that he made a grave error on the ground on 15 July 2012.*” That was not Person 10’s position in the witness box.
23. Person 10’s version is contradicted by the evidence of the other members of his patrol. It is not corroborated by the contemporaneous documents. Indeed his conduct became the subject of a Quick Assessment (Ex. R192 Tab 10) and he was removed from the patrol. Mr Roberts-Smith submits he has fabricated a version of events that whilst it might be more palatable to his self-respect and image as a soldier, is at stark variance with the facts.

Person 7

24. Person 7 gave evidence to the effect that Mr Roberts-Smith planned the mission up to Chora Valley.⁹⁵³ Person 7 stated that the mission planning was done in two parts and that Person 7 was responsible for the helo insertion.⁹⁵⁴ He spent minimal time with Mr Roberts-Smith on planning.⁹⁵⁵ On insertion he heard shots. When he met Person 55 later during the mission he confirmed there had been a small contact.⁹⁵⁶
25. Person 7 identified no flaw in Mr Roberts-Smith’s planning for the mission. His criticism was that the dispositions of the two patrols had not been communicated until they were on the ground. Person 7 asserts that this caused the blue on blue.⁹⁵⁷ However he himself was not on the ground where the incident occurred. His evidence does not take into account that the two patrols did take steps to be mutually aware of their respective positions prior to the incident (see Mr Roberts-Smith’s evidence above).

⁹⁴⁹ T4520 L44 - T4521 L19 (P10).

⁹⁵⁰ T4521 L21-36 (P10).

⁹⁵¹ T4523 L32-35, T4555 L38-41, T4556 L 28-35 (P10).

⁹⁵² T4578 L30-34. T4578 L41-44 (P10) “*I made the decision to fire and I think it’s the right one.*” Closed Court Transcript 31 March 2022 T4 L41-45 (admission of error) (redacted), Closed Court Transcript 1 April 2022 T7 L35-36 (redacted), T4621 L 22-23 (denial of error of judgment) (P10).

⁹⁵³ T3602 L38-39 (P7).

⁹⁵⁴ T3603 L19-24 (P7).

⁹⁵⁵ T3603 L 24-26 (P7).

⁹⁵⁶ T3603 L43 - T3604 L29 (P7).

⁹⁵⁷ T3781 L 14 – T 3781 L43 (P7).

C. THE EVIDENCE – AFTER THE MISSION ON 15 JULY 2012

The Applicant

26. On return to base there was a team debrief in the ready room. When Mr Roberts-Smith arrived Person 10 was present, sitting on the couch. Mr Roberts-Smith asked him something like “*what were you doing*” and Person 10 giggled and chuckled. Mr Roberts-Smith told him to stand up and punched him in the face.⁹⁵⁸ Mr Roberts-Smith then berated him. In particular, Mr Roberts-Smith pointed out the consequences to Person 10’s life and career if he had shot a woman or child or a mate.⁹⁵⁹ Mr Roberts-Smith denied saying to his patrol “*Not a word of this is to leave this room*” and stated he had never denied hitting Person 10.⁹⁶⁰ Mr Roberts-Smith recalled that he apologised to Person 10 for punching him and that they maintained a cordial relationship during the deployment.⁹⁶¹ Mr Roberts-Smith reported the fact that he had struck Person 10 to the troop commander and troop sergeant.⁹⁶² RS Section XI [18] suggests this evidence is false on the basis that no action was taken against him. The submission should not be accepted in circumstances where no action was taken the following year when Person 10 reported the assault to Person 100 (there could be a myriad of reasons for a lack of formal action).
27. Mr Roberts-Smith recalled Person 55 admitting in front of the troop back at the base that he had initiated the blue on blue, stating that he had honestly believed his target was an insurgent.⁹⁶³ According to Mr Roberts-Smith (and no evidence contradicted this) his patrol orders for the mission were never criticised at any stage.⁹⁶⁴ When it was put to Mr Roberts-Smith that he was concerned his tactical planning would be at his issue, he responded that the incident had nothing to do with a tactical plan which would in any case have been prepared with the involvement of all patrol commander and then signed off by the troop officer and ISAF.⁹⁶⁵
28. Mr Roberts-Smith denied ever threatening to report Person 10 to the Hague.⁹⁶⁶ His evidence was that he had no motive to conceal that Person 55 had fired the first shot as he was the junior patrol commander and only responsible for Phase 1 when the incident happened in Phase 2.⁹⁶⁷ The blue-on-blue incident was widely known and not hidden from anybody.⁹⁶⁸
29. Mr Roberts-Smith denied a conversation with Person 19 in which he stated that he would say Person 10 committed war crimes (and Person 19’s attitude to Mr Roberts-Smith following the weapons incident was made plain during the course of his cross-examination). Mr Roberts-Smith agreed he had a conversation with Person 10 in or about late 2012 when Person 10 said that Persons 6 and 7 had told him if he wanted to get out of his show cause he should report Mr Roberts-Smith for punching him. Mr Roberts-Smith replied Person 10 could do what he liked but that he believed Persons 6 and 7 were using him.⁹⁶⁹ The allegation that Mr Roberts-Smith subsequently said to Person 10 “If you threaten me or my family I will fuck you up” was never put to Mr Roberts-Smith.

⁹⁵⁸ T224 L1-12 (BRS).

⁹⁵⁹ T224 L18-29 (BRS).

⁹⁶⁰ T225 L14-18 (BRS)

⁹⁶¹ T228 L16-19 (BRS)

⁹⁶² T224 L31—T225 L12 (BRS).

⁹⁶³ T223 L 8-10, T226 L7-21 (BRS).

⁹⁶⁴ T226 L23-24 (BRS).

⁹⁶⁵ Closed Ct 25 June 2021 T22 L37-T23 L2 (BRS) (redacted).

⁹⁶⁶ T226 L26-29, Closed Ct 25 June 2021 T26 L25-33, T27L8-15 (BRS) (redacted).

⁹⁶⁷ Closed Ct 25 June 2021 T26 L35-43 (BRS) (redacted).

⁹⁶⁸ Closed Ct 25 June 2021 T27 L38-41 (BRS) (redacted).

⁹⁶⁹ T226 L26-29, T227 L30 - T228 L20 (BRS).

30. Mr Roberts-Smith confirmed his own statement (Ex. A18) prepared at the time was accurate save for its omission of any reference to the sighting of the woman and child. His view at the time was that the relevant issue for the statement was Person 10's loss of control and he had no interest in making him look bad.⁹⁷⁰ RS Section XI [24] contains a submission that the statement infers Person 10's responsibility for the blue on blue. In fact the statement does not say that Person 10 shot at the G3 patrol – it only says he may have seen G3 patrol members. If anything the statement is consistent with Mr Roberts-Smith minimising the seriousness of what Person 10 had done. Mr Roberts-Smith also gave evidence that the Quick Assessment was performed because of Person 10's loss of control and not because of the blue-on-blue incident.⁹⁷¹
31. Mr Roberts-Smith did not know why the OPSUM entry at 0615DE did not refer to the blue-on-blue incident. It was not suggested he had anything to do with the preparation of the OPSUM.⁹⁷² The submission at RS Section XI [23a] that the OPSUM is evidence that Mr Roberts-Smith "*used Person 10 as a scapegoat for the blue on blue initiated by Person 55*" is without merit. Similarly RS Section XI [23b] suggests that an absence of a Quick Assessment into the Person 55 incident (in circumstances where a QA was conducted into Person 10's shooting) is evidence establishing the same proposition. Yet there is no evidence that Mr Roberts-Smith had anything to do whatsoever with deciding whether a Quick Assessment would take place.

Person 22

32. Person 22's recollection of the troop debrief was that there was confusion as to what had actually been happening on the ground prior to the force going in. Mr Roberts-Smith and Person 55 both spoke to the troop commander and the troop left the room and the patrol commanders remained. Person 22 denied that the only suggestion of a blue on blue at the debrief was one initiated by Person 10.⁹⁷³ Person 22 stated that there was already talk in the locker room of a blue on blue even before the troop debrief.⁹⁷⁴ He denied that Mr Roberts-Smith had said the blue on blue was initiated by Person 10.⁹⁷⁵ Although Person 22 did not say Person 55 effectively admitted responsibility for the blue on blue at the debrief (which was Mr Roberts-Smith's recollection) the point is that it is obvious that all assembled knew there had been a blue on blue incident.
33. Person 22 recalled the members of the patrol waited for Mr Roberts-Smith to return from the patrol debrief. He recalled the patrol members were in some shock except for Person 10 who he described as being in a "*joyful mood*" before Mr Roberts-Smith struck him. Person 22 also described Person 10 as "*smiling*" and "*giggling*" at this point.⁹⁷⁶ The "*concession*" identified at RS Section XI [17] that Person 22 did not see Person 10 laugh must be viewed in the light of this evidence. As to the suggestion that Mr Roberts-Smith said "*nothing leaves this room*" Person 22 stated "*I can't remember that at all.*"⁹⁷⁷

Person 11

34. Person 11 recalled at the patrol debrief Mr Roberts-Smith pressed Person 10 as to the identity of his target. He recalled that Person 10 said "*all he could see was some civilians – women and children, and that was concerning*". Person 11 also observed that Person 10 "*did not seem to understand*" before Mr

⁹⁷⁰ T227 L20-21, Closed Ct 25 June 2021 T26 L8-16 (BRS) (redacted).

⁹⁷¹ Closed Ct 25 June 2021 T24 L28-34 (BRS) (redacted).

⁹⁷² Ex. R 192 Tab 9, Closed Ct 25 June 2021 T25 L3-15 (BRS) (redacted).

⁹⁷³ T6068 L20 - T6069 L3, T6073 L37 - T6074 L2 (P22)

⁹⁷⁴ T6074 L4-12 (P22).

⁹⁷⁵ T6074 L14-15 (P22).

⁹⁷⁶ T6069 L20 – T6070 L28, T6074 L41- T6075 L23 (P22).

⁹⁷⁷ T6075 L32-34 (P22).

Roberts-Smith hit Person 10.⁹⁷⁸ This evidence substantially corroborates the evidence of Mr Roberts-Smith and Person 22 about Person 10's demeanour at this time.

Person 10

35. Person 10 denied giggling or laughing during the patrol debrief.⁹⁷⁹ According to Person 10 Mr Roberts-Smith said nothing before he punched him in the patrol debrief. Afterwards Mr Roberts-Smith yelled at him but Person 10 could not recall what was said other than him saying at the end "*nothing leaves this room.*" Person 10 could not recall (and did not deny) Mr Roberts-Smith raising the devastating effects on Person 10 of shooting a woman or child.⁹⁸⁰ He could not recall whether Mr Roberts-Smith subsequently apologised.⁹⁸¹
36. Person 10 stated that after being woken from his sleep following the patrol meeting, he was escorted to a meeting with Person 26 (troop Bravo), Person 58 (troop Alpha) and Mr Roberts-Smith. Performance issues were raised. Person 10 stated that he was accused of firing on a patrol in a blue-on-blue incident but he did not recall who made the allegation. He did not recall whether him firing at the woman and child was raised, nor how the meeting concluded.⁹⁸² He further stated that at a subsequent meeting with the SSM he was told he would be going home following a blue-on-blue. However he was not sent home but moved into Person 31's patrol.⁹⁸³ In cross-examination Person 10 explained that Person 6 had raised with him the blue on blue with him at about this time.⁹⁸⁴ This is further evidence tending to establish that knowledge of the blue on blue incident (and Person 55's responsibility) was widely disseminated throughout the troop at the time.
37. According to Person 10 in his examination in chief, Mr Roberts-Smith said to him "*I could go to the Hague if I put that I was firing at a woman and child.*" This is said to have occurred whilst Mr Roberts-Smith helped Person 10 to prepare a statement.⁹⁸⁵ In cross-examination Person 10 added to this a quite different claim that Mr Roberts-Smith had actually threatened to report him to the Hague.⁹⁸⁶ Person 10 then visited a legal officer and kept his original statement confirming he fired at a woman and a child.⁹⁸⁷ The relevant part of the statement appears at Ex. 160 paragraph [9] and simply refers to Person 10 observing a woman and her son for the first time after the shooting had occurred. It is very difficult to see why such a statement would place Person 10 in jeopardy or why Mr Roberts-Smith would want to stop it being made.
38. Ex. R159 (a document headed "*General Comments sheet*" and prepared by Person 31) confirms that Person 10 was given a formal warning on 20 July 2012 in relation to an incident of 15 July 2012 and warned not to go outside the wire. Whilst the document does not specifically refer to the details of the incident it does not suggest that Person 10 was responsible for a blue on blue (and Person 31 confirmed it referred to the incident with the woman and child).⁹⁸⁸ Person 10 alleged that his performance started slipping after he was removed from the patrol on 20 July 2012.⁹⁸⁹ However the large and varied number of performance issues identified by Person 6 and Person 31 in the subsequent

⁹⁷⁸ T5658 L33 - T5659 L6 (P11).

⁹⁷⁹ T4557 L15-16, T4581 L10-18 (P10).

⁹⁸⁰ T4523 L1-25, T4557 L27-36 (P10).

⁹⁸¹ T4581 L34-35 (P10).

⁹⁸² T4523 L42-T4524 L38, T4592 L23-43 (P10).

⁹⁸³ T4524 L40 - T4525 L14 (P10).

⁹⁸⁴ T4593 L 17-37, T4596L30-46 (P10).

⁹⁸⁵ T4526 L22-T4527 L3 (P10).

⁹⁸⁶ T4616 L29 - T4617 L12, T4617 L42-46 (P10).

⁹⁸⁷ T4527 L5-20, T4618 L45 - T4619 L19 (P10).

⁹⁸⁸ T4712 L26-27 (P31).

⁹⁸⁹ T4528 L18-23 (P10).

period suggests that the 15 July incident was just one of many instances of poor performance by Person 10.⁹⁹⁰

39. Ex. R 160 is Person 10's statement prepared on 30 July 2012. At paragraph [11] he admits an error in failing to gain PID before firing and states that post engagement it occurred to him he may have fired at Local Nationals mistaking them for enemy. The Applicant submits this shows a lack of insight into the gravity of the situation and the degree of Person 10's personal responsibility for what had occurred. Person 10 claimed that at the time he wrote this statement he did not know that Person 55 was responsible for firing the shots at Person 22. That evidence is not credible given the evidence of other witnesses of the wide knowledge of the blue on blue. It also seems peculiar given the second sentence of paragraph [11] of Ex. R160 where Person 10 specifically denies engaging friendly call signs (which shows a consciousness of the issue).
40. According to Person 10 in February 2013 he received a call from Mr Roberts-Smith in which Mr Roberts-Smith said "*if you threaten me or my family I will fuck you up.*" Person 10 replied "*I'm not a cunt*" and Mr Roberts-Smith replied "*I'm not a cunt either.*"⁹⁹¹ In cross-examination Person 10 could not recall whether Mr Roberts-Smith said to him in 2013 that if he wished to complain he should do so and that he was being used by others including Person 7.⁹⁹²
41. Person 10 stated that he first complained about being punched by Mr Roberts-Smith during an exit interview with Person 100 in early 2013. Person 10 stated that Person 100 inquired if he had witnesses and he replied he had no witnesses and "*that was the end of it*".⁹⁹³ Person 10's evidence was that he could not recall whether Person 100 said he would follow up Person 10's complaint. He also could not recall refusing to provide a statement and the names of witnesses after being asked by Person 11 (but did not deny this had occurred).⁹⁹⁴

Person 31

42. Person 31 did not observe the blue-on-blue incident.⁹⁹⁵ He recalled Mr Roberts-Smith making an allegation against Person 10 at the debrief. He did not recollect whether Person 55 said anything (and RS Section XI [21] is incorrect to allege that his account is inconsistent with Mr Roberts-Smith's). He did not recall mention of the blue-on-blue incident in the debrief but had discussed this with Person 6 very soon after the debrief. Person 6 had indicated that Person 55 had fired at a member of Mr Roberts-Smith's patrol.⁹⁹⁶ The blue-on-blue issue was being discussed in the squadron.⁹⁹⁷ According to Person 31 no-one ever suggested to him that the incident was the fault of Person 10.⁹⁹⁸
43. Person 31 was aware in 2012 that Person 10 had fired at a woman and child and that Mr Roberts-Smith had been angry with Person 10 because of the possibility of civilian casualties.⁹⁹⁹ Person 31

⁹⁹⁰ T4583 L1-22, T4587 L9 - T4588 L27 (P10), Ex. A177 and Ex A178., Ex A184 Person 10 did not identify any inaccuracies in those documents in his evidence see T4589 L6, L 42-46, although in Ex. A180 he had contested many of the allegations against him in response to the show cause notice which is Ex. A179.

⁹⁹¹ T4528 L44 - T4529 L9 (P10).

⁹⁹² T4581 L37-41 (P10).

⁹⁹³ T4529 L15-39, T4558 L16-19, T4559 L18-24 (P10).

⁹⁹⁴ T4573 L1-25 (P10).

⁹⁹⁵ T4668 L1-2 (P31).

⁹⁹⁶ T4642 L33 - T4644 L4 (P31).

⁹⁹⁷ T4725 L14-15 (P31).

⁹⁹⁸ T4725 L26-27 (P31).

⁹⁹⁹ T4660 L7-19 (P31).

agreed that it was his decision to remove Person 10 from the unit for poor performance.¹⁰⁰⁰ Person 6 shared similar views concerning the performance of Person 10.¹⁰⁰¹

Person 7

44. Person 7 recalled there being “whispers” of a blue on blue prior to the troop debrief. According to Person 7, Person 55 stated that he had seen movement and engaged. Mr Roberts-Smith then attacked Person 10 by saying “*His eyes rolled in the back of his head and he was blazing away with a Minimi rifle.*”¹⁰⁰² Neither Person 7’s account of the debrief, nor the account of any other witness supports the submission at RS Section XI [9] that Mr Roberts-Smith was “covering up” the friendly fire incident. Indeed Person 7’s description of what Person 55 said may have embraced an admission of responsibility.
45. Effectively, the substance of Person 7s evidence seems to confirm that Person 55 admitted responsibility for a friendly fire incident at the troop debrief.
46. In 2013 Person 10 told Person 7 his version of what happened in the meeting. He also raised the assault by Mr Roberts-Smith and an allegation that Mr Roberts-Smith threatened to engage a woman and child with a machine gun.¹⁰⁰³ Person 7 later claimed to have received information from Person 22 that the allegation that Person 10 fired at women and children was false.¹⁰⁰⁴ Given Person 22’s evidence at the trial, it is very hard to see how Person 7’s evidence on this issue can be accurate.

Person 100

47. Person 100 agreed that Person 10 raised his allegation of assault against Mr Roberts-Smith in a conversation in July 2013. Person 10 requested an investigation. Person 100 agreed and requested a brief statement and a list of witnesses. Person 10 refused and said he would also not appear as a witness. Person 100 explained there was little he could do in the circumstances.¹⁰⁰⁵ He reported the allegation to his commanding officer.¹⁰⁰⁶
48. Ex A224 is a record of the exit interview on 13 July 2012. Person 100 specifically asked Person 10 if he wished to raise any issue arising from his SASR service and he said no.¹⁰⁰⁷
49. It is significant that the only allegation raised by Person 10 at this time was the assault.

D. CONCLUSION

50. The underlying theory underpinning the Respondents’ allegation collapses for two reasons:
 - (a) First, there is simply no evidence Mr Roberts-Smith was responsible for the blue-on-blue incident. Person 55 initiated the contact and there is indeed insufficient evidence to identify whether Person 55’s error was culpably negligent or innocent and accidental. There is no evidence that any person at the time actually alleged Mr Roberts-Smith bore any responsibility. At any rate, once it is accepted Mr Roberts-Smith did not bear responsibility he did not have the motive to behave in the manner alleged by the Respondents.

¹⁰⁰⁰ T4670 L10-15 (P31).

¹⁰⁰¹ T4717 L24-36 (P31).

¹⁰⁰² T3604 L 44 – T3605 L18 (P7).

¹⁰⁰³ T3605 L 20 – T3606 L20 (P7).

¹⁰⁰⁴ T3927 L1-35, T3931 L4-5, T3931 L35-40, T3932 L 25-31, T3933 L24-29 (p7).

¹⁰⁰⁵ T5607 L37-5608 L29-37 (P7).

¹⁰⁰⁶ T5614 L1-15 (P100).

¹⁰⁰⁷ T5609 L34-40 (P100).

- (b) The blue-on-blue incident was widely known throughout the troop. Mr Roberts-Smith submits the evidence (including the equivocal evidence of Persons 7 and 31) establishes that Person 55 most probably did raise the incident at the troop debrief. Even if he didn't, the incident was already being discussed (indeed Person 22 suspected this is what had occurred shortly after he had been shot at). It follows that the submission that Mr Roberts-Smith was attempting to shift blame for the blue-on-blue incident to Person 10 lacks any proper evidentiary foundation. He did not need to do this and had no motive to do this. Mr Roberts-Smith was simply angry about Person 10 having shot at a woman and child. If he did in fact raise that issue in the debrief it would have been a perfectly natural thing to do given it had occurred on the mission just ended, particularly given it occurred at a time close to the blue-on-blue incident.
51. The evidence of Person 22 concerning the shooting by Person 10 substantially corroborates Mr Roberts-Smith's evidence. Person 10 lost awareness. He shot wildly. He did not respond to questions. Person 10's own equivocations about accepting responsibility are to some extent understandable. The point is, not only Mr Roberts-Smith and Person 22 but plainly even Person 31 understood that this is exactly what had happened. It is borne out by the contemporaneous documents and particularly Ex. R159.
52. None of this excuses Mr Roberts-Smith's act of punching Person 10 but explains why Mr Roberts-Smith acted in the manner that he did towards Person 10. In the particular circumstances (where the evidence from Persons 22 and 11 corroborated Mr Roberts-Smith's evidence that Person 10 was not taking the issue seriously) this single incident punch cannot constitute bullying of Person 10. It was not a repeated course of conduct towards Person 10, but was an isolated incident which was caused by the anger of Mr Roberts-Smith towards Person 10 for having shot at a woman and child including the perceived demeanour of Person 10 following the incident.
53. As to the threat which is the subject of the relevant imputation:
- (a) As discussed above Mr Roberts-Smith had no motive to make the threat. He had no need to deflect blame onto Person 10 for the blue-on-blue incident.
- (b) The relevant part of the statement that is the alleged subject of Mr Roberts-Smith's threat is anodyne. It simply records Person 10's own belief that he was firing at insurgents and later saw a woman and a child. Once again, Mr Roberts-Smith could have had no rational reason to wish to suppress this.
- (c) Person 10's own evidence, particularly his evidence in chief was equivocal about what Mr Roberts-Smith actually said.
- (d) As distinct from the allegation of the punch, Person 10 made no contemporaneous complaint to the chain of command about the alleged threat.
54. The Court should find the Respondents have failed to justify the imputation.

SECTION XII: THE ASSAULT ON PERSON 17

A. INTRODUCTORY

1. The relevant imputations are as follows:
 - (a) **Imputation 13(a)/15(a) (Fairfax)** The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra;
 - (b) **Imputation 13(a)/15(a) (Fairfax)** The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman.
2. The Respondents have failed to discharge their burden on justification on the balance of probabilities on this issue. The imputations are plainly false. The evidence establishes that no assault occurred. The following matters are emphasised at the outset:

- (a) Person 17 had sustained a verified injury to her head above her left eye when she fell down the stairs at Parliament House on the evening of 28 March 2018. The unchallenged evidence of three witnesses, being the Applicant, Mr Nichols and Mr Grosskreutz, is that after this fall and before she returned to the hotel, she had a noticeable egg-shaped swelling above her eye. The very next day Person 17 confirmed to her own doctor that the visible injury had been caused by the fall down the stairs. She also told the Applicant's wife and mother-in-law this on 6 April 2018. For her allegation to be true, the Applicant – on the single occasion he has alleged to have assaulted Person 17 over the course of their 6 month relationship – would had to have hit her in precisely the same place, or almost precisely the same place, as the injury sustained from the fall, less than an hour after it happened. That is of itself highly improbable.

The Respondents (following the oral evidence of Mr Nichols and the documentary evidence of Mr Grosskreutz) now say at RS Section XII [45] that “*it is impossible to say whether Person 17's black eye was caused by the injury she sustained falling down the stairs*”. That contrasts with Person 17's evidence on the suppression order in these proceedings (Ex. A 273 at [5] where she said “*I have given the police photographic evidence of the black eye I suffered as a result of the assault and a series of Telegram messages from the day after the assault in which Ben is coaching me about how I should explain the black eye to my husband.*” In the last sentence of RS Section XII [45] the Respondents, deal with this difficult situation by submitting that the fall gave the Applicant an “*opportunity*” to punch her and to use the fall as “*cover*”. This is a most implausible position.

- (b) Person 17 was sufficiently affected by her alcohol consumption the night of the alleged assault that her memory of events is plainly unreliable.
- (c) Person 17's conduct after the alleged assault is inconsistent with it having occurred. She was married, independently wealthy, a lawyer and a person living in another city to the Applicant. Person 17 had agencies. If Person 17 had actually been assaulted, it is highly improbable that within days she would be pleading to be alone with him again in another hotel room. Her apology to him and her persistent attempts to contact him over the ensuing months and years are also totally inconsistent with the truth of her allegation. The suggestion that her conduct should be overlooked or ignored because she was “*in love*” does not withstand scrutiny. At any rate, the issue to be decided remains whether it is more probable than not the assault occurred, in all of the circumstances.

- (d) Person 17 proved herself to be a liar and/or a fantasist. Her suggestion that she was approached at dawn by a man on a beach in her hometown with compromising photographs who threatened to make those photos public *unless she told her lovers wife*, is a plain fabrication. There is no remotely plausible culprit. Such a person would have gone to the expense of surveillance in both Brisbane (involving photographing high level hotel rooms) and then again in Person 17's hometown (following her from her home on an early morning beach walk), only to make the most peculiar threat in the history of sexual blackmail – being a demand that a lover tell a wife. Other aspects of the story and Person 17's subsequent behaviour also point to the absurdity of her allegation.

B. THE CREDIT OF PERSON 17

The Man on the Beach

3. According to Person 17, early on the morning 3 April 2018 she was approached whilst walking on a beach near her home by a man. The man showed her photographs of Person 17 and the Applicant having sex in a room at the Milton Hotel. The man said, “*You’ve been seeing Ben Roberts-Smith*” and then after showing the photographs, said “*[Person 17] was to tell Emma about this or the photos would be made public.*”¹⁰⁰⁸
4. Person 17 not only gave this evidence in this trial but also agreed that she advised the AFP of this allegation.¹⁰⁰⁹ She agreed it was one of the reasons she put forward to the police for her visit to the Applicant's home and confrontation with his wife 3 days later, on 6 April 2018.¹⁰¹⁰
5. Person 17 has fabricated this encounter. The Applicant relies on the inherent improbability of the incident, including the nature of the threat (being a demand for a person having an affair to disclose the affair to her lover's wife) and the absence of any viable candidates with the resources and the motive to carry out such a bizarre scheme. In addition to those fundamental problems the Applicant relies on the following aspects of the evidence:
- (a) Despite being in contact with the Applicant that very morning,¹⁰¹¹ Person 17 did not tell him about this supposed incident on the beach.¹⁰¹² She agreed she had plenty of opportunity to mention the incident to the Applicant.¹⁰¹³ Her explanation for this was that she didn't trust the Applicant and felt “*he might have been involved with it*”.¹⁰¹⁴ Person 17 said further “*I think the interest in my going to his wife would be so that he could do what he ended up doing and making me out to be the bad person in the situation.*”¹⁰¹⁵ That evidence should not be accepted:
- (i) Person 17 elected to surreptitiously access the Applicant's driver's license on the evening of 5 April 2018 in order to obtain his home address¹⁰¹⁶ – and this was because she knew he would not have provided it willingly.
- (ii) The Applicant was naturally appalled and horrified when he found out Person 17 was at his home speaking to his wife. See for instance the reaction evidence from his message

¹⁰⁰⁸ T4079 L8-23; T 4081 L10-11, T 4130 L38-42 (P17).

¹⁰⁰⁹ T4136 L10-11 (P17).

¹⁰¹⁰ T4079 L25-27 (P17).

¹⁰¹¹ See Ex. A150 p. 125-126 and the 7 messages sent by Person 17 to the Applicant on 3 April 2018. It is apparent they also spoke to each other (see message at 11.51am on p. 126).

¹⁰¹² T4128 L26 – T 4129 L37 (P17).

¹⁰¹³ T4112 L45-46 (P17).

¹⁰¹⁴ T4080 L16-34 (P17).

¹⁰¹⁵ T4080 L35-38 (P17).

¹⁰¹⁶ T4050 L32-33 (P17).

from 6 April 2018 at the time of this event – “*You have been holding this over me since last year ... What have you done, this is outright blackmail.*”¹⁰¹⁷

The idea that the Applicant secretly wanted Person 17’s visit to his home and confrontation with his wife to happen, and that he achieved his desire by organising a blackmail threat via the man on the beach, is frankly ridiculous. If such an event had occurred Person 17 would certainly have told the Applicant, and the explanation she gave in her evidence for not telling him was knowingly false.

- (b) Not only did the Applicant not report this extraordinary event to the Applicant, she did not tell any other person for at least 6 weeks:
 - (i) She did not tell the police.¹⁰¹⁸ She did not tell the local police when she visited them on 8 or 20 April 2018 (and did not even allude to the incident).¹⁰¹⁹
 - (ii) She did not contact Sue Newton, her friend who was a senior police officer and who she felt she could confide in.¹⁰²⁰ Her only explanation for not asking Sue Newton to point her in the direction of someone senior to report this allegation was that “*It’s not something I thought of at the time. She doesn’t live in the same town as me.*” That explanation is not credible given the fact she had sought out Ms Newton herself to make complaints in Brisbane concerning the Applicant as recently as 13 March 2018.
 - (iii) She did not tell the Applicant’s wife on 6 April 2018 or mention the incident in her correspondence with Danielle Kennedy.¹⁰²¹ Person 17 did not tell the story until she spoke with the AFP at the end of May 2018.
- (c) The day after the alleged incident Person 17 sent a message to the Applicant complaining about their plan to spend the night together at an airport hotel.¹⁰²² She said “*Sorry but I don’t get why you want to stay there? I’d just assumed we’d go to Milton or Sofitel ...*” Person 17 agreed she was contemplating a stay at the Milton Hotel at the time.¹⁰²³ It is inconceivable that Person 17 would be proposing a return to the Milton Hotel, if as she says, the day before a stranger had approached her on the beach in her hometown with naked photographs of her and the Applicant in a room at that very hotel. This message, and the attitude of Person 17 it bespeaks as at 4 April 2018, are completely inconsistent with her allegation concerning the man on the beach. Person 17 gave no explanation for the message other than to say that she did not “*think it was really relevant where we stayed*”.¹⁰²⁴
- (d) Person 17’s evidence concerning the encounter is improbable. She said the man “*came up from behind me from the dunes*”.¹⁰²⁵ She did not take a photograph of the man.¹⁰²⁶ He did not provide, and she didn’t ask him for, his contact details¹⁰²⁷ meaning there was no way of them verifying

¹⁰¹⁷ Ex. A150 p. 129.

¹⁰¹⁸ T4129 L39 (P17).

¹⁰¹⁹ T4136 L26-30; T4225 - T 4228 (P17).

¹⁰²⁰ T4135 L33; T4073 L3 (P17).

¹⁰²¹ See Ex. A270 for the Danielle Kennedy/Person 17 correspondence.

¹⁰²² Ex. A150 at p. 127 (message at 16.33).

¹⁰²³ T4135 L7-8 (P17).

¹⁰²⁴ T4135 L20-28 (P17).

¹⁰²⁵ T4133 L22 (P17).

¹⁰²⁶ T4108 L28-29 (P17).

¹⁰²⁷ T4108 L34-39; T 4132 L37 (P17).

that she had actually carried out his demand. She did not know how the man knew she would be on the beach and there was no vehicle area near the beach.¹⁰²⁸

- (e) The evidence established that the Applicant and Person 17 only stayed at rooms between the 20th and the 30th floor at the Milton Hotel.¹⁰²⁹ This means, even assuming the accuracy of Person 17's evidence to the effect that the photographs showed her and the Applicant having sex against a window (see below), that the photographs would have to have been taken from another building or by the use of a drone. The person responsible for the taking of the photographs would have to be sufficiently well resourced and informed to know not only the identity of the hotel at which the couple were staying, but also their room number, the exterior position of that room, and the time they were in the room so that the taking of these photographs could be organised. The whole scenario is extremely improbable.
- (f) Person 17 stated in her evidence that the photographs showed her and the Applicant having sex against the windows at the Milton Hotel. The draft police statement records that Person 17 had originally told the AFP that the photographs showed them having sex on a bed but Person 17 claimed she did not tell the police this and had instead told them the photographs depicted sex against windows.¹⁰³⁰ The suggestion that the photographs depicted sexual activity against the windows is also inconsistent with the claim the Applicant was paranoid about being watched and/or followed.¹⁰³¹ Person 17 was re-examined about a message at p. 114 of Ex. 150 in which the Applicant, alluding to sexual activity, stated "*we would break these windows?*" Even if that message did allude to intercourse occurring at the window, as opposed to sound shattering the window or some other private joke at the time, the obstacles discussed above remain.
- (g) Person 17 agreed that the encounter with the man on the beach was "part" of her reason for deciding to meet the Applicant's wife on 6 April.¹⁰³² In fact, the Applicant submits Person 17's true reason for inventing the encounter with the man on the beach on or about late May 2018 was to try and render her classless and cruel conduct on 6 April 2018 more palatable, to both the police and herself. The alleged threat by the man on the beach on 3 April 2018 assisted in providing her with a moral justification for this conduct three days later.

- 6. The fact that Person 17 fabricated this incident is a matter of sufficient seriousness to cast doubt on any of her evidence when it is not otherwise corroborated by documents and other witnesses. She is a lawyer. She understands the obligations of honesty. The fabricated encounter concerning the man on the beach was a lie she told not just in this trial but also a lie she told to the AFP in or about late May 2018.

The Failure to Provide Relevant Material to the AFP

- 7. Person 17 agreed that when she met the AFP, she showed them images on her phone which the AFP photographed and that she did this by holding up her phone with the messages she wanted them to see.¹⁰³³ Person 17 denied in her evidence that she herself made the decision as to what to show the

¹⁰²⁸ T4131 L24-29 (P17).

¹⁰²⁹ See T4080 L45 - T4081 L2 (P17). See also the dates specified in the chronology which Person 17 handed to the AFP (Ex. A274).

¹⁰³⁰ T4152 L20 - T4153 L6; T4129 L4-19 (P17), Ex. A 272.

¹⁰³¹ T4133 L35-38; T4135 L14-18 (P17).

¹⁰³² T4081 L15-18 (P17).

¹⁰³³ T4115 L42-47; T4163 L7-8 (P17).

AFP officers and suggested they had full access and decided for themselves what to photograph.¹⁰³⁴ That evidence should be rejected:

- (a) In her affidavit on the suppression order¹⁰³⁵ at paragraph 5 Person 17 said “I have given the police photographic evidence of the black eye I suffered as a result of the assault and a series of Telegram messages from the day after the assault in which Ben is coaching me about how I should explain the black eye to my husband.” (emphasis added)
- (b) According to Person 17 her interview with the AFP was “quite short” because she had to get a flight home.¹⁰³⁶ In the circumstances the police would hardly have had time to trawl through her phone and identify the 19 odd pages of documents they photographed,¹⁰³⁷ which included excerpts from the 130 page message chain which became Ex. A150. It is obvious that Person 17 must have identified the material she wished to show them.

8. In fact, what happened was that Person 17 supplied the police with all of the messages passing between her and the Applicant from 29 March 2018, save the last one in which the Applicant says amongst other matters:¹⁰³⁸

“I’m not going to bullshit you Person 17, your behaviour has given me real cause to think and I’m a little in shock myself. Apart (sic) putting yourself in a dangerous situation I found it really disrespectful and inappropriate. In saying this however I acknowledge you have apologised and I accept your apology.” (emphasis added)

9. The omission of that message is material. It affects the meaning of the whole of the chain. It suggests (in the big picture) that it is Person 17 who has done something wrong and not the Applicant. It is quite inconsistent with Person 17’s allegation of assault. Person 17 agreed that the message was relevant to the police inquiry.¹⁰³⁹ The failure by Person 17 to show a plainly relevant message to the AFP, that also tended to suggest that her story might be incorrect, was dishonest.

10. Person 17 also omitted to show to the AFP her message to the Applicant from 31 March 2018, which was in these terms:¹⁰⁴⁰

“Please don’t punish me. I’m already hurting – physically and mentally. I know it’s my fault and I hate that I can’t change what happened. I really need to know what you’re thinking and where we stand.”

11. Likewise, that message suggested that it was actually Person 17 who had done something wrong such as to warrant an apology. It was also relevant and yet it was withheld by Person 17 from the AFP. Person 17’s failure to provide this message to the AFP was dishonest.
12. A failure by a complainant, let alone a lawyer, alleging a serious assault to show the police documents which she knows are relevant and which tend to suggest her allegation may be incorrect is a matter reflecting most adversely on the honesty and integrity of the complainant.

¹⁰³⁴ T4164 L14-15; T4166 L39-42 (P17).

¹⁰³⁵ Ex. A273

¹⁰³⁶ T4066 L44-46 (P17).

¹⁰³⁷ See Exs. A270, R276.

¹⁰³⁸ See Ex. A150 p. 124.

¹⁰³⁹ T4171 L5-10 (P17).

¹⁰⁴⁰ Ex. A150 p. 124.

The Affidavit Sworn in Support of the Suppression Order Application

13. On 18 October 2018 Person 17 swore an affidavit in support of an application for her suppression order.¹⁰⁴¹ The affidavit is false or misleading in three material respects:
- (a) Paragraphs 5 and 7 refer to a “*series of Telegram messages from the day after the assault in which Ben is coaching me about how I should explain the black eye to my husband.*” The messages are annexed to the affidavit at Exhibit 2. The messages omit the last five messages from 29 March 2018, including the last message from the Applicant on 29 March 2018 in which he states “*I acknowledge you have apologised and I accept your apology.*”¹⁰⁴² See paragraph 8 above. The omission of those messages means the “*series of Telegram messages*” is not complete. Even if that were not the case, the omission of the last message in particular creates a materially misleading impression. It was dishonest. It is not satisfactory for Person 17 to blame those who drafted the affidavit.¹⁰⁴³
 - (b) Paragraphs 4, 5 and 6 refer to the alleged assault and the injury allegedly caused by the assault. Person 17 states that she has “*given the police photographic evidence of the black eye I suffered as a result of the assault*” and later refers to the 29 March 2018 Brisbane airport photograph¹⁰⁴⁴ as showing “*the black eye caused by Ben punching me.*” In her affidavit she does not refer at all to her fall down the stairs, nor to the injury to her head (above her left eye) that was sustained when she fell down the stairs (matters about which she had advised her doctor on 29 March 2018).¹⁰⁴⁵ Once again, this means the affidavit (at the minimum) creates a seriously misleading impression, if not actually containing a knowing falsehood. Person 17’s explanation¹⁰⁴⁶ that she did not view the fall as relevant to her suppression affidavit should not be accepted. If she felt it relevant to advance those fairly graphic photographs of her injury, it was plainly relevant to identify the cause of those injuries, or assuming there to be two causes, both causes.
 - (c) Paragraph 11 does not identify the man on the beach as one of the persons who knew about the affair between Person 17 and the Applicant. Her explanation¹⁰⁴⁷ – that this was the fault of counsel who drafted the affidavit – should not be accepted. Of course, the more plausible explanation for this omission is that Paragraph 11 of the affidavit is in fact accurate and that the man on the beach incident never occurred.
14. The falsehoods and material omissions creating misleading impressions in this affidavit have a seriously adverse effect on the credit of Person 17. She is a lawyer and it may be assumed she understood intimately the importance of her obligations to be truthful when swearing a solemn affidavit of this kind.

6 April Message Referring to Events a “Few Weeks Back”

15. On 6 April 2018 after her visit to the Applicant’s wife, Person 17 sent a message to the Applicant at 18.20 saying “[p]lease don’t waste your time with intimidation or payback either. The benefit of what you were capable of a few weeks back & knowing the threats you’ve made to me since is that I immediately put in place ‘Insurance’ ”.¹⁰⁴⁸ While admitting she had invented the “insurance” reference,

¹⁰⁴¹ Ex. A273.

¹⁰⁴² T4171 L39 - T4172 L21 (P17).

¹⁰⁴³ T4173 L29-32; T4174 L1-3 (P17).

¹⁰⁴⁴ Elsewhere admitted at Ex A27.

¹⁰⁴⁵ Ex. A149 Tab 3.

¹⁰⁴⁶ T4102 L17-18 (P17).

¹⁰⁴⁷ T4106 L24-25; T4107 L44-46 (P17).

¹⁰⁴⁸ Ex. A150 p. 129-130.

Person 17 claimed in her evidence that the conduct embraced by “a few weeks back” included the assault the previous week.¹⁰⁴⁹ That evidence was false. It was invented to try and portray this message as a contemporaneous reference to the assault when the message was no such thing, and where there is a glaring absence of any evidence of a contemporaneous reference or complaint to the assault.

Conclusions

16. Person 17 is not a witness of credit. She has shown a preparedness to lie to both the police, and in her affidavit and oral evidence in these proceedings. Her evidence should not be accepted unless corroborated independently by documentary or oral evidence.
17. The Applicant’s denial of an assault is corroborated by the contemporaneous record of Person 17’s doctor and by the messages they exchange in which Person 17 apologises for her conduct.

C. EVENTS UNTIL FEBRUARY 2018 AND PERSON 17’S RETURN FROM LONDON

18. Person 17 gave some evidence of events in 2017 but it is hard to see how they assist the assault allegation – and in any event, they were largely denied by the Applicant.¹⁰⁵⁰
19. The Applicant had taken a trip to Singapore with his wife in January 2018. He returned from that trip on 20 January 2018.¹⁰⁵¹ On or about 22 January 2018 he told Person 17, who was then in London, that their relationship had no future. This can be discerned from Person 17’s message on 29 January 2018 where she said “*I woke up today thinking how exactly one weekend ago we were having the conversation that changed our lives.*”¹⁰⁵² Person 17 agreed that the Applicant said he was having second thoughts at this time.¹⁰⁵³ Person 17 also conceded that she had the impression that the Applicant had decided to stay with his wife and that he said that after counselling he had realised he still had feelings for his wife.¹⁰⁵⁴
20. Messages sent by Person 17 on or about 3 February 2018 betray her state of mind at this time.¹⁰⁵⁵ She agreed that she was “*very hurt*” by the Applicant’s decision. Additional messages reveal frequent references to suicidal thoughts.¹⁰⁵⁶ The Applicant gave evidence of an episode in February 2018 when Person 17 disappeared in London and he spoke with her husband in an effort to assist in tracking her down. In the course of that episode he spoke who Person 17, who said things such as that the world and her kids would be better off without her.¹⁰⁵⁷

¹⁰⁴⁹ T4061 L40-47; T4126 L10 - T4127 L17 (P17).

¹⁰⁵⁰ See Person 17’s evidence at T4028 - T4030, including the allegations concerning the evening with James Hervey, the statement that he did not intend for marriage counselling to work, the claim that it was the Applicant who suggested setting up a Gmail account and the claim that the Applicant said he was an alcoholic. The falsity of these allegations was put to Person 17 at T4205 - T4206. The relevant denials by the Applicant appear at T784-785 (although the ‘alcoholic’ conversation was not even put to the Applicant).

¹⁰⁵¹ See, for instance, Person 17’s chronology at Ex. A274, p. 2.

¹⁰⁵² See Ex. A150 p. 76. The Applicant’s expression of doubts about of the relationship is also evident in the change in the length and the tone of the messages from 22 January 2018 (starting from the bottom of p. 60).

¹⁰⁵³ T4075 L12-13; T4078 L15-18 (P17).

¹⁰⁵⁴ T4078 L22-24 (P17).

¹⁰⁵⁵ Ex. A150 p. 79-82.

¹⁰⁵⁶ Ex. A150 p. 64 (“I don’t feel like I even want to be alive”), p. 68 (“I just feel like ... jumping in front of a fucking train”), p. 69 (“Is it any wonder I feel suicidal”), p. 80 (“No doubt you’d be glad if I did kill myself”), p. 88 (“If there was an easy way to end my life I would have done it by now”).

¹⁰⁵⁷ T263 L40 -T264 L36 (BRS).

D. THE END OF THE ALLEGED PREGNANCY AND THE EVENTS ON 6 AND 13 MARCH

Pregnancy and Termination

21. On or about 15 February 2018 Person 17 told the Applicant that she was pregnant with his child.¹⁰⁵⁸ She never obtained verification from a doctor that she was pregnant and never sought treatment in relation to the miscarriage she said occurred.¹⁰⁵⁹
22. After Person 17 returned to Australia on or about 23 February 2018¹⁰⁶⁰ she met with the Applicant and they agreed to terminate the pregnancy.¹⁰⁶¹ Person 17's evidence suggesting that the Applicant became angry with Person 17 when she had second thoughts about a termination, and that he said words to the effect that "*he would not stick around long term*", should not be accepted.¹⁰⁶² The Applicant denied these matters.¹⁰⁶³ They are also inconsistent with the generally supportive attitude of the Applicant evidenced by the messages exchanged between Person 17 and the Applicant in early March 2018.¹⁰⁶⁴
23. Person 17's evidence was that she miscarried on Friday 2 March 2018.¹⁰⁶⁵ She did not tell the Applicant. Instead, she continued to send him messages pretending that she was pregnant and planning a termination.¹⁰⁶⁶ As late as 4 March 2018 she sent a message including the following words to the Applicant:

"More than anything I want and need you by my side through this – of course I do. I've just been too proud to admit it. But I feel like you just aren't strong and calm enough to help me right now. Although it kills me – I'm trying to make things easier for you by dealing with it myself."

Person 17 agreed this was at least partly a reference to the proposed termination.¹⁰⁶⁷ She agreed she wanted the Applicant to think she was still pregnant when she was not.¹⁰⁶⁸

24. Later that day the Applicant sent a message "*You know [Person 17] no matter what I really don't want you to go through it alone.*"
25. Person 17's explanation for this piece of deception was that she wanted to tell the Applicant face to face.¹⁰⁶⁹ That belies the evident no-holds-barred frankness and intimacy that characterises the 130 pages of messages that appear at Ex. A150. She was perfectly capable of communicating this information if she wished to do so, either by Telegram or telephone. Contrary to the suggestions in RS Section XII [12]-[13], the issue is not Person 17's failure to promptly communicate the fact of her miscarriage to the Applicant. Rather it is her actively encouraging him to believe she was proceeding with a termination.

Events 6 March 2018

¹⁰⁵⁸ T4030 L45 - T 4031 L6; T4136 L47 (P17).

¹⁰⁵⁹ T4093 L39-40; T 4160 L26-29 (P17).

¹⁰⁶⁰ See Ex. A150 p. 94 (message at 11.45am); Ex. A149 Tab 8 p. 2.

¹⁰⁶¹ T4031 L45-46 (P17).

¹⁰⁶² T4031 L5-13 (P17).

¹⁰⁶³ T787 L34-38 (BRS).

¹⁰⁶⁴ Ex. A150 pp. 97-101. See especially messages at 17.32-17.47 on 1 March, 12.41 on 2 March 2018 and 17.24 on 4 March 2018.

¹⁰⁶⁵ T4140 L8 (P17).

¹⁰⁶⁶ See Ex. A150 pp. 97-101. See especially messages at 8.59 and 10.21 on 3 March, and 11.28 on 4 March 2018.

¹⁰⁶⁷ T4157 L34-35 (P17).

¹⁰⁶⁸ T4158 L1-2 (P17).

¹⁰⁶⁹ T4032 L36-38; T4158 L12-13, L39-40 (P17).

26. Person 17's stated desire to tell the Applicant her news face to face was also not an explanation for the sustained piece of dishonesty that culminated in an actual visit to Greenslopes Hospital on 6 March 2018. Ex. R123 shows Person 17 getting into a taxi at the hospital. She had no reason to be there and she herself said she did nothing more at the hospital than go inside briefly to the toilet.¹⁰⁷⁰ She claimed that she only went to the Greenslopes hospital because of a prior arrangement to meet the Applicant.¹⁰⁷¹ However the decision to visit a hospital can only have been part of a plan to prolong the charade of a need to terminate a pregnancy that didn't exist.
27. The Applicant, suspecting (correctly) that he was being manipulated, requested Mr John McLeod to find out whether or not Person 17 attended the clinic.¹⁰⁷² Mr McLeod ultimately forwarded video footage of the Applicant getting into a taxi outside Greenslopes hospital. That footage became Ex. R123. Mr McLeod suggested a more plausible characterisation of her movements in a message exchange with Ms Scott:¹⁰⁷³

“She thought someone was picking her up so she had to be there. She fucked up on the hospital. Instead of going to the procedure clinic, she went to green slopes hospital which I have a voice recording of them saying they don't do that procedure. She told others she had just had the procedure and needed picking up thinking they would come. I knew she wasn't at the clinic as I and two others that work for me sat off the clinic for 6 hrs. So I thought, she's fucked up and is down at Greenslopes. So we bolted down there and I filmed her getting into a cab.”

Contrary to RS Section XII [17] the video was not simply proof that Person 17 had not had the abortion, but it showed her behaving in a very peculiar manner. In view of this, there was no plausible reason for the Applicant to wish to conceal its existence.

28. According to Person 17, she took two pregnancy tests in front of the Applicant at the Milton Hotel on the afternoon of 6 March 2018, the second of which was actually positive.¹⁰⁷⁴ The Applicant denied this and said the only evidence he saw of a completed test was sent electronically.¹⁰⁷⁵ He also denied Person 17's evidence that he had told her he had the Virgin flight manifest for her flight earlier that day.¹⁰⁷⁶ What is agreed by both parties is that Person 17 continued to pretend she had undergone a termination (even at one point saying it occurred in Townsville) before finally saying she had miscarried.¹⁰⁷⁷
29. There is also a contest over what transpired during the conversation at dinner on the evening of 6 March 2018. Person 17 claims that the Applicant said he could get into her bank accounts and told a story (intended as a threat) about a false Apprehended Violence Order taken out against a woman called Chantelle by an army friend of the Applicant's. The Applicant denied this.¹⁰⁷⁸ RS Section XII [23] suggests that the Applicant's evidence to the effect they discussed the best way to end the relationship is improbable because they continued to see each other on further occasions. That ignores the human element – it being plain from the communications from 22 January 2018 that the relationship was expiring, albeit slowly. RS Section XII [23] further criticises the Applicant for him denying the words “*Don't fucking abuse me again because it won't end well*” amounted to a threat.

¹⁰⁷⁰ T4090 L35 (P17).

¹⁰⁷¹ T4031 L13-15; T4127 L29-30 (P17).

¹⁰⁷² T265 L33-47 (BRS).

¹⁰⁷³ Ex. A265 p.2 (message at 21.01 on 20 October 2018).

¹⁰⁷⁴ T4033 L30-38 (P17).

¹⁰⁷⁵ T267 L1-41; T786 L24-30, 39-43; T789 L26-46 (BRS). The Applicant's ex-wife gave an account of a conversation with her husband which corroborated this.

¹⁰⁷⁶ T789 L7-11; T4035 L1-4 (BRS).

¹⁰⁷⁷ T4033 L39-45 (P17); T267 L10-15 (BRS); T789 L35-37 (BRS).

¹⁰⁷⁸ T790 L20-42 (BRS).

That submission is over egged – a suggestion that if a particular thing or behaviour isn't stopped that it “*won't end well*” is scarcely unknown in human discourse and most unlikely to be a threat of violence.

Telegram Messages

30. Person 17 further alleges that during the dinner the Applicant asked her when she last checked her Telegram messages, and that later in the room when she did check the messages she realised the original message chat thread had been deleted.¹⁰⁷⁹ It was actually put to the Applicant in cross-examination that he had deleted the Telegram messages from both phones whilst at the dinner. The Applicant denied this and pointed out his belief that Telegram did not have a remote deletion facility at that time.¹⁰⁸⁰ The Applicant's denial of any inappropriate conduct in relation to the deletion of messages should be accepted:
- (a) Ex. A150 is a 130 page unbroken message thread from 23 December 17 to 6 April 2018. The thread appears to be contiguous and there is no break evident at or about 6 March 2018. Person 17's evidence was that it was still retained on her phone. There is no evidence that even one message was deleted or is missing.
 - (b) Even if the Applicant did delete messages, he could only have done so by using some kind of facility on Telegram that users were entitled to avail themselves of. The note Person 17 made on 7 March 2022 which became Ex. R148 is consistent with this, and there does not appear to be any suggestion that the Applicant actually physically took Person 17's phone and tampered with it in any way. Person 17 actually said, in reference to her behaviour on 6 April 2018, that she took a screenshot of a Telegram message from the Applicant that day because she thought the Applicant would delete the message and that her understanding at that time was that messages could be deleted within 48 hours of being sent.¹⁰⁸¹ If that is right then she knew in 2018 of the existence of a function that facilitated remote deletion of messages.
 - (c) Under cross-examination Person 17 said she didn't even know if the deletions had been done on 6 March 2018.¹⁰⁸² Indeed, if the Applicant was so ingenious in terms of the remote deletion of messages from the Telegram app, it seems peculiar that he managed to miss deleting the saved threads.
 - (d) The re-examination of Person 17 at T 4220-1 does not assist the contentions of Person 17. Her evidence was the messages she supplied to the police in or about May 2018 came from a saved thread. Yet the thread that is part of Ex. A150 does not resemble the messages provided to the police (in particular the “RS” or “Rob Smith” account in the police version is described as “deleted”, and nowhere in Ex. A150 is the word “saved messages” to be observed). See for instance Ex. R. 276.

Events 13 March 2021

31. The final event of relevance during this period is Person 17's meeting with her friend Detective Sergeant Sue Newton on 13 March 2018. While this is more relevant to later events it also calls into question Person 17's true state of mind at the time. She claimed she reported to Ms Newton her concerns about the Applicant having her followed, his deletion of material from her phone and other

¹⁰⁷⁹ T4035 L15-27 (P17).

¹⁰⁸⁰ T791 L7-20 (BRS).

¹⁰⁸¹ T4180 L5-22 (P17).

¹⁰⁸² T4200 L11-13 (P17).

threats.¹⁰⁸³ However, messages passing between the Applicant and Person 17 cast her state of mind at that time in a different light. At 12.18pm on 13 March (just before lunch) Person 17 sent a message to the Applicant stating “*I hope I’m not being shadowed today*” with a laughing emoji.¹⁰⁸⁴ Person 17 agreed she was making light of the situation.¹⁰⁸⁵ Her messages over the ensuing day are consistent with her strong affection for the Applicant and quite inconsistent with any suggestion she was fearful about his behaviour or intimidated by him.¹⁰⁸⁶

Conclusions

32. In one sense the pregnancy and the termination and the events on 6 and 13 March 2018 are remote from the alleged assault on 28 March 2018 in Canberra. However, one significant matter of relevance emerges. Person 17 was prepared to lie to the Applicant about important matters concerning their relationship. She was prepared to do so at length, until she was caught and further denial and prevarication became impossible.
33. Further, the Respondents seem to suggest that the Applicant’s behaviour in having Person 17 followed, as well as his alleged behaviour in terms of his anger at her equivocations over the termination and his alleged deletion of the Telegram messages and so on, are part of a pattern of controlling behaviour. The inference seems to be that such accumulated behaviour makes it more likely that the Applicant assaulted Person 17 on 28 March 2018. There are two problems with these contentions:
 - (a) The alleged events did not happen, save for the following of Person 17 by Mr McLeod. The Applicant’s decision to ask Mr McLeod to do this was prompted by his belief that Person 17 was not being truthful with him. This was done not to control Person 17, but rather a desire by the Applicant to know the truth; and
 - (b) Indeed if it had not happened, he would never have learned the truth and Person 17 would have continued the pretence that she had allegedly aborted the pregnancy indefinitely.
34. However, even if these things had happened, if the Applicant had displayed some anger and had for instance remotely deleted messages and told a story about a woman named Chantelle, such matters are not remotely probative of a tendency to commit an assault. The alleged assault occurred weeks later. There is no rational connection between it and the alleged earlier events so as to suggest that it demonstrates that the Applicant assaulted Person 17.

E. EVENTS IN CANBERRA ON 28 MARCH 2018

Prior to Arriving at Parliament House

35. According to Person 17, at the winery at Pialligo she drank a cocktail, the smaller portion of a first bottle of wine, and half of a second bottle of wine. She then had another glass of wine at the hotel.¹⁰⁸⁷ According to the Applicant, Person 17 consumed at least a bottle of wine at the winery and a couple more drinks in the room.¹⁰⁸⁸ Even on Person 17’s version, there can scarcely be any doubt that she had

¹⁰⁸³ T4037 L9-12; T4090 L20-24 (P17).

¹⁰⁸⁴ Ex. A150 p. 106.

¹⁰⁸⁵ T4092 L4-5 (P17).

¹⁰⁸⁶ Ex. A150 pp. 106-107. See especially the messages stating “I want you inside me again” and “I literally have to force myself to keep on walking away and resist the urge to run back to kiss you one more time.”

¹⁰⁸⁷ T4038 L18-25 (P17).

¹⁰⁸⁸ T268 L10-18 (BRS).

consumed a considerable amount of alcohol before arriving at the function. Indeed, when she saw her doctor the next day the doctor recorded “*yesterday had been on a long wine tasting day*”.¹⁰⁸⁹

36. The Applicant observed Person 17 taking Valium each day prior to 28 March 2018.¹⁰⁹⁰ Person 17 denied this.¹⁰⁹¹ The submission at RS Section XII [28] to the effect that Ex. A26 which contains the photograph of the packet does not show a removed tablet goes nowhere in circumstances where the photograph plainly depicts only part of the packet (and for that matter where Person 17 could have finished another packet earlier). Equally, the submission at R Section XII [43] to the effect that the Applicant dishonestly concealed the photograph because he was worried it would somehow prove that Person 17 did not take Valium is a feeble one.

At Parliament House, Prior to the Fall

37. Person 17 continued to drink at the dinner at Parliament House.¹⁰⁹² She agreed in her examination in chief she continued to drink at the function and was “*quite drunk*” by the time she and the Applicant left.¹⁰⁹³ Later in cross-examination she agreed she was “*very drunk*”.¹⁰⁹⁴ She agreed that she dropped a glass of champagne and told Admiral Griggs (sitting next to her) that she was having an affair.¹⁰⁹⁵
38. The evidence of Terry Nichols, a bystander who offered to help Person 17, is relevant to assessing the condition she was in immediately prior to her fall (which itself could scarcely have been a half hour before the alleged assault). According to Mr Nichols:
- (a) At the end of the evening, Person 17 approached Mr Nichols and sought assistance in locating the Applicant.¹⁰⁹⁶ Person 17 suggested, quite unfairly, that Mr Nicholls was “*trying to pick me up*”¹⁰⁹⁷ but she had approached him (and her evidence only tends to emphasise the extent of her inebriation and poor memory of the events).
 - (b) Mr Nichols observed that Person 17 was unsteady on her feet and slurring her words.¹⁰⁹⁸ Concerned for her safety, he offered to walk with Person 17 to the carpark. She was wobbling on her heels and nearly walked into the metal detector at the security check-point.¹⁰⁹⁹ Mr Nichols was not cross examined at all and the submissions at RS Section XII [30] that Person 17 was “*quite drunk*” and “*walking unaided*” tend to misrepresent the overall effect of his evidence which was that Person 17 was heavily intoxicated.
 - (c) Mr Nichols, concerned at how that Person 17 might navigate the stairs, attempted to influence Person 17 to take the elevator but instead she headed for the stairs.¹¹⁰⁰ Mr Nichols, attempting to catch up with Person 17, saw Person 17 lose her balance and fall forwards approximately six stairs.¹¹⁰¹ He observed her land on her left side, head first down the stairs, feet up the stairs. He heard a “*terrible thud*”.¹¹⁰²

¹⁰⁸⁹ Ex. A271.

¹⁰⁹⁰ T270 L27; T794 L35-41; T803 L16-20 (BRS).

¹⁰⁹¹ T4182 L24-32 (P17).

¹⁰⁹² T268 L36 (BRS).

¹⁰⁹³ T4039 L33-37 (P17).

¹⁰⁹⁴ T4068 L44 (P17).

¹⁰⁹⁵ T4068 L46-47; T4183 L11-15 (P17).

¹⁰⁹⁶ T4183 L37 (P17); T5841 L39-5842 L3 (Nichols).

¹⁰⁹⁷ T4039 L 45 (P17).

¹⁰⁹⁸ T5842 L 9-10 (Nichols).

¹⁰⁹⁹ T5842 L 11-20 (Nichols).

¹¹⁰⁰ T4185 L20-24 (P17); T5842 L26-34 (Nichols).

¹¹⁰¹ T5842 L 26-34 (Nichols).

¹¹⁰² T5843 L 1-6 (Nichols).

39. Officer Grosskreutz observed that Person 17 was unsteady on her feet and struggling to keep her head up. He heard a member of the public (presumably Mr Nichols) comment on how drunk she was and how she should remove her heels before she walked down the stairs in case she fell.¹¹⁰³
40. Ex. A158 comprises the relevant extracts from CCTV video at Parliament House that morning:
- (a) The first video shows Person 17 and Mr Nicholls passing through the security checkpoint;
 - (b) The second video shows them walking along the foyer and then moving down the stairs. The video shows that initially Mr Nichols intended to take an elevator but then followed Person 17 to the stairwell. Importantly, near the end of the second video the abrupt movement of the security officers in the direction of the stairs is evident. This is some indication of the seriousness of Person 17's fall; and
 - (c) The third video shows the Applicant helping Person 17 down the stairs after her fall.

At Parliament House, the Fall and Aftermath

41. Mr Nichols observed that Person 17 did not move or say anything. He moved quickly to the landing as he was concerned for her. She regained consciousness and then moved to a standing position. He observed a large haematoma on the left side of her forehead above her eye. It was the size of a large half egg, located above the left eyebrow and very sizeable.¹¹⁰⁴ An AFP officer approached and Mr Nichols asked him to come down. Mr Nichols raised his concerns about her health and left to try and locate the Applicant. Before he did so he picked up an earring of Person 17, which had fallen on the platform.¹¹⁰⁵
42. Officer Grosskreutz, one of the two AFP officers who attended to Person 17 after her fall, recalled helping Person 17 to her feet. He recalled she was “*extremely unsteady*” and struggling to stand. Critically, he made this observation:¹¹⁰⁶
- “I observed some bruising and swelling on the left hand side of her forehead. The swelling would have been between the size of half a golf ball and half a tennis ball and located above her left eye.”*
43. Officer Grosskreutz recalled that Person 17, after confirming she attended the function with the Applicant, began to cry and apologise for her fall.¹¹⁰⁷ He recalled that he offered medical attention which she denied.¹¹⁰⁸ She continued to apologise to Officer Grosskreutz. When he asked her where she was staying, she said she could not tell him because “*she was having an affair.*”¹¹⁰⁹ The Applicant then arrived and left with Person 17.
44. The Applicant stated that when he went back up the stairs and saw Person 17 (in company with the police officers) “*she had a significant bump on her left eye.*” He also observed she was extremely intoxicated.¹¹¹⁰ Person 17 did not have coherent speech.¹¹¹¹ He put his arms around Person 17 and

¹¹⁰³ Ex. A1 Tab 64 p. 295 [3].

¹¹⁰⁴ T5843 L18-24, 44-46, T5844 L7-16 (Nichols).

¹¹⁰⁵ T5843 L32-42, T5844 L24-32 (Nichols).

¹¹⁰⁶ Ex. A1 Tab 64 p. 295 [6].

¹¹⁰⁷ Ex. A1 Tab 64 p. 295 (see last paragraph on that page).

¹¹⁰⁸ Ex A1 Tab 64 p. 296 [2].

¹¹⁰⁹ Ex. A1 Tab 64 p. 296 [3].

¹¹¹⁰ T269 L29-44 (BRS).

¹¹¹¹ T270 L1-3 (BRS).

effectively carried her to the COMCAR.¹¹¹² The third video in Ex. A158 corroborates this. In the car the Applicant asked the driver whether there was a hospital nearby. He then asked Person 17 if she wanted to go to a hospital and she said no.¹¹¹³ Contrary to RS Section XII [33] there is no contradiction between the Applicant's evidence that Person 17 was extremely intoxicated and "*couldn't string words together*" and the evidence from Officer Grosskreutz who records that slightly earlier Person 17 would not answer the Officer's basic questions as to who she was with or where she was staying, or alternatively answered by saying she was "*having an affair*" or embarrassed. Again, the overall impression to be drawn from his account is that Person 17 presented as heavily intoxicated.

45. Person 17 claimed she only fell down a couple of stairs onto the landing. She said she hit her head and bruised her left thigh.¹¹¹⁴ She either denied the existence of a lump on her forehead or said did not recall any lump on her forehead.¹¹¹⁵ Person 17 agreed she was crying and apologising in front of the police officers when she spoke with them on the landing.¹¹¹⁶ Person 17 also agreed she had refused medical attention when offered by the police officer.¹¹¹⁷ She claimed that while in the car the driver had offered to take them to an emergency centre, and that while she had wanted to go to hospital the Applicant had declined.¹¹¹⁸ That evidence should not be accepted, given the state of her memory and the fact that Officer Grosskreutz verifies she had refused medical attention moments before.
46. Person 17's evidence about the quality of her own memory was inconsistent. During examination in chief, when asked what happened after her fall she said "*I don't really remember much about what happened next.*"¹¹¹⁹ Later in cross-examination she professed to have a "*fairly good*" memory of the event of the evening.¹¹²⁰
47. The significant features of this evidence are:
 - (a) Three persons observed Person 17 with a significant swelling above her left eye after her fall. She had clearly injured her head in this place. None of them were challenged on that evidence. This injury occurred perhaps a half hour or at most an hour before she alleges she was assaulted.
 - (b) Person 17's recollection of events in the later part of this evening is totally unreliable. She was seriously inebriated. Her evidence cannot be accepted when contradicted by the other witnesses. The accounts of Mr Nichols and Officer Grosskreutz largely, if not entirely, corroborate the account of the Applicant.

At the Hotel Realm

48. The Applicant's version of events that transpired at the Hotel Realm that evening, and Person 17's, are starkly contrasting.
49. According to the Applicant, Person 17 was unable to stand and was either asleep or unconscious by the time they reached the room. They shared no conversation. He undressed her and put her to bed. He called room-service for ice and placed an ice pack on her forehead.¹¹²¹ He took photos of her in bed in

¹¹¹² T270 L5-11 (BRS).

¹¹¹³ T270 L13-17; T800 L24-25 (BRS).

¹¹¹⁴ T4040 L4-13 (Person 17 agreed she hit her head) (P17).

¹¹¹⁵ T4070 L29-33 (P17).

¹¹¹⁶ T4070 L43-46.(P17).

¹¹¹⁷ T4071 L5-11; T4186 L1-2 (P17).

¹¹¹⁸ T4040 L23-27; T4041 L3-6 (P17).

¹¹¹⁹ T4040 L15-16 (P17).

¹¹²⁰ T4068 L39. See also T4186 L8 (P17).

¹¹²¹ T270 L31 - T271 L2; 797 L33-40; T798 L23-28; T799 L23-38 (BRS).

this position.¹¹²² He stayed up all night monitoring her condition so that if her vital signs deteriorated, he could take her to hospital. Concerned she might need to go to hospital, he rummaged through her bag to check for medication. He found the Valium and took a photograph. He also located some personal notes taken by Person 17 which referred to him and photographed these.¹¹²³ He denied ever assaulting or hitting Person 17.¹¹²⁴ Contrary to RS Section XII [27], there was no contradiction in the Applicant's evidence as to the level of consciousness of Person 17. In chief his own expression (prior to the question from counsel which introduced the word "unconscious") was that she had "passed out" and that is consistent with (as the Applicant said in cross-examination) her either being asleep or unconscious.¹¹²⁵

50. In cross-examination it was put to the Applicant that he stayed up monitoring Person 17 because he knew he had punched her in the head.¹¹²⁶ It was also suggested to the Applicant that he was worried about seeking medical attention because he was frightened Person 17 would say something about an assault.¹¹²⁷ The Applicant denied these matters and his denial should be accepted. The facts are that Person 17 had incurred an injury to her head whilst falling down the stairs. She had been observed to be drunk by many people in a public place. She hadn't wanted to seek medical attention. The Applicant monitored her condition. Person 17 had not wanted to attend the hospital. The Applicant independently formed the view that she did not need go to hospital. There is no evidence that his view was wrong. Similarly the submission at RS Section XII [38] that the reason the Applicant did not attend the hospital whilst at the Realm was because he knew he had punched her on the head has no merit.
51. The Applicant was also challenged as to the reasons why he took photographs of the medication. It was suggested to him that the true reason was because it would be helpful to his story that Person 17 was suffering from the effects of alcohol and Valium. The Applicant responded to the questioning by observing that he had later deleted the photographs and that he would not have done so if they had been taken for such a purpose. The communications between the Applicant and his wife annexing photographs are dealt with elsewhere in these submissions but for present purposes the submission at RS Section XII [42] ignores the fact that there was evidence the Applicant's ex-wife had forwarded photographs (from the Applicant's deleted items) of Person 17 in the bed at the Realm to Ms Scott on or about 27 April 2018.¹¹²⁸ He was also criticised for his evidence that the reason he searched the notebook was to locate a schedule of medication.¹¹²⁹ The Applicant submits that his explanation should be accepted given the fact that Person 17 was in fact prescribed, and was taking, medication. Even if, contrary to this submission, he was prompted by a degree of curiosity, it is hard to see where that goes.
52. Person 17's version of events appears at T4041 L14 - T4043 L20. According to her, there was substantial conversation in the room between the two of them before the alleged assault. Eventually when they ended up in the bedroom, after Person 17 referred to her sore head the Applicant said, "*It's going to fucking hurt more*" or "*I will show you hurt*" and then punched her. The next morning, she claims, he showed her naked photographs of herself and said (the suggestion is menacingly) "*Do I need to keep these photos?*". Contrary to the submission at RS Section XII [44], Person 17's evidence that she asked to go the hospital during the night should be rejected. Her recollection of events is so

¹¹²² Ex. A25.

¹¹²³ T271 L4-15; T273 L24-28; T313 L1-13; T800 L4-22, L34-35 (BRS).

¹¹²⁴ T275 L17-18; T799 L10-15 (BRS).

¹¹²⁵ T270 L 37, T270 L44-45, T799 L 30-38 (BRS).

¹¹²⁶ T800. L 31-39 (BRS).

¹¹²⁷ T801 L1-5 (BRS).

¹¹²⁸ Ex. A255

¹¹²⁹ T802 L43 - T803 L23 (BRS).

unreliable at this point that the Applicant's evidence should be preferred, particularly given Mr Grosskreutz's corroborative evidence to the effect she had refused medical treatment earlier. The Court should also reject the submission that the Applicant refused to take her to the hospital because he feared she would report the assault and knew her injury was not sustained only by the fall. He knew the injury had been sustained during the fall. At RS Section XII [45] and in the general introduction to their submissions at RS Section XII [39] the Respondents all but concede they cannot link the bruise to the alleged assault.

53. Person 17's allegations have evolved somewhat over time:

- (a) Person 17 was shown a statement taken by police that she agreed was based on information she provided the AFP officers on 30 May 2018. She had not signed the statement and wished for time to check it.¹¹³⁰ It recorded that the Applicant had "*punched me straight in the left eye with a clenched right fist. I staggered back but didn't fall.*"¹¹³¹ An Outline of Evidence was provided on behalf of Person 17 in these proceedings in about May 2019 and she agreed that she had approved its final form.¹¹³² It recorded that she had been punched "*on her left temple with a clenched right fist*" and that she had fallen back onto an ottoman along the end of the bed. This was also the version put to the Applicant in cross-examination.¹¹³³ In this trial in examination in chief she said the Applicant had hit her "*with his right fist on the left side of her face*".¹¹³⁴ Later in cross-examination she placed the punch as aimed at "*the left temple and eye, but on that same side of my face*".¹¹³⁵ She later suggested that she classed "*the left temple and left side of my face as the same position*".¹¹³⁶ These inconsistencies accord with her fabrication of the event and/or her having no real memory of what happened. In any event – on any view of it – the supposed blow to her face was exceptionally proximate to the injury she had sustained a half hour or so before.
- (b) In her draft unsigned statement taken by the police Person 17 is recorded as saying "*He showed me photos that he had taken of me lying in bed with my clothes removed and with an ice pack on my head. I believe that he was trying to show me that he was looking after me.*"¹¹³⁷ There is no reference to the "*Do I need to keep these?*" implied threat by the Applicant. The information provided to the police is consistent with the photographs taken of the Applicant in bed (with the ice pack visible and her body under the sheet) which are Ex. A25. In this trial, Person 17 stated that the photographs the Applicant showed her the next morning depicted her in bed without a sheet.¹¹³⁸ The Applicant had supposedly deleted those photographs (those not being amongst the various photographs that his ex-wife sent to Danielle Scott – see the submissions directed to the Applicant's credit). The contradiction is telling and it does not appear as if Person 17 suggested to the police in May 2018 that the Applicant had actually threatened her with naked photographs. Of course, the underlying allegation is inherently most improbable. What benefit could the Applicant have possibly achieved by illegally showing such private photographs to other persons? These were (well resourced) adults involved in an affair about which Person 17's husband already knew about this. Contrary to RS Section XII [41] such photographs would not have given the Applicant anything to "*hold over*" Person 17.

¹¹³⁰ T4218 L11-31(P17). Ex A 272 at [21].

¹¹³¹ T4189 L10-14 (P17).

¹¹³² T4189 L28-47 (P17).

¹¹³³ T800 L10-11, 17-18 (BRS).

¹¹³⁴ T4042 L15-16 (P17).

¹¹³⁵ T4068 L29-31 (P17).

¹¹³⁶ T4191 L24-25 (P17).

¹¹³⁷ Ex. A272 at [22].

¹¹³⁸ T4043 L39-43 (P17)

54. The Applicant powerfully and truthfully denied the allegation and the suggestion that he would ever hit a woman.¹¹³⁹ It is totally inconsistent with his reputation and character¹¹⁴⁰ Person 17 – who first made the allegations some two months later, was thoroughly drunk that night and had already sustained an injury in a fall in the same place where she later said she was punched. As referred to below, she actually told at least three people that her injury was caused by the fall within ten days or so of 28 March 2018.

F. EVENTS ON 29 MARCH 2018

55. The Applicant's evidence was that at Canberra Airport he and Person 17 had a conversation about what she would tell her husband. The Applicant said, in reference to Person 17's husband, "*He's going to think that I've struck you. You're going to have to tell him that you've fallen down the stairs and we were together.*" He said Person 17 reacted with unhappiness because she had not told her husband that she had been with the Applicant in Canberra that night.¹¹⁴¹ Person 17 accepted the first part of the conversation and agreed that she had not told her husband that she was with the Applicant that particular night. She otherwise claimed that the Applicant had said to say that he had not been with her.¹¹⁴²

56. According to Person 17, the substantive conversation occurred at the Applicant's car at Brisbane Airport. She says the Applicant said, "*What happens for us now is going to depend on what you say to your husband when you get home.*"¹¹⁴³ That evidence is quite inconsistent with Person 17's concession that the relationship was effectively over after the previous night.¹¹⁴⁴ The Applicant would not have been hinting that he would continue with the relationship in these circumstances. Person 17 says the Applicant also asked her "*What are you going to tell him about what happened last night?*" and that she replied by saying she did not remember. She said she did this because she was afraid of him. That claim will be dealt with in the submissions below. Person 17 alleges the Applicant then called her a "*good girl*" and said, "*you know you hurt yourself when you fell over.*" The implication is that he was coaching her. The problem with that implication is that she had in fact fallen on the stairs and injured herself.

57. There is then the chain of messages which appears at Ex. A150 p. 123-124. In this chain the Applicant says, amongst other matters, "*Does he think I did it?*" and "*OK well hopefully he believes you and is sympathetic.*" At one point Person 17 refers to the bruises on her body, including one on her thigh, and says these "*will hopefully make the falling story more believable*". The suggestion was made in cross-examination that the messages showed the Applicant attempting to coach Person 17.¹¹⁴⁵ The problem with this theory is that once it is accepted that Person 17 had fallen down the stairs (contrary to the rather fevered submission at RS Section XII [49c], the word 'story' in this case cannot literally mean fiction), and that this fall had caused the bruise on her head, the messages only depict the Applicant counselling Person 17 to tell her husband what had actually happened. Person 17 herself agreed that it was almost a cliché that persons would assume a woman with a black eye had been assaulted.¹¹⁴⁶ It is hardly surprising the Applicant was keen to make sure Person 17's husband did not fall under this misapprehension. Contrary to RS Section XII [49b] the Applicant's messages are not evidence of a "consciousness of guilt" but simply consistent with his not implausible fear that Person 17's husband

¹¹³⁹ T275 L20-25 (BRS).

¹¹⁴⁰ Ex. A39 [10]; Ex. A42 [7]; Ex. A43 [12]; Ex. A44 [14].

¹¹⁴¹ T276 L11-13; T277 L1-5 (BRS).

¹¹⁴² T4207 L35-46 (P17).

¹¹⁴³ T4044 L24-34 (P17).

¹¹⁴⁴ T4078 L38-40 (P17).

¹¹⁴⁵ T806 - T810 (BRS).

¹¹⁴⁶ T4207 L32-33 (P17).

might assume she had been struck, and might assume that the perpetrator was the person with whom he knew her to be having a relationship.

58. Of course, once the final message of that day in which the Applicant refers to Person 17's apology is taken into account, along with Person 17's message on 31 March 2018 in which she says, "*I know it's my fault and I hate that I can't change what happened*",¹¹⁴⁷ the earlier message chain is put in proper context. The Applicant had not done anything wrong, much less committed a serious crime.
59. The most significant event of that day was Person 17's visit to her doctor. The record of that visit is at Ex. A271. The record relevantly says:

"tripped and fell down some concrete steps yesterday had been on a long wine tasting day and was fairly drunk at that point, does not think knocked out, friends applied ice and kept checking on her all night, banged head above and lat to left eye, got big egg, now 90% subsided but now has dark purple bruising of upper lid and around medial corner left eye ... Head still hurts where whacked skull ... level of alcohol intake was an exceptional event ..."

60. This account is consistent with the Applicant's (and indeed with that of Officer Grosskreutz and Mr Nichols). It is utterly inconsistent with an allegation of assault (which Person 17 had not yet invented). Her explanation for not reporting the assault was that she and her family had close links to the medical practice and she didn't want those persons to know what had happened.¹¹⁴⁸ That explanation does not explain why she would mislead the practice by suggesting that her injury had been caused by a fall. In any case she could have visited a different medical practice whether in her home city or in Brisbane.
61. The Applicant submits that the medical record of what Person 17 actually said on 29 March 2018 is by itself sufficient to cause the Respondents to fail on the assault allegation, on the balance of probabilities. It is contemporaneous. It is verified by the account of the Applicant, Officer Grosskreutz and Mr Nichols. Furthermore, in contrast to her assault allegation, it is plausible. RS Section XII [50] and [52] contain a submission to the effect that the apology to the Applicant and the statement to the doctor should be discounted because they represent typical behaviour by victims. That submission is unsupported by any evidence. Accepting it may in some or even many cases be true, each case must be assessed on its own facts. Person 17 was an independently wealthy married lawyer in her thirties who lived in a different city to the Applicant with whom she engaged in an entirely voluntary extra marital affair. She had agency. These pieces of evidence remain before the Court to be assessed on the balance of probabilities.

G. EVENTS FROM 30 MARCH TO 5 APRIL 2018

62. Person 17's evidence was that she and the Applicant spoke on Tuesday 3 April 2018, after the Easter weekend. Her evidence was that both she and the Applicant agreed the relationship needed to end and that she had said "*I'd like to see you one more time*".¹¹⁴⁹ Person 17 agreed she "*pleaded*" to spend one more night with the Applicant and that she wanted this to occur as soon as possible.¹¹⁵⁰
63. The messages exchanged between Person 17 and the Applicant on 3 and 4 April 2018 appear on pages 125-127 of Ex. A150. They are consistent with Person 17 pushing to spend time with the Applicant whilst he appears less enthusiastic. See for instance the message from the Applicant, at 15.58 on 4 April 2018:

¹¹⁴⁷ Ex. A150 p. 124.

¹¹⁴⁸ T4048 L34-49 (P17).

¹¹⁴⁹ T4049 L29-35 (P17).

¹¹⁵⁰ T4078 L29-41; T4084 L45-46 (P17).

“You should get a room at the airport Novotel in case I late and so you have somewhere to stay. I will also get one there! I still don’t understand what you need to discuss but in any case why don’t you just focus on being there?”

See also the message from Person 17, at 16.14 and 16.35 on 4 April:

“Why there? Aren’t you coming from the GC? Are we not going to stay together? ... Sorry but I don’t get why you want to stay there. I’d just assumed we’d go to Milton or Sofitel.”

64. As discussed in the credit section above, Person 17 did not mention or say anything about the man on the beach during any of these exchanges.
65. The attitude of Person 17 at this point is of significance in terms of assessing whether she had in fact been assaulted by the Applicant just a week before on 28 March 2018. The Applicant submits that it is highly improbable that she would enthusiastically be pursuing a night alone in a hotel room with the Applicant if she had been assaulted. Once again, Person 17 was a lawyer, married, and independently wealthy. She lived in a different city to the Applicant and to see him she had to arrange flights and hotel rooms and leave her family.¹¹⁵¹ Her relationship with the Applicant had none of the indicia of coercive control. She had complete agency and she was responsible for aggressively pursuing the Applicant on 3-4 April 2018 so they could spend another night together. That is not consistent with her having just been assaulted or being afraid of him. Contrary to RS Section XII [65] Person 17’s evidence that she was *“simultaneously in love with him and afraid of him”* does not explain away her choices or exempt her from any scrutiny. Ultimately the standard of proof remains the balance of probabilities and all of her cumulative decisions and actions must be assessed by that standard.
66. Two other matters during this period point to the improbability of an assault having occurred:
 - (a) Person 17 says she told her husband she had been assaulted during that weekend and that she also told him she was planning to spend the night with the Applicant on 5 April 2018.¹¹⁵² If this were true, it must mean her husband failed to take any steps to report the assault and/or do something to prevent Person 17 meeting alone with the Applicant in circumstances where he believed she had just been assaulted by him. That is not probable. Person 17 agreed her husband was *“worried about her going”* but that evidence does not address the implausibility of this sequence of events.¹¹⁵³ Person 17’s husband was in good health and available to give evidence.¹¹⁵⁴ He was not called to corroborate Person 17’s evidence that she reported the assault to him on the Easter weekend (some 8 weeks before there is verification that she first reported the assault to Mr McKenzie and the AFP on or about 29-30 May 2018). The Court should assume that his evidence would not have assisted the Respondents.
 - (b) In the course of her messages on 4 April 2018 excitedly referring to the proposed dinner the following day, Person 17 said at 18.56 *“... It’d be nice to go out ... if you can live with the stares at my black eye! What time did you book for? Let’s try & talk before then so we can just enjoy it”*. This was followed by a winking emoji.¹¹⁵⁵ That sort of language is not consistent with the Applicant having just assaulted her and caused the very black eye that is the subject of the message. It is consistent with her joking about a recent accident.

¹¹⁵¹ T4085 L8-31 (P17).

¹¹⁵² T4049 L17-23; T4073 L19-20; T4125 L25-33 (P17).

¹¹⁵³ T4124 L32-33 (P17).

¹¹⁵⁴ T4124 L22-23 (P17).

¹¹⁵⁵ Ex. A150 p. 127.

67. Person 17's version of the night of 5 April 2018 appears at T 4049 L45 - T 4050 L28. She says the Applicant said she was "*like crack*" and that it would be hard for him to give her up. She claims he threatened to "*burn her house down*" and hurt the people she loved if she turned against him. She further says that he showed her photographs taken in the hotel room in Canberra including her notebook and photographs of her bank cards. She said she woke up crying in the night and that "*I knew it was over*". When the Applicant was in the shower, she looked at his driver's license and took note of his address.
68. The Applicant's evidence was that he and Person 17 shared an amicable conversation and that they both understood the relationship was over.¹¹⁵⁶ He denied the "*crack*" statement and the "*burn the house down*" threat. He also denied showing her any photographs. He agreed they discussed the notes he had photographed on 28 March 2018.¹¹⁵⁷ Given that there is no issue these notes concerned their relationship nothing turns on this. The Applicant says the next morning, after they said goodbye at the hotel, he observed Person 17 standing at the end of the corridor at the front of the airport lounge. They had a brief conversation in which she told him she had changed to an earlier flight.¹¹⁵⁸
69. The Applicant's version should be preferred to Person 17's. In particular, the suggestion that he would take photographs of her bank cards in order to threaten her is improbable. Why would he threaten to steal money from the bank account of an independently wealthy lawyer? To what end? Such a threat would lack any credibility. It is wildly improbable.

H. EVENTS ON 6 APRIL 2018

70. There is no dispute that after surreptitiously accessing the Applicant's driver's license to obtain his address, Person 17 hired a car and drove to the Sunshine Coast to pay an unannounced visit on the Applicant's wife. This occurred on the morning of 6 April 2018.
71. The evidence for what transpired during this encounter comes from Ms Roberts and Person 17 who both gave evidence for the Respondents. The evidence is mostly consistent but to the extent there are contradictions the version of Ms Roberts should be accepted. The reason is that Ms Roberts provided her evidence in accordance with an Outline of Evidence provided to the Applicant's side in 2019, before her acrimonious separation from the Applicant and move into the Respondents' camp.
72. The following matters of significance emerge from the evidence:
- (a) Ms Roberts asked Person 17 to take off her sunglasses. She observed the black eye. When asked what had happened to her face, Person 17 said "*I fell down some stairs when I was drunk.*"¹¹⁵⁹ Ms Roberts asked which stairs Person 17 had fallen down and she replied, "*At Parliament House at the Prime Minister's Veteran's Employment Awards*". She said this had happened "*last week*".¹¹⁶⁰
- (b) Ms Roberts observed that Person 17 kept touching her bruised eye.¹¹⁶¹ Ms Roberts recalled Person 17 saying that she had embarrassed the Applicant by getting drunk and falling down the stairs.¹¹⁶² Person 17 herself agreed that, referring to her black eye, she had said something like,

¹¹⁵⁶ T279 L18-22 (BRS).

¹¹⁵⁷ T814 L1-24 (BRS).

¹¹⁵⁸ T279 L26-35 (BRS).

¹¹⁵⁹ T1920 L7-19 (ER). Ex. A 258 at [9]

¹¹⁶⁰ T1960 L19-26 (ER). Ex. A 258 at [9]

¹¹⁶¹ T1961 L44 (ER). Ex. A 258 at [9]

¹¹⁶² T1962 L8-22 (ER). Ex. A 258 at [9]

*“It’s because of this that he won’t see me anymore”, and further, “Because I got so drunk and embarrassed him when I fell down the stairs.”*¹¹⁶³

- (c) Ms Roberts observed that Person 17 took screenshots of messages from the Applicant as they arrived. Ms Roberts asked, *“Why are you doing that?”*. Person 17 replied *“I’ve kept all his messages.”* Ms Roberts asked, *“Does he know?”* and Person 17 replied, *“No, he thinks they’re all deleted. But I’ve kept everything.”*¹¹⁶⁴ Person 17 agreed she made these statements.¹¹⁶⁵
- (d) Person 17 claimed that Ms Roberts’ mother, upon observing the black eye had said *“He did that to you, didn’t he?”*. Person 17 further said that when she replied that the injury had been caused by her falling down the stairs drunk, Ms Roberts’ mother had said *“No you didn’t. That’s not what happened. I’ve seen injuries like that before.”* That evidence should not be accepted.¹¹⁶⁶ It is inconsistent with the subsequent conversation between Ms Roberts and Person 17 for which her mother was present at least in part. The submission at RS Section XII [58] that a silence by Person 17 in response to a question by Ms Roberts’ mother means *“she did not want to continue the lie Mr Roberts-Smith was imposing upon her, but she was also too scared to disclose the truth”* stretches credulity. Person 17 said what she said. Her position – in the midst of this unpleasant drama she created - was that the black eye was caused by the fall and that she had embarrassed the Applicant.

73. When Person 17 was asked in chief why she did not tell the truth about her black eye her response was, *“I had just gone there to make sure that was the end of the affair. I didn’t want to tell them anything more than that because I just knew that I would be targeted by him”*.¹¹⁶⁷ That evidence should not be accepted:

- (a) The relationship had already ended and they both knew it.¹¹⁶⁸ Indeed that very morning at 8.02am the Applicant had sent her a message saying *“I’m glad we got to see each other [Person 17] ... You will be OK ... you can work through it ... you don’t need to dwell on the past anymore ...”* That message is not consistent with the Applicant trying to exercise continuing control over Person 17, nor with him refusing to let the relationship end.
- (b) If Person 17 was genuinely frightened about being targeted by the Applicant she would not have gone to his marital home to confront his wife in the first place. That was an act so destructive it would have had the obvious consequence of making him angry and displeased. Furthermore, if she had such fear she would not have repeatedly attempted to see and contact him (see the sections of these submissions below dealing with subsequent periods). Nor would she have approached Mr McKenzie and told her story to a journalist.
- (c) The fabrication concerning the man on the beach, who it is alleged specifically directed Person 17 to tell Ms Roberts about the affair, shows the preparedness of Person 17 to lie about this issue.
- (d) As to the submission at RS Section XII [57] concerning typical behaviour by domestic violence victims see paragraphs [60] and [64] above.

¹¹⁶³ T4129 L4-17 (P17).

¹¹⁶⁴ T1963 L1-4 (ER); Ex. A 258 at [10]

¹¹⁶⁵ T4180 L24-33 (P17).

¹¹⁶⁶ T4177 L26-32 (P17).

¹¹⁶⁷ T4051 L39-31 (P17).

¹¹⁶⁸ T4040 L1-3; T 4175 L34-35 (P17).

74. The true motive for Person 17's visit to the Applicant's home was to attempt the end his marriage, so she could restore their relationship or at the very least to take revenge on the Applicant for ending the relationship. Those are the only plausible explanations for Person 17's conduct in contrast to the explanations put forward by Person 17.
75. As to the messages exchanged between Person 17 and the Applicant during and after her visit to the home, Person 17 agreed that she invented the reference to immediately putting in place "insurance" "in the event that anything should happen to me or my family".¹¹⁶⁹ This again shows her preparedness to lie to the Applicant. The reference to "a few weeks back" is dealt with in the credit section above. Otherwise, Person 17 concluded her messages on this day with a statement that "if the media finds out it will not be from me or anyone associated with me. As far as I'm concerned it's a private matter & I truly hope it remains that way for everyone's sake." Her subsequent conduct did not bear out this sentiment.

I. THE VISITS TO THE LOCAL POLICE AND OTHER EVENTS PRIOR TO LATE MAY 2018

8 April Visit to Police

76. After cross-examination suggesting that Person 17 had fabricated her visits to the local police on 8 and 20 April 2018, the Respondents elected to waive privilege and deploy police records confirming the fact of those visits. Although the records show Person 17 visited the police in her hometown on 8 and 20 April 2018, they only point to the underlying falsity of her assault allegation. The 8 April 2018 record is in these terms (see T 4225-4227):

Informant has attended [] Police Station to inform Police she was having an affair with a high profile military person. She has recently broke off the affair and has told his wife. The informant is now concerned of the things he might do. She said she is scared he is going to burn her house or access her bank account. The informant requested police obtain CCTV footage at an hotel to prove that she was having an affair. Police attempted to ascertain this high profile persons name however it was not provided. Advice and referral given.

77. There is of course no reference to any assault express or implied. However the record has a significance beyond that:
- (a) Person 17's real concern appears to be to tell the police the news that she was having an affair and seek evidence to verify that affair. That is a peculiar position when she had for instance maintained the 130 pages of messages with the Applicant which refer frequently to sexual activity between them. At this point she had even retained every envelope holding the hotel key cards for the nights they had spent together¹¹⁷⁰ – so she already had abundant proof of any affair. Person 17 claimed she requested CCTV footage from Hotel Realm and that she did so for a purpose other than proving an affair.¹¹⁷¹ That evidence should not be accepted in the face of the contemporaneous record.
 - (b) She made no allegation that she had in fact been threatened. She did not tell the police the Applicant had actually done anything. She only spoke of her own fears. She did not mention her encounter with the man on the beach on 3 April 2018 and his threat.

¹¹⁶⁹ Ex. A150 p. 129-130; T4125 L6-22 (P17).

¹¹⁷⁰ T4204 L1-5 (P17).

¹¹⁷¹ T4226 L38 - T 4227 L2 (P17).

- (c) There is no evidence that she was unable to obtain an appointment with a senior person as she claimed.¹¹⁷² Indeed the record says “*advice and referral given.*” As was put to her in cross-examination, if she really wanted to speak to a senior police officer to report an assault, she could have approached her friend Detective Sergeant Newton, to either speak with her directly or obtain an appropriate referral.¹¹⁷³ Person 17 admitted she had not asked for an appointment to see a senior officer.¹¹⁷⁴

Events 20 April 2018

78. On 20 April 2018 the Applicant called Channel Seven Maroochydore and asked to speak to Leonie Atkinson, the Applicant’s then Personal Assistant. Ms Atkinson later contacted Person 17 and they spoke at about 12.57pm. The terms of that conversation are set out in Ex. A153, being an email sent by Ms Atkinson to the Applicant on 23 April 2018. Person 17 said she urgently needed to get a message to the Applicant. As recorded in Ex. A153, she further said:

“You need to tell him ‘Switzerland 2018’ he will know what that means. You need to tell him that ‘someone has the story and I am getting threatened and I am frightened and I need Ben’s help’.”

79. Person 17 agreed she said “*something like that*” to Ms Atkinson.¹¹⁷⁵ Person 17 explained that “Switzerland 2018” was the password to their Gmail account and she was in effect asking the Applicant to log onto that account.¹¹⁷⁶ She claimed that the reference to her being “threatened” was a reference to the man on the beach. Her evidence was that she had also received information from her husband that “*a big news story about Ben*” was coming out.
80. Person 17’s contact with Ms Atkinson and her determined attempt not only to get in contact with the Applicant but to seek “help” from him, is on the balance of probabilities inconsistent with her having recently been assaulted by the Applicant. It is also inconsistent with her being afraid of the Applicant.
81. On the very same day Person 17 returned to the police station in her hometown. The content of the record of her visit is confirmed at T4227-4428 (the underlined material is different from the 8 April entry):

Informant has attended [] Police Station to inform Police she was having an affair with a high profile military person. She has recently broke off the affair and has told his wife. The informant is now concerned of the things he might do. She said she is scared he has her bank details and can external remote into her phone and emails. The informant requested police to run a phone number to see if it is registered to anyone as she believes he is using burner phones to contact her. Police attempted to ascertain this high profile persons name which she refused to provide. Advice given.

82. The Applicant makes the same submissions in relation to the 8 April 2018 visit. So far from a report of the assault there is not even a hint of that kind of event. There is no suggestion she sought an appointment or was told she unable to speak with a senior officer. On this occasion, instead of asking for CCTV footage, Person 17 asked the police to run phone numbers. She claimed in cross-examination that this request was in relation to previous burner phones the Applicant had used co

¹¹⁷² T4062 L28-33 (P17).

¹¹⁷³ T4136 L22-41 (P17).

¹¹⁷⁴ T4193 L39 (P17).

¹¹⁷⁵ T4111 L39 (P17).

¹¹⁷⁶ T4061 L42 - T 4062 L5 (P17).

communicate with her.¹¹⁷⁷ The record suggests she told the police the reason for the request was because the Applicant was attempting to contact her. However, she agreed in her evidence that that he had ceased contact.¹¹⁷⁸ That in itself suggests she was telling the police a falsehood. The only probable inference to be drawn is that her attempt to get the police to run a number was part of a means to re-establish contact with the Applicant.

83. The Court will bear in mind that Person 17 visited the police station on the same day she spoke with Leonie Atkinson and begged for the Applicant's help. The juxtaposition of the two events can only suggest that Person 17 was desperate to attract the attention of the Applicant at this time. At this stage it is quite plain that she was not alleging any assault had occurred. The Applicant submits this is because she had not yet invented the allegation.

Danielle Kennedy Correspondence 22-23 April 2018

84. The correspondence is relevantly to be found at Exs. R151, R152 and Ex. A 270. The Applicant agreed that in substance he drafted these letters but denied that he had anything to do with Danielle Scott adopting the nom de plume "Danielle Kennedy".¹¹⁷⁹ The Respondents provided an Outline of Evidence in respect of Ms Scott but elected not to call her.
85. There are two relevant matters:
- (a) Ms Scott confirms unambiguously in both her emails at Exs. R151 and R152 that the Applicant does not want to receive any contact from Person 17.
 - (b) Person 17 says that her only reason for attempting to contact the Applicant the previous week "*was to warn him that I'd received information to the effect that our affair was about to be made public. I would think this was to be of significant interest and concern to him and something he may have wanted to discuss.*"¹¹⁸⁰ Whether this related to the man on the beach or her husband's news about a "big story", it again confirms Person 17's willingness to engage with the Applicant even when she knew he had broken off contact.

Contact with Channel Seven 30 April 2018

86. At 11.47am Channel Seven Maroochydore sent an email to the Applicant saying "*11.47 am phone call for you to try your Switzerland Gmail again. Asked for the woman's name and she did not provide it.*" Person 17 denied this attempted contact despite it obviously recording a call by herself.¹¹⁸¹ It is yet another example of Person 17 trying to get in contact with the Applicant.

Emails Left by Person 17 on the Gmail Account

87. Ex. A161 comprises two messages that Person 17 left for the Applicant on 1 and 5 May 2018 respectively.¹¹⁸² By this stage Person 17 had been told by Ms Danielle Scott that contact was unwelcome, but in any case she must have known this from the moment she visited the Applicant's home on 6 April 2018.

¹¹⁷⁷ T4228 L8-9, 25-27 (P17).

¹¹⁷⁸ T4228 L6 (P17).

¹¹⁷⁹ T816 L16-23 (BRS).

¹¹⁸⁰ Ex. A270 p. 10.

¹¹⁸¹ T4201 L25-26 (P17).

¹¹⁸² T4221 L7-9 (P17).

88. In the 1 May message Person 17 begins by saying “*This has become ridiculous. I’m so frustrated.*” Person 17 says she is “*trying to reach out to you – in order to help us both*”. She also says, “*All I care about at this point is not becoming a headline*”. It is at this stage just 4 weeks until Person 17 herself will approach Nick McKenzie and makes her assault allegation.

89. In the 1 May 2018 message Person 17 further says the following in relation to the situation:

“I’ve been going round and round in circles for weeks now trying to figure out what the hell is going on. It seems to me that someone has a serious vendetta against you & now I’m caught up in it.

The police can’t and won’t do anything – but I think you can. Unless you’re prepared to throw me to the wolves because you feel I betrayed you.”

90. This message suggests, that so far from the police receiving or considering an assault allegation, they have instead been dealing with something quite different. Person 17 is saying she believes someone has a vendetta against the Applicant and that he is caught up in this vendetta. This email is once again utterly inconsistent with a suggestion that Person 17 believed or was making any allegations that the Applicant assaulted her on 28 March 2018. It is not easy to discern the email’s true meaning other than to say Person 17 is desperate to receive attention from the Applicant.

91. Her message of 5 May 2018 – the last known attempt at contacting the Applicant before she contacts Mr McKenzie is in these chilling terms:

“Why won’t you just talk to me – before things get out of control? Find a way.”

92. Given what transpired it is very hard to see this email as anything other than a threat, which Person 17 made good when she contacted Mr McKenzie approximately three weeks later.

J. THE CONTACT WITH MR MCKENZIE AND THE MAKING OF AND WITHDRAWAL OF THE COMPLAINT TO THE AFP

93. It is not contested that the first time Person 17 made her allegation of assault to anybody (other than her husband on Easter weekend – who was not called to corroborate the alleged prior consistent statement) was when she told Mr McKenzie on or about 29 May 2018.¹¹⁸³ Her evidence was she became aware that Mr McKenzie “*had been writing articles about Ben*” and then she “*anonymously contacted*” him. She flew to Melbourne at her own expense to meet Mr McKenzie.¹¹⁸⁴ She was, to put it mildly, enthusiastic to meet Mr McKenzie.

94. Person 17 gave evidence as to the motivation for her decision to contact Mr McKenzie. She said in substance that the reason was the accumulation of strange events such as her husband’s informing her of a “big story” to emerge concerning the Applicant, the approach by the man on the beach, the Danielle Kennedy correspondence and the anonymous letter the Applicant claimed to have received.¹¹⁸⁵ She also claimed she wanted to obtain information from Mr McKenzie.¹¹⁸⁶ That evidence was not credible:

¹¹⁸³ See Ex. A37 (see reference to ‘journalist’)

¹¹⁸⁴ T4065 L21-31 (P17).

¹¹⁸⁵ T4065 L15-24 (P17).

¹¹⁸⁶ T4065 L21-24 (P17).

- (a) The anonymous letters had been received in December 2017 and January 2018.¹¹⁸⁷
 - (b) The alleged man on the beach incident had occurred on 3 April 2018.
 - (c) The Danielle Kennedy correspondence had occurred on 22-23 April 2018.¹¹⁸⁸
 - (d) Her husband had told her about a “big story” prior to 20 April 2018.¹¹⁸⁹
 - (e) What had in fact changed was that by early to mid-May she understood the Applicant would no longer speak with her and had cut off contact.
95. Person 17 also claimed that she asked Mr McKenzie not to publish and further that she declined to comment on the 11 August 2018 articles before they were published.¹¹⁹⁰ This evidence should not be accepted. It was Person 17 that brought this story to the media. She specifically selected Mr McKenzie as her preferred media contact because she knew he was writing articles critical of the Applicant in relation to Afghanistan. It is not to the point that he may have later found another way to verify her allegations – Person 17 elected to take her allegations to the press before she had reported them to the police. She has the agency for this decision.
96. Person 17 completed an interview with the AFP on 30 May 2018. Her evidence was that she did this because she was “scared” of what the Applicant might do and in particular “scared that if this all becomes public somehow anyway that he will think it was my doing and he will seek payback”.¹¹⁹¹ That evidence also should not be accepted:
- (a) Person 17 herself had just approached a journalist and told her story! If she was genuinely scared of “payback” arising from a media story about the affair she would hardly have called a journalist to advise him of that very fact.
 - (b) If she was genuinely frightened of the Applicant then she would not have pleaded to spend a night with him on 5 April, then visited his wife the next day to reveal their affair even once it had already ended by mutual agreement, and then repeatedly attempted to try and get in touch with him on at least 20 April, 30 April, 1 May and 5 May 2018.
97. The most plausible explanation for Person 17’s report of an assault to the AFP is simply that this is something Mr McKenzie suggested she do.¹¹⁹²
98. Person 17 withdrew her complaint to the police on 24 August 2018. This was some 13 days after her allegation of domestic violence first appeared publicly in the 11 August 2018 articles. She did this only days after the ACT police had requested access to her medical records and in fact in her formal letter of withdrawal she refers to that correspondence.¹¹⁹³ Person 17 denied that the request for her medical records played any part in her decision to withdraw her complaint.¹¹⁹⁴ Her evidence was that she had told the police that in the visit to her doctor on 29 March 2018 she had said that a fall down the stairs had caused the black eye.¹¹⁹⁵ Assuming that is right, the police would not have known about the other matters in the medical record including for instance the reference to the “long wine tasting

¹¹⁸⁷ T316 L18-26 (BRS); Ex. A34; T777 L1-30 (BRS); Ex. A150 p. 43 (messages from top of page onwards).

¹¹⁸⁸ Ex. R151; Ex. R152; Ex. A 270

¹¹⁸⁹ T4062 L45-46 (P17).

¹¹⁹⁰ T4065 L42-43; T4100 L1-2, L15-25 (P17).

¹¹⁹¹ T4066 L32-37 (P17).

¹¹⁹² T4065 L44 (P17).

¹¹⁹³ See Ex. A152; T 4096 L35 - T 4097 L3.

¹¹⁹⁴ T4192 L8-12 (P17).

¹¹⁹⁵ T4220 L3-28 (P17).

day” and the reference to friends applying ice. Even if one accepts Person 17’s evidence that she withdrew the complaint on legal advice, the fact remains that the immediate trigger in the sequence seems to have been the request for her medical records.¹¹⁹⁶

99. In short, Person 17 waited two months to report her alleged assault (having previously provided contrary indications for the cause of her injury to her doctor and the Applicant’s wife and mother). She then told a journalist. At a journalist’s urging she finally went to the police and made her complaint. Thirteen days after the journalist published her complaint and 4 days after the police forwarded her an authorisation form for her medical records, she withdrew her complaint. Those circumstances tell heavily against the credibility of the complaint.

K. EVENTS FROM JUNE 2018 TO 2020

100. Even after soliciting Mr McKenzie, and making her complaint to the AFP Person 17 persisted in attempts to contact the Applicant – the man she claimed to be frightened of in these proceedings.
101. On 20 June 2018 Person 17 contacted the Channel Seven switch. Ex. A284, containing an email of 20 June 2018 from Ms Jewell at Channel Seven to Ms Leonie Atkinson (the Applicant’s PA), is a record of the communication. Person 17 adopted the nom de plume “Louise Sparrow”. She asked if the Applicant could check the Gmail account and said to tell him “2018 is now 2019”. Person 17 did not leave a return phone number. Person 17 denied calling herself Louise Sparrow but otherwise agreed she said similar words to Ms Atkinson herself at about this time.¹¹⁹⁷
102. Person 17 called Ms Atkinson again on 25 June 2018. She asked Ms Atkinson whether she had passed on the previous message. Person 17 agreed that Ms Atkinson then stated that Person 17 was engaging in harassment. She claimed that she said, “*Is that you Emma?*” Ms Atkinson confirmed her identity.¹¹⁹⁸
103. It is significant that as late as 20 and 25 June 2018, Person 17 was still attempting to obtain contact with the Applicant. Despite telling her story to a journalist and making a complaint to police she was still plainly desperate to speak to him. Her evidence that “*she wanted an explanation from him about what on earth was going on*” in relation to war crimes should not be accepted.¹¹⁹⁹ It was a falsehood created to try and explain away her ongoing desire for contact in the face of an assault allegation and other evidence to the effect that she was frightened of the Applicant.
104. Person 17’s true attitude to the Applicant was made apparent to her therapist in a session on 9 April 2020. The notes taken during that session which are Ex. A159 record these words: “*if saw him could all be back on. may meet needs, shouldn’t matter.*” Person 17 denies she said these things “*because that’s not how I feel.*”¹²⁰⁰ However the sentiment as recorded in those notes is consistent with her ongoing desire for contact with the Applicant.
105. Person 17 agreed that as late as July 2020 she called the Applicant’s solicitor and again asked for the Applicant to contact her. At that stage an Outline of Evidence on her behalf had been served in these proceedings. Her explanation for this contact was that she wanted to “*tell him to just stop. Just stop traumatising anybody.*”¹²⁰¹ That evidence should also not be accepted. After two years – of not speaking, of knowing that contact was unwelcome, after she had taken her allegation to the press,

¹¹⁹⁶ T4067 L24 (P17).

¹¹⁹⁷ T4117 L6-27 (P17).

¹¹⁹⁸ T4118 L18-22 (P17).

¹¹⁹⁹ T4117 L10-12; T4201 L1-4 (P17).

¹²⁰⁰ T4196 L29-30 (P17).

¹²⁰¹ T4128 L17 (P17).

taken it to the AFP before withdrawing it and then agreeing to provide an Outline of Evidence in this case – it seems Person 17 still wanted to speak to the Applicant. Once again that tells against the credibility of her assault allegation, and against her claim that she was in fear of the Applicant.

L. OVERVIEW

106. From the time Person 17 became aware in late January 2018 that the Applicant did not see a future in the relationship, her conduct is troubling:
- (a) She claimed to have been pregnant. She later claimed to have miscarried but induced the Applicant to believe she remained pregnant and was having an abortion and she plainly would have continued to let him labour under that misapprehension if she had not been caught out;
 - (b) Person 17 got seriously drunk at a public function and fell down the stairs and injured herself, resulting in a black eye. She apologised to the Applicant and told her doctor the next day that this is exactly what had occurred;
 - (c) She pleaded to see the Applicant again. She managed to spend one more night with him at a hotel, but the relationship ended. She immediately went to his wife's house to reveal the affair. When asked how she obtained the black eye she referred (truthfully) to her fall down the stairs;
 - (d) After the Applicant cut off contact, she twice visited the local police to report her affair with a 'high profile' person and ask for CCTV footage and phone numbers to be run. She tried to contact the Applicant (at least) on 20 April, 30 April, 1 May and 5 May 2018. The last of those contacts contains in effect a plea for him to speak to her. She claimed to be worried at this time that a media story about their relationship was in train;
 - (e) At some point in May 2018, after it was plain the Applicant would not speak to her, Person 17 called a prominent journalist who she knew was writing articles critical of the Applicant. She flew at her own expense to Melbourne to see the journalist. She made allegations which included the assault on her by the Applicant at the Hotel Realm. The Applicant's case is that these allegations were fabricated at this time;
 - (f) At the journalist's urging Person 17 made her allegations to the AFP. In addition to her assault allegation at this point she also fabricated the allegation about the blackmail threat by the man on the beach. She withdrew her police complaint three months later once her allegations had already been made public. During the course of those three months, and after that time, she continued to try and contact the Applicant. She had an obsession with him.
107. As stated in the introduction, the absence of contemporaneous corroboration for the allegations – and in fact the existence of positive evidence (in the form of the doctor's report and the statements made to the Applicant's wife on 6 April 2018) – that Person 17's injury was caused by a fall down the stairs and not by any assault of the Applicant, is enough to dispose of her evidence of the balance of probabilities. However the course of conduct in which she engaged demonstrates serious dishonesty on her part and suggests that the invention of the assault allegation was a by-product of her obsession. It is probable that she either wanted to try and induce the Applicant back into a relationship, or take revenge upon him for leaving the relationship, or both.
- 108.** The Court should find that the Respondents have not established the substantial truth of either imputation. The Respondents' case on the hypocrisy imputation fails once it is accepted no assault occurred.

SECTION XIII: THE RESPONDENTS' ASSERTIONS IN RELATION TO COLLUSION, INTIMIDATION, LIES AND CONCEALMENT

A. OVERVIEW

1. The Respondents have devoted a considerable amount of their written submissions in section XIII which is titled "*Collusion, Intimidation, Lies and Concealment*" to launch a broad based and rolled up approach to attack the credit of Mr Roberts-Smith and witnesses who have been called to give evidence in his case.
2. The attack is misguided and contrary to authority. The approach lacks any focus or nuance and fails to explain how the united force of all the circumstances put together which they allege ties in with proof of the very grave criminal allegations which were pleaded in this matter, presumably on instructions from each of the Respondents.

B. MR ROBERTS-SMITH'S CREDIT

Introduction

3. The challenges to the credit of Mr Roberts-Smith lack substance. During the course of a prolonged cross-examination in which he was accused of murder (or complicity in the murder) of six persons, violent assaults, domestic violence as well as bullying. Mr Roberts-Smith gave his evidence politely, frankly and openly. He made appropriate admissions, even when against interest. His evidence was corroborated by documents and other oral evidence. The most intimate parts of Mr Roberts-Smith's personal life were the subject of extensive questioning. This was a blatant attempt to damage his character before the Court in order to bolster the Respondents' misguided serious allegations of criminality.
4. This section will deal with each of the major attacks put by the Respondents as affecting Mr Roberts-Smith's credit. It will also address the credit of Ms Roberts, Mr Roberts-Smith's former wife, the witness in respect of whom much of the challenge to Mr Roberts-Smith's credit depends upon.

The Separation

Overview

5. A significant amount of time was spent cross examining Mr Roberts-Smith on whether he was in fact separated from his wife for approximately six months from late 2018 as he claimed.
6. It is difficult to see how this issue is relevant to the justification of the imputations. Even if a person had told a lie about his marital status it is hard to see how that could bear on allegations that he committed murder and assaults in Afghanistan whilst a soldier, or that he committed an act of domestic violence against a woman.

Mr Roberts-Smith's Evidence

7. Mr Roberts-Smith's evidence was that he and his wife separated in about late September 2017.¹²⁰² The separation lasted until about April 2018. He stayed for much of the time at properties owned by his friends Mr Mooney and Mr Wheeler.¹²⁰³ The relationship remained amicable and Mr Roberts-Smith

¹²⁰² T261 L40 (BRS).

¹²⁰³ T262 L1-7 (BRS).

also continued to stay at the marital home, particularly on weekends where he would sleep in a granny flat.¹²⁰⁴ He spent an average of two-three nights a week at home.¹²⁰⁵ His wife continued to help with his public speaking business.¹²⁰⁶ He and his wife agreed not to tell anyone about their separation. In January 2018 they took a holiday in Singapore together with their children. The purpose was to see whether their marriage would work.¹²⁰⁷ Contrary to the submission at RS Section XII 85(i) the reference to the “gym” in the 17 January 2018 message¹²⁰⁸ is not a reference to a shared domestic life but a message sent whilst they were staying in a hotel on this holiday.

8. Mr Roberts-Smith’s affair with Person 17 began in October 2017. Mr Roberts-Smith agreed that he concealed this from his wife for some months.¹²⁰⁹ In January 2018, whilst they were on holiday in Singapore, he told his wife he was having a relationship with another woman.¹²¹⁰ He did not tell his then wife the name of Person 17 and it follows at the time he understood she discovered this when Person 17 visited the marital home on 6 April 2018.¹²¹¹ After the Singapore trip, the separation did not end but Mr Roberts-Smith and his then wife agreed to work on their marriage.¹²¹² He denied ever threatening her or pressuring her to lie about the separation.¹²¹³
9. Mr Roberts-Smith did not contest that during the period of the separation he had attended functions and events with his then wife, and that they had sex on at least one occasion.¹²¹⁴
10. Mr Roberts-Smith’s evidence is to some extent corroborated by Person 17:
 - (a) The outcome of the trip to Singapore is corroborated by the messages passing between him and Person 17. Mr Roberts-Smith on or about 22 January 2018 (two days after his return from Singapore) had told Person 17 he saw no future in the relationship.¹²¹⁵ Person 17 agreed that from this time she had the impression he had decided to stay with his wife.¹²¹⁶
 - (b) On 22 January 2018 Person 17 sent a message to Mr Roberts-Smith including this observation: *“You’ve spent the past year away for work all the time and barely home with your kids because you were so unhappy in your marriage.”*¹²¹⁷

Evidence of the Applicant’s Ex-Wife

11. According to Mr Roberts-Smith’s ex-wife, she and Mr Roberts-Smith had not separated at all in the period late 2017-early 2018.¹²¹⁸ Ms Roberts gave further evidence that during that period Mr Roberts-Smith continued to sleep in her bed and the granny flat was used by her parents for some of those months.¹²¹⁹ She agreed that Mr Roberts-Smith may have stayed with Mr Wheeler (for one night every two weeks).¹²²⁰ She gave evidence that during the relevant period, her and Mr Roberts-Smith had

¹²⁰⁴ T261 L45-47; T760 L8-18 (BRS).

¹²⁰⁵ T760 L23-25 (BRS).

¹²⁰⁶ T262 L23-27 (BRS).

¹²⁰⁷ T262 L36-42; T263 L12-14 (BRS).

¹²⁰⁸ Ex. R 106

¹²⁰⁹ T262 L16; T263 L16-21 (BRS).

¹²¹⁰ T263 L23-27 (BRS).

¹²¹¹ T767 L7-11 (BRS).

¹²¹² T263 L32-34 (BRS).

¹²¹³ T781 L38-45 (BRS).

¹²¹⁴ T760 L38 ; T 774 L11-29 ; T776 L26-36 (BRS).

¹²¹⁵ See Ex. A150 p. 76. Mr Roberts-Smith’s expression of doubts about the relationship is also evident in the change in the length and the tone of the messages from 22 January 2018 (starting from the bottom of p. 60).

¹²¹⁶ T4078 L15-24 (BRS).

¹²¹⁷ Ex. A150 p. 61 (message at 7.16am).

¹²¹⁸ T1911 L24-26 (BRS).

¹²¹⁹ T1911 L31 - T 1912 L31 (BRS).

¹²²⁰ T1912 L38-42 (BRS).

attended functions together and exchanged anniversary gifts.¹²²¹ Her evidence in chief was that she did not know of the existence of any affair on the part of Mr Roberts-Smith until Person 17 visited her on 6 April 2018.¹²²²

12. Ms Roberts alleged that after she discovered the affair, Mr Roberts-Smith had asked her to lie about being separated for the duration of the affair.¹²²³ She alleged that he threatened she would lose the children if she did not lie.¹²²⁴ She further suggested that Mr Roberts-Smith had asked her to lie to his lawyers by confirming a separation in two Outlines of Evidence to be provided on his behalf in these proceedings in April and July 2019.¹²²⁵ The effect of Ms Roberts' evidence was that on two occasions she provided knowingly false information to Mr Roberts-Smith's lawyers expecting and knowing that material to be deployed in an Outline of Evidence in these proceedings.¹²²⁶

13. Contemporaneous documents contradicted Ms Roberts' claims:

(a) On 28 December 2017, Ms Roberts exchanged messages with Ms Scott:¹²²⁷

Ms Roberts *"Yeh I'm just trying to be conscious of that, it's just new and raw at the moment. I'm still trying to come to terms with it all."*

Ms Scott: *"Totally understand but keep that in the back of your mind. He fell in love with you because you were strong and wonderful and proud be that person now."*

Ms Roberts: *Do you think he's made his mind up?*

Ms Scott: *Doesn't make sense that he has otherwise he would not want holiday etc*

The clear import of the exchange is that Ms Roberts and Ms Scott believed Mr Roberts-Smith at this time was in the process of deciding whether or not he wanted to continue in the marriage. Ms Roberts agreed that when she asked, *"Do you think he's made his mind up?"*, she was referring to whether Mr Roberts-Smith had made his mind up to leave her permanently.¹²²⁸

(b) On 13 January 2018, in the course of another message exchange with Ms Scott, Ms Roberts said *"How is he ever going to tell Kerry we are separated? I honestly think things like that is on his mind?"*¹²²⁹ "Kerry" referred to Kerry Stokes, the Chairman of the Seven Network. Ms Roberts, having denied that the statement indicated her belief that she and her husband were separated at the time, was unable to say what this statement meant.¹²³⁰ Her evidence that she did not recall its meaning should not be accepted. The message has a plain meaning which is inescapable. RS Section XIII [83] describes the message as containing a *"hypothetical question"* but Ms Roberts did not give this evidence.

(c) A second message on 13 January 2018 between Ms Scott and Ms Roberts plainly referred to the fact that Mr Roberts-Smith was having an affair.¹²³¹ Ms Roberts denied she actually knew by

¹²²¹ T1913 L22-33; T 1915 L10-24 (BRS).

¹²²² T1915 L28-29 (ER).

¹²²³ T1924 L45 - T1925 L19 (ER).

¹²²⁴ T1925 L13-16 (ER).

¹²²⁵ T1929 L18 - T1930 L3; T1931 L11 - T1932 L15 (ER).

¹²²⁶ See also Ex. A257 and Ex. A258, which are emails in which Ms Roberts is sent the filed Outline of Evidence.

¹²²⁷ Ex. A255.

¹²²⁸ T1971 L23 (ER).

¹²²⁹ Ex. A255.

¹²³⁰ T1972 L1-2 (ER).

¹²³¹ Ex. A255.

this time the identity of Person 17. However, the reference to “*some s*** mother who didn’t want to spend time with the kids anyway*” is consistent with her knowing or at least suspecting the identity of Person 17. Ms Roberts conceded only that the message recorded her “*suspicious*” that Mr Roberts-Smith was having an affair.¹²³² RS Section XIII [94] contains a submission that, understood properly, Ms Roberts really intended to refer to her husband and that the word “*mother*” actually meant “*motherfucker*”. Ms Roberts gave no evidence to support this theory and there is no hint of a misspelled word or an error (she had previously used that epithet to describe Mr Roberts-Smith without any apparent difficulty¹²³³).

(d) On 17 August 2018 (shortly after the 11 August 2018 publications) Ms Roberts sent a message to three friends (Snazzie, Jodes and Missy) whom she was scheduled to go on holiday with.¹²³⁴ The message included the words “*I wanted to touch base with you all before I see you tomorrow and in particular talk to you about a deeply personal issue. Last year, Ben and I separated for a short while. We kept it extremely private. It’s now been made very public ... in that time Ben saw someone else who has leaked damaging, false and slanderous allegations to the press.*” Ms Roberts claimed that she was told to tell this lie to her friends.¹²³⁵ That answer reflected poorly on her credit. This was plainly a personal message that she had crafted herself with agency and independence. She was under no obligation to lie.

14. The cumulative effect of those documents broadly supports Mr Roberts-Smith’s evidence that a separation exists and suggests that his ex-wife was not telling the truth about his issue in the trial. The Respondents at RS Section XIII [75] rely upon a message between Mr Roberts-Smith’s ex-wife and Ms Scott from April 2018.¹²³⁶ In that message Ms Roberts says “*BRS thinks if it hits the press I say we were separated*” and further that she is “*not really*” ok with that. That message is not consistent with a separation having actually occurred.
15. Ex. A254 was a Family Law Affidavit sworn by Ms Roberts on 30 September 2020. Paragraphs 24-25 of the affidavit contradicted an aspect of her evidence in these proceedings. The plain effect of those paragraphs is to suggest that, as at December 2017, Ms Roberts became aware of her husband’s affair with Person 17. Ms Roberts was driven to say that paragraph 25 of her affidavit was false and later that it was a mistake.¹²³⁷ RS Section XIII [93] contains a submission that Ms Roberts’ explanation of a mistake is supported by Mr Roberts-Smith’s evidence that he did not tell her about an affair until later in January 2018 (Singapore). However, as is apparent from the message discussed at [13c] above, Ms Roberts appeared to have acquired knowledge about Mr Roberts-Smith’s relationship one way or another. This matter materially affected the credit of Ms Roberts. If Ms Roberts was prepared to tell untruths on oath in identifying the time about which she became aware of the affair, her evidence as to the separation is also suspect.
16. RS Section XIII [89] submits that Mr Roberts-Smith’s behaviour on 6 April 2018 is consistent with his then wife first discovering an affair that day. Even if those things were said by Mr Roberts-Smith (bearing in mind he denied he told his ex-wife Person 17’s name when he disclosed an affair in January 2018), they are consistent with his shock and remorse that the woman with whom he was having an affair had turned up at his home and confront his then wife. Likewise, there is a submission at RS Section XIII [90] that Ms Roberts’ transfer of funds to her parents is consistent with her

¹²³² T1972 L39-40 (ER).

¹²³³ Ex. A261 p. 58 (message on 7 February 2020, at 06.16).

¹²³⁴ Ex. A257, Annexure D.

¹²³⁵ T1975 L34-39 (ER).

¹²³⁶ Ex. R109.

¹²³⁷ T1966 L8; T1967 L40-46 (ER).

discovering an affair. It might equally be said that it is consistent with her shock at discovering the sort of person her husband was having an affair with and the lengths to which she would go.

17. Once the documentary material is taken into account, Ms Roberts' allegations – that no separation existed and that she was asked to lie about a separation – are exposed as baseless. In one sense that is the end of the matter, but certain of the documents put to Mr Roberts-Smith on this issue are addressed below, to highlight the unfairness and artificiality of this attack on his credit.

Documentary Evidence Used to Challenge the Applicant's Evidence on Separation

18. The Respondents relied on medical records prepared by Drs Gogna and Lawless. In a referral for anxiety dated 7 November 2017, Dr Gogna had recorded that Mr Roberts-Smith "*has a very kind and supportive wife and children*".¹²³⁸ Following an appointment with Mr Roberts-Smith, Dr Lawless wrote a letter to Dr Gogna in which he said "*He has a good relationship at home.*"¹²³⁹
19. Mr Roberts-Smith agreed that he did not tell either Doctor about the separation.¹²⁴⁰ In his view it was not something relevant for them to know. There is nothing improbable about a person, particularly a middle aged, somewhat taciturn man, not disclosing a personal matter to a doctor. Even a modest appreciation of human foibles and failings – of the manner in which a person navigates their way through life – exposes as baseless the Respondents' allegation that the failure to reveal a personal matter like a separation to a number of medical professionals is evidence that Mr Roberts-Smith is lying. As an example of the air of unreality permeating the Respondents' submissions, at RS Section XIII [85e] it is said that Mr Roberts-Smith's references in messages to Ms Roberts wanting time with him and feeling his lack of affection (when he has "fallen" for Person 17) are inconsistent with a separation. This is a flawed submission, particularly in circumstances where the couple are seeing each other regularly and planning a family holiday to work on the marriage. Likewise, the suggestion at RS Section XIII [85(k)] that Ms Roberts would have no interest in turning up to Mr Roberts-Smith's hotel room if they were truly separated (bearing in mind the recent history of holidays and counselling and shared functions) betrays little understanding of human nature and frailty.
20. The Respondents also relied on evidence of marriage counselling records from several appointments in early 2018.¹²⁴¹ The records made no mention of any separation. Mr Roberts-Smith confirmed that neither he nor his wife had mentioned the separation to the counsellor.¹²⁴² His explanation was that given his public profile, he and his wife had agreed they would not tell the counsellor as they preferred not to have this matter recorded in a document.¹²⁴³ Mr Roberts-Smith was also challenged on entries that suggested the state of the marriage was positive or improving. Mr Roberts-Smith did not dispute the entries and agreed that this was the case.¹²⁴⁴ A relationship that improves during the course of counselling is not inconsistent with the couple being separated at the time the counselling occurs. Once again, the Respondents' submissions on this issue do not belong in the real world.
21. Otherwise the Respondents relied on various material including affectionate messages that Mr Roberts-Smith has sent to his then wife, messages sent to Person 17 that suggested he was with his

¹²³⁸ Ex. R56.

¹²³⁹ Ex. R58.

¹²⁴⁰ T762 L1-3 and 19-25 ; T764 L34 – T765 L3 (BRS).

¹²⁴¹ Exhibits. R60;-R64.

¹²⁴² T769 L27-29 (BRS).

¹²⁴³ T769 L31-34 (BRS).

¹²⁴⁴ T769 L1-25 ; T 770 L18-38 (BRS).

wife and happy events which Mr Roberts-Smith and his then wife had attended together.¹²⁴⁵ None of this was inconsistent with a separation of the kind described by Mr Roberts-Smith.

Conclusion

22. The preponderance of the evidence and in particular the messages exchanged between Ms Roberts and Ms Scott and her other friends, suggests that Mr Roberts-Smith and Ms Roberts were indeed separated. Mr Roberts-Smith had no apparent motive to tell a lie about this issue. The reason is that he agreed that he continued in his affair with Person 17 for some months without disclosing this to his wife where “*I didn’t have any expectation that I was in a position to be allowed to do that.*”¹²⁴⁶ He did not deny that he had been unfaithful and concealed this from his wife.

23. The quite human nature of the situation was summed up by Mr Roberts-Smith in these exchanges:¹²⁴⁷

Q. How was having an affair with Person 17 working on your marriage?

A. Because I didn’t know what I wanted. So my wife wanted to keep trying. I didn’t want to throw it away completely. And I met somebody else at a time when I didn’t know what I wanted.

Q. I will put it to you Mr Roberts-Smith that you were clearly talking about the fact that you were not at this point separated from your wife?

A. It can only be told the way that it was, and the way that it was is my wife and I had a conversation that I would not live in the house because we were going to separate to get time apart. It was amicable and we saw each other quite a bit. We tried to work on it. I saw somebody else. It was life. Didn’t get it right all the time, but that’s exactly what happened.

24. Finally, even if the Court formed the view that Ms Roberts was telling the truth about aspects of this particular dispute, a separation may not necessarily be a bright line event. It is entirely possible for one spouse to have a discussion with the other in which serious unhappiness about the marriage is expressed and following which, that spouse spends very little time at home for many months. There might in the ensuing period be discussions about counselling and working on the marriage resulting in a reconciliation. One spouse might regard that time as amounting to a “separation” and the other might not. The point is that even if the Court accepts Ms Roberts’ evidence that she and Mr Roberts-Smith did not discuss a formal separation, it does not mean that he is lying. Still less does it mean he would have a propensity to lie about what happened in Afghanistan or at the Hotel Realm.

The USBs

Overview

25. The Respondents allege that Mr Roberts-Smith concealed and/or destroyed evidence and that he deliberately failed to discover documents. The allegations concern the receipt, handling and disposal of a series of USBs. Mr Roberts-Smith, while accepting that mistakes have been made, denies the allegations and in particular denies that he acted dishonestly.

26. At the outset it ought to be observed that even in circumstances where the Respondents themselves came into possession of the USBs in or about March 2021 (and published excerpts from them on the

¹²⁴⁵ T772-780 (BRS); Ex. R43 Tab 6; Ex. R64; Ex. R65; Ex. R66; Ex. R67; Ex. R68.

¹²⁴⁶ T773 L19-20; T782 L 18-21 (BRS).

¹²⁴⁷ T773 L26-29; T778 L19-25 (BRS).

60 Minutes program on 11 April 2022 whilst these proceedings were on foot in what was a clear attempt to prejudice the public against the Applicant and to place pressure on him to not continue with the proceedings), they have not identified a single document on those USBs that materially advantaged the Respondents or disadvantaged Mr Roberts-Smith in these proceedings. That is, all of the allegations of impropriety and dishonesty in relation to this issue are nothing more than general assertions which do not bear upon any of the allegations of murder or complicity of murder, which have been propounded by the Respondents.

The Origin and Arrival of the USBs

27. Mr Roberts-Smith gave evidence that in or about 2019 he asked Persons 5, 11, 29, 35, 75, 78 and others to send imagery from the deployments the subject of the allegations against him.¹²⁴⁸
28. From late 2018 to January 2020, he received approximately four or five USBs in the mail. The USBs arrived anonymously.¹²⁴⁹ Mr Roberts-Smith looked at the properties of the documents and saw names that correlated to the various deployments. However, as the photographs tended to be widely disseminated amongst the troop, those names did not provide an indication of the identity of the sender.¹²⁵⁰ Mr Roberts-Smith observed the USBs mainly contained photographs of SASR operators including particularly large numbers of photographs at the Fat Lady's Arms. There was also some imagery of W108 and Scan Eagle footage.¹²⁵¹ Mr Roberts-Smith placed the USBs into a Tupperware container which sat at the top of his desk at his then home in the Sunshine Coast.¹²⁵²
29. Mr Roberts-Smith was criticised for being in possession of classified material and it was suggested to him that in retaining the USBs he had committed a criminal offence. Mr Roberts-Smith's evidence was that he did not regard possession of the photographs (widely circulated throughout the troop as they were) as an offence.¹²⁵³ He frankly admitted he should not have had the drone footage and that he did not attempt to return that footage to the Commonwealth.¹²⁵⁴
30. Mr Roberts-Smith accepts that the USBs ought to have been discovered.¹²⁵⁵ He explained his failure to include the USBs in amended discovery lists by reason of his circumstances. He was going through a difficult divorce and deciding where he needed to live and he did not focus on the issue.¹²⁵⁶ He had already discovered images concerning the Fat Lady's arms and the leg and was not trying to conceal anything.¹²⁵⁷ He did not fully appreciate his obligations.¹²⁵⁸ He also denied the exaggerated proposition that the images could "*imperil the national security of Australia.*" As Mr Roberts-Smith observed the images simply involved a building in Afghanistan and had nothing to do with Australia's national security.¹²⁵⁹

¹²⁴⁸ T649 L33-42 (BRS).

¹²⁴⁹ T321 L18-24; T1943 L3-8 (BRS).

¹²⁵⁰ T652 L11-29 (BRS).

¹²⁵¹ T321 L28-34 (BRS).

¹²⁵² T322 L11 (BRS).

¹²⁵³ T652 L41-46 (BRS).

¹²⁵⁴ T653 L14-24 (BRS).

¹²⁵⁵ T689 L8-12 (BRS).

¹²⁵⁶ T322 L3-8; T 676 L5-12 (BRS).

¹²⁵⁷ T682 L21-28 (BRS).

¹²⁵⁸ T689 L7-12, 26-32 (BRS).

¹²⁵⁹ T653 L26-32 (BRS).

Events of March 2020

31. Mr Roberts-Smith separated from his wife and left the marital home in January 2020.¹²⁶⁰
32. Ms Roberts gave evidence of an event that occurred on 16 March 2020:
- (a) Ms Scott had come to stay with her at the Sunshine Coast property. According to Ms Roberts, she and Ms Scott had a conversation on the morning before Ms Scott was due to fly home. Ms Roberts had recalled that she had seen Mr Roberts-Smith in the lead up to the separation withdraw cash on a regular basis Ms Roberts suggested that Mr Roberts-Smith “used” to be out in the garden burying things. Ms Scott inquired as to where this had occurred.¹²⁶¹
 - (b) Mr Roberts led Ms Scott to the location in the garden at the corner of the office structure. Ms Roberts observed a rock beneath a hose reel and her evidence was “*it was very obvious to me that there was a spot.*”¹²⁶²
 - (c) Ms Roberts then retrieved a pitchfork, dug down approximately 30 centimetres and located a lunchbox. It contained four or five USBs in snap lock bags.¹²⁶³
 - (d) Ms Roberts provided the USBs to Ms Scott who downloaded them onto her laptop. They then replaced the USBs and reburied the lunchbox.¹²⁶⁴
33. The whole story is implausible and should be rejected by the Court:
- (a) If Ms Roberts truly believed her husband had been burying cash at a spot in the garden, she would scarcely have waited more than six weeks after he had separated from her and left the marital home to verify this. Ms Roberts agreed that she believed the burial must have occurred before he left the home in January 2020.¹²⁶⁵ Her explanation that she had “forgotten” about her husband hiding cash is not credible.¹²⁶⁶
 - (b) In cross-examination Ms Roberts suggested that the cash withdrawals her husband was making occurred “*every time Ben went to Sydney.*”¹²⁶⁷ However it makes no sense that Mr Roberts-Smith would fly to Sydney to withdraw cash to take home and bury in his garden in Queensland.
 - (c) There is nothing obvious about a rock under a hose reel at a 10-acre property. Further, there is no explanation as to how Ms Roberts knew to dig 30 centimetres to find the cash she believed she was looking for. That is a substantial amount. The notion that Ms Roberts suddenly hit on the idea of digging in this place at that depth because of nothing other than old memories of her husband being out in the garden is not plausible.
 - (d) No photographs were taken of the hole or the lunchbox or anything to confirm the event. Ms Roberts’ explanation for this was that Ms Scott’s son appeared and disturbed his mother and Ms Roberts. That would not have done anything to impede the taking of photographs for more than

¹²⁶⁰ T1911 L9 (ER).

¹²⁶¹ T1949 L31-39 (ER).

¹²⁶² T1949 L45 - T1950 L1 (ER).

¹²⁶³ T1950 L3-19; T2019 L12-19 (ER).

¹²⁶⁴ T1950 L21-24 (ER).

¹²⁶⁵ T2000 L8 (ER).

¹²⁶⁶ T2016 L31-38 (ER).

¹²⁶⁷ T1999 L45-47 (ER).

a few seconds.¹²⁶⁸ Indeed Ms Roberts agreed that Ms Scott's son was not present at the point the USBs were reburied.¹²⁶⁹

34. Further, Ms Scott did not give evidence. The Respondents in or about March 2021 had provided a detailed Outline of Evidence on behalf of Ms Scott. The Respondents did not disclose that they did not intend to call Ms Scott until by way of letter from Minter Ellison dated 7 March 2022. That was of course after Ms Roberts and Mr McLeod had already given evidence. No explanation has been provided for the failure of the Respondents to call one of their own witnesses. There is no evidence that Ms Scott was sick or unwilling or unavailable. In the circumstances the Court should draw an inference that the evidence of Ms Scott would not have assisted the Respondents.
35. The Court will bear in mind that the messages exchanged that day between Ms Roberts and Ms Scott – who frequently messaged each other dozens of times every day about all manner of subjects – record not a skerrick about this (not unremarkable) tale of digging, copying and reburying.¹²⁷⁰

Events of 5 June 2020

36. According to Mr Roberts-Smith he returned to the marital home on 5 June 2020 for an organised visit.¹²⁷¹ He retrieved the USBs from the top drawer of his desk in his study along with some files and ski gear and left the property.¹²⁷²
37. According to Ms Roberts, by 5 June 2020 she had already cleared out the desk save for one drawer into which she could see only partially.¹²⁷³ Ex. R113 was a series of photographs taken by Ms Roberts of some of the contents of the desk on 23 February and 10 March 2020.¹²⁷⁴ Contrary to the submission at RS Section XIII [126] these photographs do not prove there were no USBs in the drawers at those dates (some objects remain out of view) and in any event Ms Roberts had selected whatever it was that she wished to photograph at those times.
38. Ms Roberts alleged the following sequence of events on the afternoon of 5 June 2020:
- (a) Around 2pm, she called Ms Scott to explain that Mr Roberts-Smith was on the way to the house. She advised Ms Scott that Mr Roberts-Smith was returning to the home to pick up files. Ms Scott then said, "*Do you think they're the file files?*" Ms Roberts, understanding this to mean the USB files said, "*Surely not.*"¹²⁷⁵
 - (b) Ms Roberts then went to the spot where she says the lunchbox was buried and took a photograph of the lunchbox.¹²⁷⁶ Her evidence was that this photograph was Tab 21 of Ex. R43.¹²⁷⁷ The photograph bears a time stamp of 2.06 pm.
 - (c) Ms Roberts let Mr Roberts-Smith into the property. At this time, she was having another conversation with Ms Scott whilst looking at the security camera and because of this circumstance Ms Roberts was able to recollect that Mr Roberts-Smith arrived early.¹²⁷⁸ She

¹²⁶⁸ T2002 L14-18, 32-33 (ER).

¹²⁶⁹ T2020 L21-26 (ER).

¹²⁷⁰ Ex. A261 pp. 103-104.

¹²⁷¹ See Ex. R112 or Tab 20 of Ex. R43 for the emails between the Applicant and his wife organizing the visit for 2.30 pm.

¹²⁷² T322 L29-39; T 673 L1-4 (BRS).

¹²⁷³ T1950 L11-25 (ER).

¹²⁷⁴ T1951 L31 - T 1952 L7 (ER).

¹²⁷⁵ T1952 L28 - T 1953 L1 (ER).

¹²⁷⁶ T1933 L2 (ER).

¹²⁷⁷ T1953 L19-30 (ER).

¹²⁷⁸ T2030 L45-46; 2030 L43-46 (ER).

stayed inside while he was outside. She was about to leave to pick up her children from school when Mr Roberts-Smith said, “*Will you follow me out?*” Ms Roberts, knowing she wished to take another photograph at the site of the lunchbox, said “*I’m going to the bathroom.*”¹²⁷⁹

- (d) Mr Roberts-Smith left the property and she took another photograph of the place where the lunchbox was buried.¹²⁸⁰ Her evidence was that this photograph was Tab 21 of Ex. R43.¹²⁸¹ The photograph bears a time stamp of 2.32 pm. It shows a (fairly slight) disturbance to the soil. At the very time she took this photograph, Ms Roberts said she was also sharing a Facetime conversation with Ms Scott.¹²⁸²

39. Ms Roberts has fabricated her version of the events that day and the evidence of Mr Roberts-Smith is to be preferred:

- (a) The photographs taken by Ms Roberts which appear at Tabs 21 and 22 of Ex. R43 had no metadata to verify the time stamps. The phone upon which Ms Roberts claimed she had taken and retained those photographs had been given to her mother and then disposed of in approximately May 2021.¹²⁸³ Ms Roberts denied that she consciously disposed of a phone which had significant evidence for these proceedings.¹²⁸⁴ However the fact remains she chose not to preserve the original digital copies of those photographs. She agreed that it was no longer possible to check the accuracy of the timestamps.¹²⁸⁵
- (b) Ms Roberts claimed to have given the two critical photographs to Ms Scott.¹²⁸⁶ Yet Ms Scott did not produce them on subpoena.¹²⁸⁷ All she produced on subpoena was four photographs sent to her by Ms Roberts at 15.02 on 5 June 2020.¹²⁸⁸ These included both the “before” and “after” shot. They did not contain the 2.06 and 2.32 pm timestamps.¹²⁸⁹ There is no evidence of any kind that Ms Scott was sent the photographs with the timestamps at 2.06 and 2.32 pm. Indeed, the full chain of messages passing between Ms Scott and Ms Roberts which is Ex. A261 does not contain such a message. See in particular pages 124-126 of Ex. A261. The origin of these two photographs and the manner in which they have been transmitted is unknown. RS Section XIII [127] refers to the messages between Ms Roberts and Scott late on 5 June 2020 that concern the “lunchbox”. That reference does not corroborate the burial story as Mr Roberts-Smith agreed he retrieved the USBs from the desk.
- (c) Ms Roberts denied that she provided the photograph behind Tab 21 of Ex. R43 to the Respondents or Minter Ellison. She did not know if Ms Scott had done so.¹²⁹⁰ That evidence was not credible. The volume and frequency of the messages contained in Ex. A261 points to the closeness of the friendship between Ms Roberts and Ms Scott and it was an agreed fact they exchanged thousands of messages on a wide range of topics from January 2020 to February

¹²⁷⁹ T1953 L13-17; T2033 L4-27 (ER).

¹²⁸⁰ T1953 L16-17 (ER).

¹²⁸¹ T1953 L37-46 (ER).

¹²⁸² T2032 L37-45 (ER).

¹²⁸³ T2007 L5-15; T2026 L10-11, 28-34; T2027 L16-27; T2028 L18-31 (ER).

¹²⁸⁴ T2027 L28-33; L38-42 (ER).

¹²⁸⁵ T2028 L33-41 ; T 2029 L5-7 (ER).

¹²⁸⁶ T2007 L17-18; T 2023 L43-47 (ER).

¹²⁸⁷ T6234 L28 – T 6235 L8; Ex. A285.

¹²⁸⁸ T2021 L33, 38-46 (ER). See also Ex. A259.

¹²⁸⁹ This is evident on the face of Ex. A259, but Ms Roberts agreed at T2023 L8-17.

¹²⁹⁰ T2007 L45 – T 2008 L12; T 2028 L1-17 (ER).

2021.¹²⁹¹ It is not plausible that Ms Scott would have given such photographs (belonging to Ms Roberts) to the media without even telling Ms Roberts.

- (d) Mr Roberts-Smith had been designated a very specific arrival time of 2.30pm. It was then agreed he would pick up his daughters from school.¹²⁹² It is improbable, given the acrimony existing between the parties, that he would have arrived early and been gone by 2.30pm. Ms Roberts agreed that if Mr Roberts-Smith had in fact arrived at the home at 2.30pm or afterwards then then it would have been impossible for him to disturb the soil as shown in the photograph stamped 2.32pm at Ex. R43.¹²⁹³
- (e) Ms Roberts's evidence concerning her excuse to Mr Roberts-Smith at the time of his departure from the home about a need to use the bathroom, provided to him in an effort to hide the fact that she wanted to take a second photograph, lacks credibility. She hardly had a reason to fabricate a need to visit to the bathroom if she wanted to stay a few extra minutes in her own house.
- (f) The whole story is predicated on the equally if not more improbable version of events on 16 March 2020 dealt with above.

40. Once again, the failure to call Ms Scott is critical. There is no-one to verify that Ms Roberts actually sent the two photographs with the 2.06pm and 2.32pm timestamps. Ms Scott cannot corroborate the evidence about her alleged three conversations with Ms Roberts (occurring prior to Mr Roberts-Smith arriving, then at the time of his arrival and then the Facetime conversation after Mr Roberts-Smith left). The Court may assume her evidence would not assist the Respondents and the decision not to call her was taken after Ms Roberts had given evidence.

Events After Mr Roberts-Smith Retrieved the USBs from His Home and the Discovery Process

- 41. Once it is accepted that Mr Roberts-Smith did not "bury" the USBs in the garden, the Respondents' allegations that Mr Roberts-Smith dishonestly and improperly attempted to conceal the material, lose their sensational flavour.
- 42. Mr Roberts-Smith's evidence concerning his failure to discover the material on the USBs through inadvertence¹²⁹⁴ should be accepted. The Respondents' complaints that they were deprived of relevant material in this litigation and/or that Mr Roberts-Smith was in possession of classified information ring hollow when they came into possession of the material in or about March 2021 and promptly put some of these images to air on 60 Minutes.¹²⁹⁵
- 43. At RS Section XIII [150] after making a deal of noise about this issue during the proceedings, which was the subject of extensive publications by the Respondents whilst the proceedings were on foot, the Respondents finally identify five specific documents from the USBs they say ought to have been discovered. None of those documents are critical to this litigation. There is no rational basis for there to be a suggestion that Mr Roberts-Smith would have had a motive to conceal any one of those documents. As to the five nominated documents:

¹²⁹¹ T6215 L8-27.

¹²⁹² See the emails exchanged on 5 June 2020 at Ex. R112. Mr Roberts-Smith explains that he will pick the children at 3.10pm and that he wanted access from 2.30-3:00 pm. Ms Roberts confirmed she would allow access at 2.30pm.

¹²⁹³ T 2030 L12-23 (ER).

¹²⁹⁴ T322 L1-9; T675 L29 - T657 L8 (BRS).

¹²⁹⁵ See Ex. A76 (60 Minutes video 11 April 2021) and Ex. A77 (transcript of 60 Minutes program 11 April 2021). See especially p. 3 L4-11.

- (a) Four of them (Exs. R42, R135, R167 and R200) are photographs taken on days in 2012 that are not the subject of any allegations in the litigation. None of them were captured by a discovery category. Perhaps the highest it rises for the Respondents is that Ex. R-42 is alleged to contain a photograph of Person 12 on 5 October 2012. However, this document was not captured by a discovery category.¹²⁹⁶ This became one of a large number of disputed photographs allegedly depicting Person 12. In any event, there was no issue that Mr Roberts-Smith himself could not recognise Person 12.
- (b) The fifth is a photograph taken from the helicopter at Chenartu on 12 October 2012 (Ex. R39). There is no active dispute about the geography or landscape on that mission.
44. To similar effect RS Section XIII [112] contains a complaint about the failure to discover four documents in 2019 (in addition to the USBs). The four documents are communications with Persons 5 and 29 in 2018-2019. The Respondents allege these documents evidence collusion between Mr Roberts-Smith and the witnesses and this topic is discussed in a section below. However, for present purposes none of the content of these documents or their attachments is even remotely damaging to the Applicant's case on Afghanistan. He had no motive to conceal a map or a photo of W108 – or a video of a bomb being dropped. Mr Roberts-Smith's evidence about his insufficient understanding of the process should be accepted in preference to allegations of dishonesty in the absence of a motive to conceal.¹²⁹⁷
45. At RS Section XIII [145] Mr Roberts-Smith is challenged as to his disposal of the laptop onto which he had transferred the contents of the USBs in or about April 2021. His evidence was that before the disposal of the laptop he had transferred all of the material into another USB which he had provided to his lawyers.¹²⁹⁸ He understood that he acted in compliance with his obligations. In those circumstances the fact that he proceeded with previous plans to discard and "wipe" his existing laptop and then replace it¹²⁹⁹ is not a matter which affects his credit. This is particularly the case given that Mr Roberts-Smith was aware that the Respondents had been provided with copies of the USBs, which was apparent from the 60 Minutes program broadcast 11 April 2021.¹³⁰⁰ Mr Roberts-Smith resisted any suggestion that there had been anything novel or unusual in the manner in which he had "wiped" his laptop.¹³⁰¹

Alleged failure to discovery documents concerning Person 17

46. In the strict sense, the answer to the Respondents' complaint about the failure to discover documents concerning Person 17 is the fact that the documents about which the Respondents' complain, were not captured by discovery category.¹³⁰² However, the material below addresses in any event the suggestion that the Applicant attempted to conceal the material.
47. Mr Roberts-Smith's evidence was that following Person 17's visit to the house on 6 April 2018, his ex-wife asked that he delete all of the photographs he had in his possession concerning Person 17. He then did as she asked.¹³⁰³ In cross-examination Mr Roberts-Smith was shown an email chain dated 17 August 2018 which became Ex. R75. Ex. R75 consists of an email from Mr Roberts-Smith's account to his then wife's account at 1.56pm on that day attaching a photograph of the valium in Person 17's

¹²⁹⁶ Ex R43 Tab 19

¹²⁹⁷ T671 L19-25 (BRS).

¹²⁹⁸ T684 L22-38; T687 L18-28 (BRS).

¹²⁹⁹ T323 L12-34; T684 L40-42 (BRS).

¹³⁰⁰ T684 L43 - T685 L2 (BRS).

¹³⁰¹ T687 L1-11 (BRS).

¹³⁰² Ex R43 Tab 19

¹³⁰³ T821 L19-23 (BRS),

bag taken on the evening of 28 March 2018. At 2.06pm the email was forwarded by Ms Roberts to Ms Scott. It was put to Mr Roberts-Smith in cross-examination that Mr Roberts-Smith himself had sent this email. He denied this and explained that it was his then wife who had located the images of Person 17 in his deleted items folder.¹³⁰⁴ His evidence was further that his then wife would routinely take photographs of his deleted items and send them to Ms Scott. He also expressed the view that such documents assisted his case and he would never have attempted to conceal them.¹³⁰⁵

48. In chief Ms Roberts gave evidence that her then husband had emailed her the photographs of the valium packet and Person 17's diary. Her evidence was that Mr Roberts-Smith "*told me that he wanted to keep them in case we ever needed them.*"¹³⁰⁶
49. Ex. A255 (last two pages) includes a message from Ms Roberts to Ms Scott dated 27 April 2018, produced on subpoena by Ms Scott. The message contained various images including images of Person 17 in bed with an icepack on the evening of 28 March 2018. Ms Roberts agreed these were images she had taken from Mr Roberts Smith's deleted items folder on his laptop.¹³⁰⁷ When asked whether she had taken the photographs and sent them to Ms Scott without the knowledge of Mr Roberts-Smith, Ms Roberts said "*I don't know if he knew.*" That evidence should not be accepted. It is plain that the photographs taken from the "deleted items" folder were taken in a clandestine fashion. Further, this evidence corroborates Mr Roberts-Smith's claim that he had in fact deleted items at his ex-wife's request shortly after 6 April 2018. RS Section XIII [94] p. 258 contains a submission that it is "*fanciful*" to suggest that in August 2018, Ms Roberts secretly accessed Mr Roberts-Smith's emails, searched through his deleted items and decided to preserve particular images by sending them to Ms Scott. Yet that is precisely what she had done in April 2018.
50. Ex. A256 was a collection of four emails all from 17 August 2018. When considered collectively, these emails put the individual email which is Ex. R75 in a different light. The emails show that between 1.55pm and 1.58pm, four emails were sent from Mr Roberts-Smith's account to Ms Roberts' account. They attached images of the valium packet, the diary and an image of a text message sent by Person 17 on 6 April 2018.¹³⁰⁸ From 2.05-2.07pm those same four emails were forwarded from Ms Roberts' account to Ms Scott's account. That time frame suggested this activity was likely to be the result of the industry of a single person. Although she denied this,¹³⁰⁹ the plausible candidate is Ms Roberts.
51. Once again, the absence of Ms Scott – who received the message containing the deleted items on 27 April 2018 and the four emails with attached images of 17 August 2018, and would presumably have discussed those communications with Ms Roberts – is telling. The Court should not assume that her evidence would have assisted the Respondents.
52. None of this material impacts adversely on Mr Roberts-Smith's credit. Every one of the disputed images (being the images of Person 17 in bed with the icepack, the images of the valium packet, the images of the diary and the 6 April 2018 message from Person 17) are images that he tendered or attempted to tender in these proceedings. In advancing their submission, the Respondents have overlooked the fact that the three images of Person 17 and the images of her diary were annexed to Mr Roberts-Smith's Outline of Evidence in Reply. In those circumstances, it is illogical and plainly wrong to assert that there was an attempt to conceal the material. Indeed, objections were made to

¹³⁰⁴ T819 L19-41 (BRS).

¹³⁰⁵ T820 L14-20 (BRS).

¹³⁰⁶ T1948 L40 – T1949 L12 (ER).

¹³⁰⁷ 2009 L30-44 (ER).

¹³⁰⁸ See pp. 129-130 of Ex. A150 for the 6 April message.

¹³⁰⁹ T2035 L5-13 (ER).

questions on the diary and to the attempted admission of the diary into evidence.¹³¹⁰ The idea that Mr Roberts-Smith would have attempted to hide the fact that he had a photograph of the diary note is highly improbable and unsupported by the evidence. The same goes for the valium packet and the 6 April 2018 message chain (which was widely circulated and produced on subpoena by the AFP and Person 17 early in the proceedings). The evidence of his ex-wife and the documents produced by Ms Scott on subpoena only supported Mr Roberts-Smith's position. The submission at RS Section XIII [94] that Mr Roberts-Smith sought "*to preserve material that he considered might be useful against Person 17 but that he did not want to discover*" strains credulity. The Respondents cannot have it both ways.

53. Complaint is also made at RS Section XIII [137] and [140] about the failure to produce the video of Person 17 outside the Greenslopes Hospital until 2021. Again, the video was not captured by a discovery category.¹³¹¹ That same video had been emailed by John McLeod to Danielle Scott in October 2018.¹³¹² Ms Scott was also handling the USBs on, and possibly from, 16 March 2016. She did not give evidence and the Court should assume that her evidence on this issue would not assist the Respondents. In addition, Person 17 had become aware of the video on the day it was made.¹³¹³ It is improbable that Mr Roberts-Smith would have deliberately attempted to conceal a video when its existence was widely known, including by witnesses appearing for the Respondents in these proceedings.

John McLeod

54. Two of the chief credit attacks on Mr Roberts-Smith involve Mr McLeod. The first concerns correspondence sent by Mr McLeod in late 2017 concerning person 6. The second concerns the letter sent to Person 18 in June 2018.

Late 2017 Correspondence Referring to Person 6

55. Mr Roberts-Smith is attacked for providing material to McLeod containing allegations concerning Person 6. The allegations concerned the smuggling of unregistered guns from Australia into Afghanistan in 2012. Mr Roberts-Smith agreed he advised McLeod of the allegations and provided him with a document in bullet point form summarizing the allegations.¹³¹⁴ McLeod sent that material in the form of anonymous letters to the AFP Commissioner Colvin, Nick Xenophon MP and a journalist Andrew Burrell. At approximately the same time Mr Roberts-Smith's own lawyers sent a letter to Mr McKenzie providing similar information concerning Person 6.¹³¹⁵
56. Mr Roberts-Smith disputed authorship of a small part of the documentary material.¹³¹⁶ He agreed that he expected McLeod to pass the information to his contacts in the AFP and that this was "*fine with me*".¹³¹⁷ He denied knowing it would be sent to Mr Colvin the Commissioner.¹³¹⁸ According to McLeod, Mr Roberts-Smith had asked him to get the allegations investigated.¹³¹⁹ Consistent with Mr

¹³¹⁰ T274 L23-38 (BRS); T 4210 (P17).

¹³¹¹ Ex R43 Tab 19

¹³¹² Ex. A265 (see 20 October entries).

¹³¹³ T4034 L24-44 (P17).

¹³¹⁴ T589 L26-36; T 590 L30-38 (BRS). See also Ex. R43 Tab 1.

¹³¹⁵ Ex. R43 Tab 2 (Letter of 18 October 2017).

¹³¹⁶ T590 L39-48 (BRS); Ex. R43 Tab 1 (last bullet point on page 4 disputed); T2412 L8-9, T2470 L38 - T2471 L15 (JM).

¹³¹⁷ T589 L38-41 (BRS).

¹³¹⁸ T592 L1-14 (BRS).

¹³¹⁹ T2410 L20-24 (JM).

Roberts-Smith's evidence, McLeod did not recall Mr Roberts-Smith directing him to send anything to Commissioner Colvin.¹³²⁰

57. This matter simply does not speak to Mr Roberts-Smith's credit. In particular, there is no evidence that Mr Roberts-Smith's belief about the allegations concerning Person 6 was dishonest.¹³²¹ The mere fact that charges were not laid against Person 6 says nothing about Mr Roberts-Smith's knowledge and understanding of the allegations. There was nothing wrong with him handing this material to McLeod on the understanding it would be provided to the proper authorities. RS Section XIII [10] complains that Mr Roberts-Smith had an intention that Person 6 should be investigated. That purpose in and of itself would hardly be improper. Mr Roberts-Smith did not take this step until it had become plain that Person 6 was briefing the media against him.¹³²² There is an abundance of evidence, including from the Respondents' witnesses, that Person 6 hated Mr Roberts-Smith and had been attempting to influence others with his negative views of Mr Roberts-Smith.¹³²³ Person 6 did not give evidence in these proceedings despite his close relationship with the Respondents. It may be assumed that whatever he might have said about this affair would not have assisted the Respondents' case.

Letter Sent to Person 18

58. On or about 12 June 2018 Person 18 received an anonymous letter in the mail at the squadron pigeonhole.¹³²⁴ On 14 June 2018 Person 18 received an identical anonymous letter, also in the mail.¹³²⁵ The content was as follows:¹³²⁶

You and others have worked together to spread lies and rumours to the media and the IGADF inquiry. You have one chance to save yourself. You must approach the inquiry and admit that you have colluded with others to spread these rumours and lies about certain individuals or you will become their focus. We are very aware of your murderous actions over many tours in Afghanistan and we have specific mission details, dates and witnesses who now are willing to expose you to the authorities so you are criminally investigated. Just like when you participated in the execution of 2 PUCs from the Taliban's makeshift medical compound following the battle in Tizak. You know what you have done and so do we. Approach the inquiry and admit to working with others to concoct lies about other SAS members. You have until the end of the month to tell them the truth, and don't ignore this because it will not go away. You will go down. Better to take a reprimand than murder charges

A friend of the regiment

59. The Respondents' case is that Mr Roberts-Smith authored this letter and directed John McLeod to send the letter, which he did so from a post box in Tweed Heads. The allegation depends entirely on the evidence of Mr McLeod and to a lesser extent on the evidence of Ms Roberts (who alleges that Mr Roberts-Smith in effect made a confession to her).
60. Mr McLeod's version is that Mr Roberts-Smith met him at a Bunnings store in North Lakes in 2018. Mr Roberts-Smith had a blue folder in his hand. He said to Mr McLeod "I'm under the pump. Can you post these for me?"¹³²⁷ Mr Roberts-Smith handed McLeod the blue folder which contained four

¹³²⁰ T2410 L20-38 (JM).

¹³²¹ T596 L16-19; T597 L 36-40 (BRS).

¹³²² T595 L11-16 (BRS).

¹³²³ See for instance T1276 L3-7 (P41), T3054 L24-43 (P18), T3471 L32 (P24), T3197 L42-46, T4595 L26-27 (P10), Ex. A51

¹³²⁴ T3027 L10-27 (P18).

¹³²⁵ T3028 L16-2 (P18).

¹³²⁶ Ex. R133; T3027 L36-41 (P18), T3234 L18-30 (P18), T3235 L42 - T3236 L41 (P18).

¹³²⁷ T2412 L16-22 (JM).

envelopes and two scraps of paper containing names, ranks and a place for an address to be inserted. He advised that the names of the recipients were inside the folder and that he would call McLeod that night to provide the addresses.¹³²⁸ According to McLeod Mr Roberts-Smith rang him that night and provided two addresses (being post office boxes) and told him not to post two of the four envelopes.¹³²⁹ Mr Roberts-Smith directed him to post the letters for Person 18, but to throw away the letters intended for Person 1.¹³³⁰ McLeod then wrote the names and addresses on two of the envelopes.¹³³¹ He says that despite being asked to throw out the other two envelopes he retained them in his office.¹³³² The next day he posted the two envelopes addressed to Person 18 from Tweeds Head.¹³³³ Mr McLeod alleges that about ten days later, after articles had appeared in the press discussing the anonymous letters, that he and Mr Roberts-Smith had a confrontation in Brisbane.¹³³⁴

61. Mr McLeod identified the envelopes he posted and retained, as well as the scraps of papers with names appearing on them, as the documents appearing in Tab 7 of Ex. R43.¹³³⁵
62. According to Ms Roberts, in the course of a conversation concerning media articles about regiment members being sent letters in the mail, Mr Roberts-Smith told her he had written the letters, printed them at the Seven office, sealed them in envelopes (using stamps from her drawer) and given them to McLeod to post.¹³³⁶ She also said that Mr Roberts-Smith had asked her “*what the PO Box was for the regiment*”.¹³³⁷ Mr Roberts-Smith also asked her to check how the mail system worked with Ms Scott.¹³³⁸ Ms Roberts also claimed that in the week prior to the publication of the articles concerning the letters, she had seen Mr Roberts-Smith come through the door with a plastic bag containing Reflex paper, and packets of envelopes and gloves.¹³³⁹
63. Mr McLeod is a liar and a fantasist and his evidence cannot be relied upon. The matters reflecting adversely on his credit include the following:
 - (a) In the messages McLeod exchanged with Ms Scott in October 2018 he claimed to have “*techs*” and “*computer nerds*” working for him.¹³⁴⁰ At one stage, describing the filming at Greenslopes Hospital on 6 March 2018, he said “*I and 2 others that work for me sat off the clinic for 6 hours.*” Mr McLeod agreed that statement was untrue. However, he said he had “no idea” as to why he said this.¹³⁴¹ That evidence was dishonest and should not be accepted. He was plainly exaggerating the scope of his private investigative business.
 - (b) Later when asked about the truth of the statement “*I’m sending the techs home. My need some sleep. They know how to charge*”, McLeod claimed “*That could be in relation to a problem I had with my computer at home.*” That evidence was also dishonest and should not be

¹³²⁸ T2417 L16-19; T 2418 L29-33 (JM).

¹³²⁹ T2417 L23-43; T 2418 L11-12 (JM).

¹³³⁰ T2418 L1-5; L14-15. (JM)

¹³³¹ T2418 L18-22 (JM).

¹³³² T2418 L 26-27; L35-40 (JM).

¹³³³ T2419 L1-19 (JM).

¹³³⁴ T2420 L41 - T 2421 L32 (JM).

¹³³⁵ T2419 L21 - T 2420 L27 (JM).

¹³³⁶ T1957 L1-29; T 1958 L21-22 (ER).

¹³³⁷ T1957 L45 - T 1958 L2 (ER).

¹³³⁸ T1958 L12-16 (ER). The Applicant’s evidence was this discussion occurred in August 2018 and related to an attempt to ascertain whether Person 17 was responsible for the sending of the anonymous letter which is Ex. A34.

¹³³⁹ T1958 L31-34 (ER).

¹³⁴⁰ Ex. A265 p. 1 (message at 19.26), p. 2 (messages at 20.50, 21.01 and 21.48).

¹³⁴¹ T2427 L25-3 (JM).

accepted.¹³⁴² Mr McLeod was once again pretending to Ms Scott to operate some kind of larger business.

- (c) Mr McLeod claimed to have “*pretended to be a bartender to listen to the conversations that were happening and report back to Ben*” at a function for Channel Seven staff at Mr Roberts-Smith’s home on the Sunshine Coast. Later when asked what he did to pretend, he replied “*I dressed in white. I put black pants on and I stood behind the bar and served the Channel Seven guests alcohol all night.*” It was then put to Mr McLeod that he actually was a bartender to which he replied, “*An average one.*” This is an example of McLeod’s grandiose imagination at work. On his original account he is some sort of glorified espionage agent but when pressed it turns out he was really the person engaged to pour drinks at a function.
- (d) According to Mr McLeod, on the day before she was due to leave the former marital home, Ms Roberts threw Mr Roberts-Smith’s uniforms and military equipment outside in the rain.¹³⁴³ McLeod claimed to have retrieved Mr Roberts-Smith’s uniforms and equipment and retained them at his home in trust for Mr Roberts-Smith’s daughter’s. That claim was nonsensical in circumstances where on his own evidence he had not seen Mr Roberts-Smith since mid 2018 and had not seen Mr Roberts-Smith’s ex-wife since approximately April or May 2021.¹³⁴⁴ There was and is no rational possibility of him seeing Mr Roberts-Smith’s children again. This is not just a matter which goes to McLeod’s honesty. It also demonstrates that he has some kind of peculiar obsession with Mr Roberts-Smith. This matter underscores McLeod’s tendency to self-aggrandise and exaggerate his connections to, and involvement in the lives, of powerful or well-known people.
- (e) McLeod also pretended a degree of familiarity with Mr Kerry Stokes, including by using his first name. In his evidence he described Mr Stokes as “*a stand up bloke. He looks after, he backs his people.*”¹³⁴⁵ At another point in his evidence McLeod said that, as at April 2021, “*I was worried about Kerry.*”¹³⁴⁶ Various messages that McLeod exchanged with Ms Scott also suggested McLeod’s familiarity and personal connection with Mr Stokes.¹³⁴⁷ However ultimately McLeod admitted that he had never even met Mr Stokes. He had intended or hoped to work for him on two occasions but had never actually done so.¹³⁴⁸
- (f) In or about March 2021, McLeod’s legal representatives contacted the Respondents and he met with Minter Ellison.¹³⁴⁹ By about this time McLeod’s messages with Ms Scott point to his hatred of Mr Roberts-Smith. He calls Mr Roberts-Smith “*a psycho*” and says, “*How many lives has this prick fucked up!!!*”¹³⁵⁰
- (g) McLeod’s evidence was that he did not recall watching the 60 Minutes program on 11 April 2021.¹³⁵¹ This evidence strained credulity when the program had been broadcast just 10 months before Mr McLeod gave evidence and where it clearly referred to his allegations and called him

¹³⁴² T2430 L1-15; T2439 L5-12 (JM).

¹³⁴³ T2442 - T2443 L19 (JM).

¹³⁴⁴ T2421 L34 ; T2470 L4-12 (JM).

¹³⁴⁵ T2464 L30-33 (JM).

¹³⁴⁶ T2465 L8-11 (JM).

¹³⁴⁷ Ex. A265 p. 11 (two 11 April messages at 22.06, 12 April 21 messages at 11.23 and 11.41, 22 April 21 message at 08.12).

¹³⁴⁸ T2466 L46 - T2467 L12 (JM).

¹³⁴⁹ T2444 L33-40 ; T2445 L24-26 (JM).

¹³⁵⁰ Ex. A265 p. 10 (16 March 21 message at 21.36, 17 March 21 message at 20.56).

¹³⁵¹ T2452 L5-13 (JM).

an “associate” and a “mysterious person”.¹³⁵² Later Mr McLeod conceded he had “seen bits and pieces” and that “I think I recorded it.”¹³⁵³

- (h) On 11 April 2021, the evening the 60 Minutes program was broadcast, Ex. A85 p.10 contains the following message exchange between McLeod and Ms Scott from 22.02 to 22.10 that evening.

Scott “U good?”

McLeod “they will come for me”

Scott “referred to as “an associate””

McLeod “Do you think it was enough to wake Kerry?”

Scott “Not sure, hope so.”

McLeod “Kerry is stoic, if not sure it wont be enough.”

- (i) McLeod claimed in evidence that the “they” in the message “they will come for me” meant Mr Roberts-Smith (individually).¹³⁵⁴ That evidence ought not to be accepted and is inconsistent with the plain meaning of the sentence.
- (j) McLeod further gave evidence that when he read Scott’s message “referred to as an ‘associate’” at the time, he did not know she was speaking about 60 Minutes. Again, that evidence is completely implausible and ought not to be accepted.¹³⁵⁵ That is how McLeod had been referred to in the program.
- (k) When initially asked about the identity of the “Kerry” referred to in these messages McLeod replied “I don’t recall.” This was not honest evidence. When prompted he agreed that it “appears to be the case” that the Kerry referred to is Mr Kerry Stokes.¹³⁵⁶ McLeod further denied that in this message he was expressing his desire for Mr Stokes to withdraw his support for Mr Roberts-Smith. That evidence is again inconsistent with the plain meaning of the words McLeod used.
- (l) According to McLeod he had no idea of how Channel Nine got hold of the information about the things he had done in relation to the envelopes and the letter to Mr Colvin concerning Person 6.¹³⁵⁷ This is despite the fact that he had just spoken to Minter Ellison on or about 24 March 2021. The evidence should not be accepted. The only plausible way in which his allegations could have reached 60 Minutes is via Minter Ellison or Ms Scott or Ms Roberts. The overwhelming probability is that he knew how this had occurred but wishes to paint himself as distant from the 60 Minutes program in the witness box.

¹³⁵² Ex. A77 pp. 10-11 of 12.

¹³⁵³ T2453 L29-33 (JM).

¹³⁵⁴ T2462 L10-27 (JM).

¹³⁵⁵ T2462 L28 - T 2463 L9 (JM).

¹³⁵⁶ T2449 L17-30 (JM).

¹³⁵⁷ T2463 L39-41 (JM).

- (m) McLeod gave evidence that when he sent his message “*I need to get out of town*” to Ms Scott on 12 April 2021, that he was worried about “*being shot in the head*”. He affirmed that was his serious suggestion.¹³⁵⁸ This is another example of his tendency to exaggerate and fantasise.
64. McLeod’s allegation concerning the letters addressed to Person 18 also suffers from critical implausibilities:
- (a) He gave no evidence explaining the addresses (for Person 18) allegedly provided by Mr Roberts-Smith. Ms Roberts said Mr Roberts-Smith had asked her for the Regiment PO Box. Counsel for the Respondents put to Mr Roberts-Smith that the two addresses were Campbell Barracks and a PO Box in Claremont. There would simply be no reason for Mr Roberts-Smith to go through all his elaborate subterfuge in providing the envelopes and scraps of paper to McLeod to only then provide him with obvious, in one case publicly available, addresses. The critical difficulty with the Respondents’ position is exposed at RS Section XIII [56]-[57]. RS Section XIII [56] states that later, on the same day as meeting McLeod, Ms Roberts gave him the two addresses. RS Section XIII [57] submits that later that night, Mr Roberts-Smith called McLeod with the addresses. If the addresses had been obtainable so easily from Mr Roberts-Smith’s wife, Mr McLeod’s whole story about the pieces of paper simply makes no sense.
- (b) According to McLeod, Mr Roberts-Smith had already bought envelopes and stamps and filled in names on pieces of paper. The suggestion that he would have described himself as “*under the pump*” and indicated he didn’t have time to post the letter is not plausible. Furthermore, if Mr Roberts-Smith had actually engaged McLeod to assist, then it would have been McLeod buying envelopes and stamps – bearing in mind he had been performing odd jobs for Mr Roberts-Smith and his wife for years.
- (c) As at June 2018, Mr Roberts-Smith had no reason to apprehend that Person 18’s evidence to the IGADF would be a particular threat to him. RS Section XIII [27] and RS Section XIII [47] complain about Mr Roberts-Smith’s failure to disclose that Person 5 had said to Mr Roberts-Smith, in a telephone call more than a month earlier, that he had seen Person 18 being interviewed by the IGADF. The criticism is unfair. The allegation was not put to Mr Roberts-Smith and his memory of a telephone call approximately three years before he gave evidence was undoubtedly imperfect. Even if Mr Roberts-Smith had become aware that Person 18, like many other soldiers, was giving evidence to the IGADF, he had no reason to believe that Person 18 (as distinct from Persons 6 or 7) was a person making serious allegations against him.
65. As to Ms Roberts’ allegations, Mr Roberts-Smith relies on the submissions dealing with the separation, the USBs and the separate section addressing the credit of Ms Roberts. She ought not to be believed on matters of this kind. In addition, there is an obvious contradiction between her claim on the one hand that Mr Roberts-Smith brought Reflex paper home (with the gloves and the envelopes) and on the other hand, that he printed the letters at work.
66. In the circumstances the Court should accept Mr Roberts-Smith’s version of events, being that he only provided six names on pieces of paper (and no envelopes or letters) to Mr McLeod. This was so McLeod, who held himself out as a private investigator, could track down the home addresses of the men. Mr Roberts-Smith’s aim was to use this information to assist in briefing a private investigator in WA to check if those men were leaking to the media.¹³⁵⁹ Mr Roberts-Smith’s version is supported by:

¹³⁵⁸ T2465 L35-41; T2466 L20-28 (JM).

¹³⁵⁹ T297 L1 – T 298 L41 ; T 313 L15-24 (BRS).

- (a) his evidence that previous attempts to address media links via the chain of command had been unsuccessful. He only elected to engage McLeod with the aim of briefing additional private investigators once those steps had failed;¹³⁶⁰ and
- (b) the draft letter he prepared in or about June 2018 addressed to Person 28 concerning his complaints about SAS members (especially Person 6) speaking to the media (and calling for an investigation) and the alternative letter actually sent by his solicitors to the Wing Commander on 21 June 2018.¹³⁶¹

67. RS Section XIII [66] and [67] suggest that there is no other plausible candidate for the sending of the letters other than Mr Roberts-Smith because there is no evidence any other person held animus to Persons 1 or 18. With respect, this completely ignores the burden which the Respondents have to establish that it was Mr Roberts-Smith who was responsible for sending the letters. In respect of Person 18, there were persons who were aware that he was attending or had attended an interview with the IGADF. There has been no exploration by the Respondents as to whether those persons informed anybody about Person 18's attendance before the IGADF. Further, and aligned to this, there is no evidence before this Court as to what evidence Person 18 provided to the IGADF and whether there were persons he named at the IGADF who may have become aware of his evidence to the IGADF. These persons would clearly have a motive to send a letter or letters to Person 18.

C. THE CREDIT OF MS ROBERTS

68. Much of the Respondents attack on Mr Roberts-Smith's credit is based upon the evidence of his ex-wife. The sections of these submissions dealing with the issues of the separation and the alleged events concerning the disputed USBs on 16 March and 5 June 2018 already contain adverse submissions concerning the credit of Ms Roberts including for instance her evidence in these proceedings that she was willing to propound Outlines of Evidence that were materially false. However, Mr Roberts-Smith raises additional matters which bear on Ms Roberts credit and her attitude to Mr Roberts-Smith.

69. The messages exchanged between Ms Roberts and Ms Scott contained frequent and strong abuse of Mr Roberts-Smith over a sustained period of time.¹³⁶² However in the period from approximately November 2020 to April 2021 there is evidence of a sustained course of conduct which not only reveals Ms Roberts' malice to Mr Roberts-Smith but also reflects adversely on her honesty:

- (a) On 9 November 2020 Ms Roberts mediated her family law dispute with her husband. On that day she sent a message to Ms Scott "*just ran into the cunt at the coffee shop.*"¹³⁶³
- (b) On 30 November 2020 Ms Roberts engaged in the following exchange with Ms Scott:¹³⁶⁴

DS So I reckon we put our heads together and we get you as financially sufficient in the next 2-3 years as possible

DS Then it doesn't matter what happens to him or what jail cell he rots in

ER Yes (prayer emoji)

ER (laughing emojis)

¹³⁶⁰ T293 L3-48 (BRS).

¹³⁶¹ Ex. A33; Ex. R43 Tab 8; T 313 L35 - T 314 L22 (BRS).

¹³⁶² Ex. A261 pp. 32, 44, 49, 58, 123 and 160; T 1989-1991 (ER).

¹³⁶³ T2057 L39 - T2058 L1; Ex. A261 p. 162 (ER).

¹³⁶⁴ Ex. A261 p. 168.

ER He won't go to jail

DS Yeah I don't think he will either but itll be destroyed

ER Because hes a lying cheating cunt human

DS Yes and you can't run away from that ship forever

ER Nup

ER: # titanic

Ms Roberts, confronted with this rather unpleasant exchange, denied that the prayer emoji referred to her desire for Mr Roberts-Smith to go to jail. Instead, she said it indicated her desire to be financially set up. That construction is untenable on the face of the exchange. Ms Roberts denied hating her husband,¹³⁶⁵ but the extent of her feelings is exposed by this and other messages in which vile language was used to describe her husband. The Court will bear in mind that according to McLeod and as discussed above, Ms Roberts threw her ex-husband's uniforms and equipment out into the rain prior to her moving from the marital home.

- (c) In or about early December 2020, Ms Roberts and Ms Scott were reviewing the material on the DVDs belonging to Mr Roberts-Smith they had secretly copied earlier that year. Ms Roberts agreed that Ms Scott sent her multiple images at this time and that she knew many of the images depicted soldiers drinking from the prosthetic leg.¹³⁶⁶ Either she or Ms Scott circled images in a joint endeavour to identify the soldiers giving evidence on behalf Mr Roberts-Smith.¹³⁶⁷ Ms Roberts denied that the purpose of this was to provide information to Mr McKenzie or the media¹³⁶⁸ but on its face it is difficult to discern any other purpose. Ms Scott did not give evidence and it may be assumed her evidence would not have assisted the Respondents.
- (d) On 23 February 2021, Ms Roberts signed her financial agreement under family law legislation with Mr Roberts-Smith.¹³⁶⁹ Shortly after this time, she invited Mr McKenzie into her home for a (voluntary) meeting. Ms Scott and Minter Ellison employees were also present.¹³⁷⁰ Ms Roberts denied providing the USBs to the Respondents.¹³⁷¹ She also denied providing any of the information contained in the 60 Minutes broadcast on 11 April 2021 to the Respondents or their lawyers (including for instance the story of the USBs being buried in the garden).¹³⁷²

Ms Roberts' evidence was to the effect that she did not know whether Ms Scott provided the USB to the Respondents or Minter Ellison, or whether Ms Scott provided them with the information that was broadcast.¹³⁷³ She was unsure about whether Ms Scott said anything in the meeting with McKenzie and Minter Ellison about the burial of the USBs, despite being present herself.¹³⁷⁴ When asked whether she had any real recollection of what Ms Scott said in the meeting Ms Roberts replied "*It was – it was a very emotional day.*"¹³⁷⁵ In circumstances where

¹³⁶⁵ T2059 L38-45 (ER).

¹³⁶⁶ T2060 L21-36 (ER). See also Ex. A290

¹³⁶⁷ T2060 L38 - T2061 L3; T2061 L34 - T2063 L41 (ER); Ex. A261 pp. 169-173, Ex A 290

¹³⁶⁸ T2061 L23-25; T2063 L43-45 (ER).

¹³⁶⁹ T2064 L1-7 (ER).

¹³⁷⁰ T1978 L3-5, 16-18; T2064 L9-17 (ER).

¹³⁷¹ T2064 L16-18; T2068 L28-30 (ER).

¹³⁷² T2066 L10-11, 29-30; T2067 L16; T2077 L26-43; T2078 L33 (ER).

¹³⁷³ T2064 L20; T2066 L32-35; T2067 L43 - T2068 L6 (ER).

¹³⁷⁴ T2078 L26-43 (ER).

¹³⁷⁵ T2080 L30-32 (ER).

Ms Scott did not give evidence, Ms Roberts' evidence is highly implausible. This was in essence Ms Roberts' own story involving her home and her soon to be ex-husband. The idea that Ms Scott provided the USBs and the information without the knowledge and approval of Ms Roberts is farfetched.

70. The pattern of events suggests that Ms Roberts surreptitiously retained the USBs, waiting for her opportunity. She waited until her financial agreement was signed and then entered enthusiastically into the Respondents' camp, even to the extent of inviting them into her home. She provided them with the USBs and a fabricated, sensational tale about the burial of the USBs in the garden in a pink lunchbox.
71. She must have known this would be aired or published in some way. In fact, Ms Roberts' story appeared in lurid form on the 60 Minutes program. It is in this way that Ms Roberts exacted her revenge and her messages with Ms Scott leave no doubt as to her true feelings. In those circumstances, allegations by Ms Roberts against her ex-husband should not be believed unless she is corroborated by other documents and oral evidence.
72. The issue of Ms Roberts' and Ms Scott's access to Mr Roberts-Smith's email stored within the RS Group account emails is also troubling:
 - (a) Ms Roberts gave evidence in chief that she had not accessed Mr Roberts-Smith's RS Group email account at any time after 20 January 2020 (the date of the separation).¹³⁷⁶ She agreed in cross-examination that this evidence was incorrect and that she had in fact accessed his account for a "*private matter*". Her evidence that she was "*confused*" by the questioning in chief should not be accepted. It was not ambiguous and the issue of Ms Roberts' access to this account had been canvassed extensively in separate proceedings.¹³⁷⁷
 - (b) According to Ms Roberts, in April 2018, in response to a communication from Person 17 there followed a conversation between herself, Mr Roberts-Smith and Ms Scott. Person 17 had requested that Mr Roberts-Smith access their joint Gmail account. Ms Roberts and Mr Roberts-Smith requested Ms Scott to do this on their behalf. In the course of this discussion, according to Ms Roberts "*Ben gave Danielle on that phone call the password to our company account. He gave her Switzerland 2018, which was the password to the gmail account ... and then gave her our company account password as well.*"¹³⁷⁸ Ms Scott ultimately contacted Person 17 from a private account.¹³⁷⁹

It is utterly implausible that Mr Roberts-Smith would provide Ms Scott with the password to the company email account for the purposes of engaging with Person 17. Either a Gmail account or any other email account would have sufficed (and indeed did suffice). Ms Scott was not called to corroborate this evidence. In any event it is inconceivable that even if such authorisation had been given that it would have extended to a *carte blanche* authority to peruse Mr Roberts-Smith's emails for a number of years thereafter. When it was put to Ms Roberts that Ms Scott's ongoing access was for a different purpose she responded, "*I don't know if he had authorised anything other than that car – trip that day.*"¹³⁸⁰ That evidence is quite disingenuous and Ms Roberts plainly knew that Ms Scott had not been authorised to access Mr Roberts-Smith's emails in 2020-2021.

¹³⁷⁶ T1946 L30-35 (ER).

¹³⁷⁷ T1968 L14 - T 1969 L27 (ER).

¹³⁷⁸ T1947 L16 - T1948 L15 (ER).

¹³⁷⁹ T1948 L18-22 (ER).

¹³⁸⁰ T2044 L29-32 (ER).

- (c) It transpired that Ms Scott had accessed Mr Roberts-Smith's emails within the RS Group account over 100 times from January 2020 to April 2021.¹³⁸¹ Ms Roberts initially claimed she had not known this until the proceedings before Bromwich J in 2021.¹³⁸² That evidence was untrue, as soon became apparent. Subsequently during the cross-examination she said "*I knew she had access and I knew from time to time she was checking yes.*"¹³⁸³ In fact Ms Roberts knew Ms Scott was checking her husband's account on her behalf and they would discuss this not "*very often*".¹³⁸⁴ Eventually she agreed that she had asked Ms Scott to access the emails.¹³⁸⁵ Ms Scott continued to access the emails through to April 2021 even after Ms Roberts and Ms Scott had agreed to give evidence for the Respondents.¹³⁸⁶
- (d) In the proceedings before Bromwich J Ms Roberts swore two affidavits on 9 July 2021 and 19 August 2021. Both contained statements by Ms Roberts that she had not authorised Ms Scott to access Mr Roberts-Smith's RS Group email account.¹³⁸⁷ In neither affidavit did Ms Roberts disclose that she knew that Ms Scott was accessing that email account and from time to time discussing its contents with Ms Roberts. That omission meant both these affidavits were apt to mislead the reader. Ms Roberts' conduct in swearing those affidavits was dishonest.

73. The Court should infer that Ms Roberts provided the password to Mr Roberts-Smith's RS Group email account to Ms Scott and authorised and encouraged her to continue to check the account. Even if that is incorrect, Ms Roberts plainly knew that Ms Scott had no authority to peruse the emails in 2020 and 2021 merely because she had been provided with a password for a limited purpose in April 2018. The Court should find that Ms Roberts misled the Court in her affidavits in the proceedings before Bromwich J and lied about these matters in the course of giving evidence in these proceedings.

D. ALLEGED COLLUSION BETWEEN THE APPLICANT AND PERSONS 5, 11, 29 AND 35

Overview

74. The Respondents allege that Mr Roberts-Smith and certain of his witnesses, particularly Persons 5, 11, 29 and 35, colluded in relation to their evidence before the IGADF and in these proceedings. The allegation is baseless.
75. In relation to the allegation of collusion concerning the IGADF, the Respondents' have absolutely no basis to assert that any of the discussions that took place between Mr Roberts-Smith and any other person impacted upon the evidence which they gave or did not give before the IGADF. Their evidence before the IGADF is not before this Court and there is no proper way upon which this Court could make any assessment or draw any inferences concerning that allegation.
76. The Respondents' submissions ignore the reality that it is not collusion for a number of military colleagues (some retired, some still serving) to discuss their service, particularly when aspects of that service appear in lurid headlines in newspapers as part of articles alleging war crimes. There is no

¹³⁸¹ Ex. A262. See in particular page 24 where at paragraphs a-d and f-I Telstra identifies a series of IP addresses as belonging to Mr Pill, Ms Scott's husband. The supporting data is attached. See for instance Annexure H page 24 which is a business record confirming an email address linked to Mr Phil as attached to one of the IP addresses. The record at p. 8-11 shows access to the account from those IP addresses in North Queensland.

¹³⁸² T1988 L40-41; T2039 L3-7 (ER).

¹³⁸³ T2041 L40-41. See also T 2046 L24 (ER).

¹³⁸⁴ T2043 L1-18 (ER).

¹³⁸⁵ T2048 L15-19 (ER).

¹³⁸⁶ T2049 L18-26 (ER).

¹³⁸⁷ Ex. A260 [at [23]]; Ex. A263 [8], [13], [23], [27] and [28].

evidence that the discussions between and amongst Mr Roberts-Smith and these other persons ever amounted to dishonesty or that any of the persons involved conspired to provide false evidence.

Legal principles

77. The Respondents assert RS Section XIII at [156]-[164] that Mr Roberts-Smith colluded with various witnesses concerning W108, Darwan and Person 12 and, on reliance of *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731 (*Perisher Blue*), the evidence of these witnesses ought to be rejected, given no weight and/or not used as corroboration.
78. The Respondents' reliance on *Perisher Blue* is misplaced. *Perisher Blue* does not stand for the proposition that *all* discussions amongst or between witnesses constitute collusion or that, where there are such discussions, the Court ought to give no weight to the evidence of those witnesses. The latter was accepted by Sheller JA (McColl JA (at [38]) and Windeyer J (at [39]) agreeing): "it is arguable that the various witnesses' credibility could have survived the attack made upon it in reliance on the solicitor's letter and the teleconference" (at [35]). Similarly, in *In the matter of Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789 (which concerned a collusion allegation in circumstances where parts of affidavits were copied, generally word for word, from each other), Black J held that "in some cases, the courts have the view that difficulties of this kind do not render the credit of a witness worthless, although they require care before accepting the evidence of one or other of the witnesses".¹³⁸⁸
79. A "finding of collusion is a serious matter" that "connotes cooperation for an improper purpose". Such a finding has "serious reputational implications for those involved". Thus, there must be "probative evidentiary foundation" before a Court makes a finding of collusion between witnesses.¹³⁸⁹ The notion of collusion encompasses a witness changing "their evidence to make it fit with that of another".¹³⁹⁰
80. In the present matter, there is no probative evidentiary foundation, or any basis for an inference that can reasonably be drawn, for the finding that there was cooperation (for an improper purpose) by Mr Roberts-Smith and each of the witnesses, let alone any discussion to produce a consistent account or "consistent false account" of matters concerning W108 and Darwan (cf. RS Section XIII [158], [162]). There is no evidence that Mr Roberts-Smith adopted some recollection of a particular matter(s) from, for example, Person 5 in respect of the W108 mission (and vice versa) or from Person 11 in respect of Darwan (and vice versa).¹³⁹¹ Nor is there any evidence that any of the witnesses collaborated, cooperated or conspired with one another to make one's evidence fit with another, or to reconstruct or concoct some false account of the events.
81. Instead, the Respondents premise their allegation of contamination and collusion on an illusory juxtaposition between the "early uniformed exchanges on W108" and "detailed recollections each [witness] professed to have on the witness stand starkly illustrates" (RS Section XIII [159]). There is simply no support or foundation for this proposition, particularly in circumstances where the

¹³⁸⁸ Citing *Macquarie Developments Pty Ltd v Forrester* [2005] NSWSC 674 at [89]-[91] (Palmer J); *Rosebanner Pty Ltd v Energy Australia* [2009] NSWSC 43 at [324], [326] (Ward J), *Celermajer Holdings Pty Ltd v Kopas* [2011] NSWSC 40 at [183]-[189] (Ward J) (leave to appeal refused in *Kopas v Celermajer Holdings Pty Ltd* [2012] NSWCA 53).

¹³⁸⁹ *Thompson Healthcare Pty Ltd T/A Thompson Health Care v Adamopoulos* [2017] FWCFCB 6922 at [9] and [23] (DP Gostencnik, DP Colman and Commissioner McKinnon).

¹³⁹⁰ *Celermajer Holdings Pty Ltd v Kopas* [2011] NSWSC 40 at [186] (Ward J).

¹³⁹¹ In *IVI P/L v Baycrown P/L* [2006] QCA 461; [2007] 1 Qd R 428, Jerrard JA distinguished *Perisher Blue* on the basis that there was "no evidence that discussion occurred between witnesses, or that amendments suggested by Mr Moss [one witness] were brought to Mr Gahan's [another witness] attention or otherwise found their way into his statement" (at [57]). Similarly, Wilson J distinguished *Perisher Blue* on the basis, *inter alia*, that there was no evidence of Mr Moss' suggested "corrections" to Mr Gahan's statement or any discussions between the two about Mr Gahan's statement, or whether Mr Gahan's executed statement included Mr Moss' suggested corrections.

conclusion the Respondents urge the Court to find is a “serious matter”. The mere fact that witnesses may have a more detailed subsequent recollection of an event does not speak of reconstruction or collusion to produce a consistent false account. Rather, it is open for the Court to find that there are equally other legitimate and natural reasons (that are far apart from collusion or contamination) for subsequent detailed recollection of events. Human memory is a “fragile vessel” whose “contents can change and evaporate over time”.¹³⁹²

82. Further, the facts of *Perisher Blue* are distinguishable from the present matter. In that case, not only were there discussions amongst the witnesses, there were also:
- (a) a joint telephone conference attended by witnesses, senior members of the defendant (Perisher Blue) and Perisher Blue’s solicitors concerning the evidence each witness was expected to give; and
 - (b) a letter sent by the solicitors to Perisher Blue (copied to the various witnesses) that detailed, for example, possible areas of questioning and suggestions as to appropriate responses that would be in line with the defendant’s case.
83. The joint telephone conference, the subsequent letter, and the discussions amongst the witnesses took place between a few days and about three weeks prior to the commencement of the hearing on 14 July 2003 (which was also about two years after the statement of claim was filed on 12 July 2001).
84. Unlike *Perisher Blue*, the discussions that occurred between Mr Roberts-Smith and the witnesses were with respect to allegations that had already been publicly aired in the media. Some of the discussions occurred *before* the Originating Application and Statement of Claim was filed in this proceeding on 17 August 2018, and not in the weeks or few days before the witnesses were to give evidence or during the course of preparing their affidavits. Further, in *Perisher Blue*, the “process adopted” in that case (which included the joint telephone conference, the letter and discussions amongst witnesses) was “concerned with ensuring that all the witnesses gave evidence which would best serve their employer’s case”. In contrast, none of the discussions, in this matter, between Mr Roberts-Smith and the witnesses were concerned with ensuring that all witnesses gave an account of evidence that would best serve Mr Roberts-Smith’s case.

September 2017-February 2018 Person 11

85. The submission that Person 11 and Mr Roberts-Smith colluded (in the sense of agreeing to propound a consistent and false account) prior to Person 11’s second interview with the IGADF presupposes, wrongly, that Person 11 was notified by the IGADF of the topics that he would be asked about in that interview. While Person 11 initially denied that he had contacted Mr Roberts-Smith prior to attending the IGADF interview, he subsequently qualified that answer by saying that he did not recall any communications with Mr Roberts-Smith about the interview.¹³⁹³ That is unsurprising. See Applicant’s Closed Court Submissions at paragraph G1.

Communications with Person 5 in May to June 2018

86. On 9 May 2018, Ms Roberts forwarded a message to Ms Scott which included the words in relation to Person 5’s IGADF interview: “*He was drilled for hours. Lots of questions about Ben and even to the point of questioning his VC action.*”¹³⁹⁴ In response to a comment by Ms Scott, Ms Roberts also said

¹³⁹² *Ahmadi v Minister for Immigration and Border Protection* [2017] AATA 1086 at [188] (SM Sosso).

¹³⁹³ T5765 L9-10 (P11).

¹³⁹⁴ Ex. R45.

“It’s obvious that someone has said a hell of a lot about Ben. But they also have to be able to prove it.” Mr Roberts-Smith recalled telling his then wife that Person 5 had told him his awards were being questioned again.¹³⁹⁵ Otherwise his evidence was that the statements in the messages reflected the views of his wife.¹³⁹⁶

87. Ms Roberts stated that she did not hear the content of any conversation between Mr Roberts-Smith and Person 5. She remembered nothing more than Mr Roberts-Smith telling her the IGADF was very interested in what Mr Roberts-Smith was doing in Afghanistan and that *“it was obvious someone had said a hell of a lot”* about him.¹³⁹⁷ Mr Roberts-Smith’s version should be preferred for the matters put forward in these submissions dealing with the credit of Ms Roberts, but in any event Ms Roberts’ evidence suggests Person 5 referred to his IGADF interview only at the highest level of generality.
88. There is no evidence that Person 5 in his conversation with Mr Roberts-Smith following his IGADF interview in May 2018 said anything other than in the most general terms about his attendance at the IGADF interview. Person 5 did tell Mr Roberts-Smith that his awards were the subject of question in the IGADF Inquiry. This was something that was already well known by Mr Roberts-Smith. It cannot be rationally suggested that this could or would influence any evidence Mr Roberts-Smith would give to the IGADF Inquiry in relation to rumours of war crimes. It does not speak to the credit of either Person 5 or Mr Roberts-Smith.
89. On 15 June 2018 Person 5 sent Mr Roberts-Smith an email which attached a draft complaint concerning Person 5’s treatment by the IGADF.¹³⁹⁸ Mr Roberts-Smith provided the document to his lawyers.¹³⁹⁹ He had not asked to be provided with the information.¹⁴⁰⁰ Mr Roberts-Smith denied speaking to Person 5 about W108 at this time but agreed they had done so subsequently. He denied the suggestion they had tried to “line up” their evidence.¹⁴⁰¹ This assertion by the Respondents is unfair. It is made in a vacuum because the Respondents, it is assumed, do not know what evidence was given by Person 5 or Mr Roberts-Smith to the IGADF Inquiry. The Respondents are not in a position to assert that any discussions between Person 5 or Mr Roberts-Smith led to them seeking to give evidence before the IGADF Inquiry that was consistent or false. Nor is Mr Roberts-Smith or Person 5 in a position to disclose what evidence each of them gave to the IGADF Inquiry.
90. The Respondents’ focus on the 15 June 2018 letter of Person 5 ignores the totality of the evidence. First, Person 5 made no attempt to conceal his communication of the letter to Mr Roberts-Smith. It was emailed to him. As Person 5 noted, if he had wanted to conceal the fact that he had sent the letter to Mr Roberts-Smith, there were other ways he could have provided the information in the letter to Mr Roberts-Smith. Secondly, the Respondents ignore the fact that by the time Mr Roberts-Smith was first interviewed by the IGADF on 28 and 29 November 2018,¹⁴⁰² the matters complained of had already been published *by them* on 9-10 June 2018. They included detailed allegations about for instance Chora, W108 and Darwan missions. By reason of those publications a substantial amount of the content of the IGADF investigation concerning rumours relating to missions which Mr Roberts-Smith had participated in, had already entered the public domain. There is simply no evidence that Person 5’s complaint influenced Mr Roberts-Smith’s evidence or affected the outcome of the IGADF process or indeed these proceedings in any way. In fact, it was the Respondents who published material that

¹³⁹⁵ T641 L4-6; T642 L11-13 (BRS).

¹³⁹⁶ T641 L23-25 (BRS).

¹³⁹⁷ T1933 L39 - T1934 L4; T1937 L16-38; T2081 L31-33 (ER).

¹³⁹⁸ Ex. R43 Tab 10.

¹³⁹⁹ T624 L4-5 (BRS).

¹⁴⁰⁰ T638 L27; T639 L1-10 (BRS).

¹⁴⁰¹ T625 L8-24 (BRS).

¹⁴⁰² T646 L10 (BRS).

they alleged the IGADF was investigating, who were more likely to contaminate or influence evidence being provided to the IGADF by witnesses.

Legal Advice

91. The Respondents have expended quite a deal of energy in the trial and in their written submissions seeking to cast aspersions on Mr Roberts-Smith, Person 5, Person 11 and Person 35 because Mr Roberts-Smith provided assistance to them to obtain independent legal representation before the IGADF. An essential part of the argument advanced by the Respondents, is that there was something untoward in Person 5, Person 11 and Person 35 not availing themselves of legal representation provided by the Department of Defence. This is a curious suggestion. It is a matter for any citizen to choose his or her lawyer. Person 5, Person 11 and Person 35 cannot be criticised for obtaining independent legal representation instead of lawyers chosen by the Department of Defence.
92. Properly understood, the allegation by the Respondents is serious. In essence, it is that Persons 5, 11 and 35 have deliberately given false evidence before the IGADF and in these proceedings because Mr Roberts-Smith provided assistance to them to obtain independent legal representation. This very serious allegation does not withstand scrutiny. *First*, there is no suggestion that it was an implied or express condition of any assistance that Persons 5, 11 and 35 would provide false testimony to the IGADF or in these proceedings. *Secondly*, Person 5, Person 11 and Person 35 were represented by senior lawyers. There can be no suggestion that these lawyers acted in some manner other than in accordance with their obligations to their clients. *Thirdly*, and in any event, Mr Roberts-Smith is not financially responsible for the fees of the lawyers acting for Persons 5, 11 and 35. Whilst the fees of Person 5, Person 11 and Person 35 were added to Mr Roberts-Smith's loan account with Seven Network (Operations) Limited (SNOL) at the time they were incurred, that was an error. That error has now been reversed.¹⁴⁰³ Mr Roberts-Smith is not financially responsible for their fees. In any case, the payment by a party of the legal expenses of a witness who is seeking independent legal representation, is not unlawful. Without more, it cannot be relevant to an assessment of the credit of a witness.
93. The Court should not draw any adverse inference against Person 5, Person 11 or Person 35 simply because their legal fees have been paid by SNOL and now Australian Capital Equity.
94. The Respondents assert that it was unusual that Persons 5, 11 and 35 were not aware of arrangements concerning the payment of their legal fees. It is not clear what inference they want the Court to draw from that proposition. In this respect, it is to be noted that Person 4 who was represented by Dr Kremer in these proceedings was not aware of who was paying the legal fees of Dr Kremer.
95. The Respondents also contend that Mr Roberts-Smith swore an affidavit on 21 September 2021 which was misleading because a schedule of the loan facility between Mr Roberts-Smith and SNOL contained certain redactions. It is said that the sentence in paragraph 11 of that affidavit contained a deliberate falsehood to conceal references to Addisons law firm who were representing Persons 5, 11 and 35.
96. It is unfair and disingenuous for the Respondents in aid of their contention that there was something unusual in Mr Roberts-Smith providing assistance to Persons 5, 11 and 35 to obtain legal representation, to assert that he swore an affidavit on 21 September 2021 to deliberately conceal that Addisons were representing Persons 5, 11 and 35.

¹⁴⁰³ Ex A-286 and Ex A-288.

97. The affidavit was prepared as part of a claim for privilege by Mr Roberts-Smith and SNOL in relation to documents produced on subpoena by Cato & Clive Partners Pty Ltd and Mr Ross Coulthart. The judgment of Justice Abraham in *Roberts-Smith v Fairfax Media Publications Pty Limited (No.23)* [2021] FCA 1460 sets out the circumstances in which that claim for privilege was made and upheld by this Court. It had nothing to do with what legal fees, if any, were being paid in relation to lawyers acting for witnesses.

Communications in June-July 2018 following publication of the matters complained of

98. Mr Roberts-Smith visited Person 11 in Perth in June 2018, shortly before he was to give evidence before the IGADF. Mr Roberts-Smith recalled that Person 11 was “*in quite a bad state*” and that his wife had told Mr Roberts-Smith he had experienced suicidal ideation.¹⁴⁰⁴ The Respondents’ witness, Ms Roberts, addressed the trip to Perth in her Outline of Evidence and described it as a pre-existing work commitment¹⁴⁰⁵. Mr Roberts-Smith also travelled to Sydney to support Person 11 after his interview with the IGADF.¹⁴⁰⁶ After that interview, Mr Roberts-Smith had dinner with Persons 11 and 29. His evidence was that he did not discuss the content of the interview and that he and Person 29 were present to support him and his wife.¹⁴⁰⁷ Person 11 gave evidence that it was his wife who had organised the dinner and that she had travelled to Sydney with him for support.¹⁴⁰⁸ Person 29 confirmed that Person 11’s wife was present at the dinner.¹⁴⁰⁹ No evidence was adduced to the contrary.

Communications with Mick Keelty and the purchase of Pre-Paid Phones

99. Mr Roberts-Smith agreed that after the 9 June 2018 publications he asked his wife to contact Ms Scott to obtain some prepaid mobiles. Mr Roberts-Smith then used these phones to contact other soldiers. Encrypted messaging apps were installed on the phones.¹⁴¹⁰ He took this precaution because he was worried about the media intercepting his calls. Mr Roberts-Smith specifically referred to the News of the World scandal, that being a notorious affair in the UK where widespread media surveillance of mobile phones had come to light.¹⁴¹¹ Mr Roberts-Smith’s evidence was that the kind of thing he would discuss would be “*where we dropped off, what our route was moving into position, who assaulted which areas of the compound ... whether it was night or day. Just looking basically at what had been written because most of it was wrong and false.*”¹⁴¹² He denied that any part of his purpose in doing this was to avoid detection by the IGADF or law enforcement.¹⁴¹³ Mr Roberts-Smith did not know there was a police investigation into him until the time of the 11 August 2018 publications.¹⁴¹⁴ In cross-examination it was put to Mr Roberts-Smith that Mr Keelty had revealed to him the existence of a police investigation in June 2018. Mr Roberts-Smith denied this¹⁴¹⁵ and no other evidence was adduced to contradict his denial.

¹⁴⁰⁴ T621 L43 - T622 L34 (BRS).

¹⁴⁰⁵ Outline of Evidence filed 5 April 2019 at [9]-[12] and T1983 (ER).

¹⁴⁰⁶ T623 L1-7 (BRS).

¹⁴⁰⁷ T623 L19-24 (BRS).

¹⁴⁰⁸ T5789 L13-15 (P11).

¹⁴⁰⁹ T5565 L38-47 (P29).

¹⁴¹⁰ T615 L41 - T616 L2 (BRS).

¹⁴¹¹ T319 L5-26; T607 L26-30; T619 L42-47 (BRS).

¹⁴¹² T319 L28-34. See also T607 L32-41 (BRS).

¹⁴¹³ T319 L44 - T320 L2; T620 L1-38 (BRS).

¹⁴¹⁴ T320 L4-7 (BRS).

¹⁴¹⁵ T619 L20-36 (BRS).

Alleged Collusion November 2018

100. Mr Roberts-Smith agreed that in or about November 2018 he had been speaking with Person 29 about W108. In particular, they had been trying to locate W108 and 109 on Google Maps and work out the cardinal points. Person 29 forwarded an email to Mr Roberts-Smith referring to this issue on 3 November 2018.¹⁴¹⁶ Mr Roberts-Smith agreed that the position Person 29 suggested for the location of the compounds in his email was incorrect.¹⁴¹⁷
101. This exchange occurred only shortly after the Respondents filed their first set of defences which included the allegations of murder at W108.¹⁴¹⁸ Mr Roberts-Smith's evidence was that his dealings with Person 29 at this time related to the defamation proceedings.¹⁴¹⁹ There is nothing improbable about this given the chronology. The fact that the IGADF was investigating W108 could not prevent discussion about the events of that day between those colleagues and friends who had actually been there – particularly when those events had been the subject of sensational media coverage and then become allegations within a defamation case. It is also unfair to paint such discussions as attempts at collusion or attempts to improperly synchronise evidence. As Mr Roberts-Smith said, he was trying to work out “*what actually happened*”, and indeed, as is evident from the 3 November 2018 email, where it had happened.¹⁴²⁰
102. RS Section XIII [99]-[100] contains a submission that the purpose for Mr Roberts-Smith's communications with Person 29 concerning W108 in November 2018 is preparation for Mr Roberts-Smith's upcoming IGADF interview. The Respondents point out that Mr Roberts-Smith mistakenly claimed to be preparing his Outline in Reply at that stage (it was not due until July 2019). However as stated above, the Defence, containing serious allegations concerning W108, had been filed in October 2018. Mr Roberts-Smith never attempted to hide that he was communicating with his friends and colleagues about these proceedings at around that time.¹⁴²¹
103. The Respondents tendered a document which purported to be an analysis of activity on the relevant prepaid phones. RS Section XIII [102] alleges the document contains a spike in usage around 7 November 2018.¹⁴²² The relevant pages show multiple spikes at various spikes in usage in July, August, October, November and December and there is nothing remarkable about that date. In any event the “activity” measured includes any activity on the phone of any kind including the use of the internet for any purpose. It is not any proof of messaging or telephone calls, and still less proof of messaging or telephone calls with Persons 5, 11, 29 or 35. Fundamentally, there is no evidence of any use of the phones to discuss the content of evidence given at the IGADF.
104. Ms Scott did not give evidence in relation to the pre-paid phones. Once again, the Court ought to infer that any evidence she would have given on this topic, including for instance the alleged conversation put to Mr Roberts-Smith as to his motive in obtaining the phones,¹⁴²³ would not have assisted the Respondents' case.

¹⁴¹⁶ T646 L26-46 (BRS); Ex. R43 Tab 15.

¹⁴¹⁷ T647 L11-23 (BRS).

¹⁴¹⁸ Defences filed in each of the 3 proceedings on 9 October 2018.

¹⁴¹⁹ T647 L44 - T648 L9 (BRS).

¹⁴²⁰ T648 L40-47 - T649 L4 (BRS).

¹⁴²¹ T663 L41-43 (BRS).

¹⁴²² Ex. R 187 pages 6, T661 L37 - T662 L8 (BRS).

¹⁴²³ T615 L17-18 (BRS).

Communications with Persons 5 and 29 in 2019

105. On 29 June 2019 Mr Roberts-Smith sent Person 29 an email which attached footage (from one of the USBs) of the bomb hitting W108.¹⁴²⁴ Mr Roberts-Smith agreed that he and then Person 29 then communicated in some fashion in relation to the footage.¹⁴²⁵ On 3 July 2019 Mr Roberts-Smith sent Person 29 another email which attached a marked-up photograph of W108.¹⁴²⁶ Mr Roberts-Smith gave evidence suggesting he put the markings on the photograph. Mr Roberts-Smith agreed that he and Person 29 and 35 “*would have discussed the scheme of manoeuvre*”. Mr Roberts-Smith disagreed that the discussions at this time had compromised the evidence of anyone involved.¹⁴²⁷ Once again, there is an air of artificiality in the submission that conversations between these colleagues at or about this time – after the W108 incident had become the subject of prominent newspaper articles and the defence in these proceedings – is in any way indicative of dishonesty or an attempt to falsify evidence. Serious allegations had been raised about an historical incident and images were exchanged and conversations were had in an effort to try and understand the allegations.

Meetings with Persons 5, 11, 29 and 35 in December 2019 to January 2020

106. Mr Roberts-Smith agreed that he had dinner with Person 29 on 4 December 2019, after the conclusion of his second interview with the IGADF. He denied discussing his evidence before the IGADF at that dinner.¹⁴²⁸ Ms Roberts claimed that Mr Roberts-Smith told her that he had provided his note from the IGADF to Person 29.¹⁴²⁹ That evidence should be rejected. There is no evidence that Mr Roberts-Smith provided his note from the IGADF to Person 29. Person 29 denied it.¹⁴³⁰ Similarly, there is no evidence that Person 29 was aware at that time that he would be required to attend the IGADF for a further interview in January 2020.

107. In December 2019 Mr Roberts-Smith flew to New Zealand and then the United States. His family accompanied him. In New Zealand he met Person 35 and his family for Person 35’s 40th birthday.¹⁴³¹ In the United States he met Person 5 and the two families skied together.¹⁴³² The holidays had been booked well prior to Mr Roberts-Smith knowing that his interview with the IGADF would be scheduled for 2-4 December 2019.¹⁴³³ Mr Roberts-Smith denied he discussed his IGADF interview with Persons 35 or 5.¹⁴³⁴

108. Mr Roberts-Smith met Person 29 at his home at Ilkley on 27 December 2019. Person 29 is the godfather of one of his children. Person 29’s parents live in Brisbane and he agreed it was likely he would have been in Queensland to see them at that time.¹⁴³⁵ Again, Mr Roberts-Smith denied discussing the IGADF interview on this occasion.¹⁴³⁶ It is not unknown for friends and relatives to visit each other at that time of year. Something was also made of Person 29’s call to Mr Roberts-Smith’s wife’s phone on or about 24 January 2020.¹⁴³⁷ Mr Roberts-Smith did not recollect receiving a message that Person 29 would call on his wife’s phone and could not understand why his wife would

¹⁴²⁴ Ex. R43 Tab 16.

¹⁴²⁵ T665 L1-23 (BRS).

¹⁴²⁶ Ex. R43 Tab 17.

¹⁴²⁷ T665 L31-3; T667 L8-10 (BRS).

¹⁴²⁸ T 668 L1-23 (BRS).

¹⁴²⁹ T 1941 L35-37 (ER).

¹⁴³⁰ T5570 L19 (P29).

¹⁴³¹ T5288 L20 (P35)

¹⁴³² T 668 L25-40 (BRS).

¹⁴³³ T 669 L20-24 (BRS).

¹⁴³⁴ T 668 L30-33, 42-43 (BRS).

¹⁴³⁵ T5514 L19-20 (P29).

¹⁴³⁶ T 669 L9-13 (BRS).

¹⁴³⁷ T 669 L43 - T 670 L28 (BRS); Ex. R43 Tab 18.

be happy to give Mr Roberts-Smith her phone at this time given their recent separation.¹⁴³⁸ As Ms Scott suggested in her message of that day at 18.38, “*Perhaps he was just making a welfare call.*” Ms Roberts gave no evidence about this conversation. Mr Roberts-Smith also pointed out that if Person 29 had required the call to remain secret he could have called him on one of the prepaid phones which were still in Mr Roberts-Smith’s possession.¹⁴³⁹

109. Mr Roberts-Smith also flew to Perth to meet Person 11 in January 2020. This trip was for the purpose of meeting Person 11.¹⁴⁴⁰ Again Mr Roberts-Smith denied any discussion of his interview with the IGADF.¹⁴⁴¹ At that time, Mr Roberts-Smith had already attended his two interviews before the IGADF. Given this meeting occurred in January 2020, after Mr Roberts-Smith and Person 11 had completed their evidence before the IGADF, there is no merit in a submissions that it was for the purpose of aligning their stories and/or colluding to give false evidence.
110. The suggestion that these holidays and conversations and meetings represented anything remotely improper or dishonest has no merit. Mr Roberts-Smith was meeting and speaking with his friends and their families. He was providing support to Person 11. None of this material reflects adversely on his credit and it is an unfair attack on Mr Roberts-Smith. On the Respondents’ approach, in order to avoid the allegation of collusion which is propounded by them, Mr Roberts-Smith should not have been meeting or speaking with Persons 5, 11, 29 and 35. This is unrealistic as these five men are friends who served Australia together on multiple deployments to Afghanistan.

Communications with Persons 14 and 40

111. The initial defence filed by the Respondents on 9 October 2018 contained a raft of allegations about various events and incidents in Afghanistan. There was nothing improper about Mr Roberts-Smith communicating with Person 14 on the topic of an allegation concerning him in the defence. A review of the evidence which is cited by the Respondents in paragraphs [96]-[97] of RS Section XIII demonstrates that there was no attempt by Mr Roberts-Smith to influence Person 14 but rather to ascertain whether he agreed or did not agree with the pleaded allegation by the Respondents. Mr Roberts-Smith gave evidence that he believed that he was being recorded by Person 14 and that it was a “stitch up”.¹⁴⁴² He made a contemporaneous file note of the meeting.¹⁴⁴³ When Person 14 was asked whether he was recording Mr Roberts-Smith, the Commonwealth took an objection.¹⁴⁴⁴ There is no evidence that Mr Roberts-Smith asked Person 14 to lie to assist him. And in any event, given Mr Robert-Smith’s state of mind as to being recorded, the suggestion is most improbable. Indeed, that proposition was not even put to Mr Roberts-Smith.
112. The allegations by the Respondents in paragraphs [141]-[143] of RS Section XIII that there was an attempt to intimidate Person 40 by Person 29 are baseless. Firstly, there was no evidence that Person 29 had spoken to Mr Roberts-Smith before the alleged discussion with Person 40. Secondly, no suggestion was put to Person 29 that Mr Roberts-Smith had asked him to speak to Person 40. Person 29 said that he raised the issue of Person 40 out of concern for Person 40’s welfare.¹⁴⁴⁵ Thirdly, Person 40 did not assert that he considered any discussion he had with Person 29 to be a threat or an attempt to intimidate him.

¹⁴³⁸ T 670 L30-44 (BRS).

¹⁴³⁹ T 671 L3-9 (BRS).

¹⁴⁴⁰ T669 L15-16, 35-38 (BRS).

¹⁴⁴¹ T669 L18 (BRS).

¹⁴⁴² T661 L35 (BRS).

¹⁴⁴³ Ex. A35.

¹⁴⁴⁴ T1723 L12 (P14).

¹⁴⁴⁵ T5561 L1-27.

E. CONSCIOUSNESS OF GUILT

113. The Respondents contend that Mr Roberts-Smith’s alleged conduct (such as witness intimidation, destroying and concealing evidence, and deliberately giving false evidence) is indicative of a consciousness of guilt that constitutes an admission or circumstantial evidence from which an adverse inference of guilt may be drawn (RS Section XIII [166]-[184]), such that the Court should find that the Respondents’ allegations in its defence are true and that Mr Roberts-Smith’s case is unfounded (RS Section XIII [185]). That contention must be rejected for the reasons that follow.
114. *First*, the various conduct that is said to evidence consciousness of guilt (which is otherwise denied) does not come close to discharging the very heavy burden that the Respondents bear to prove that the defamatory imputations are substantially true.¹⁴⁴⁶ It is trite that the Respondents must prove that “[e]very material part of the imputations upon the plaintiff contained in the words complained of” is true.¹⁴⁴⁷ This entails not only proving the truth of the words complained of in their literal meaning but also the truth of the defamatory sting.¹⁴⁴⁸
115. None of the conduct complained of by the Respondents (at RS Section XIII [176]-[184]) gives rise to an adverse inference or constitute an admission that proves, or tends to prove, that the specific imputations pleaded were true in substance (or were not materially from the truth), let alone that every material part of the imputation was true. They do not come close to meeting the defamatory sting of the imputations¹⁴⁴⁹ including – for example – that Mr Roberts-Smith *murdered* an unarmed and defenceless Afghan civilian,¹⁴⁵⁰ a man with a prosthetic leg,¹⁴⁵¹ and an elderly, unarmed Afghan (by pressuring another SASR soldier).¹⁴⁵² As discussed in the section on pleadings in these submissions, the matters that the Respondents rely upon as proof of the substantial truth of the imputations are not directed to, and distracts from, the *real* matters that the Respondents must prove, namely the elements of the offences that imputations convey Mr Roberts-Smith committed.
116. Further, the Respondents’ broad brushed, rolled-up approach, based on an alleged consciousness of guilt, does not prove the multiple and very specific instances of criminal conduct alleged to be conducted by Mr Roberts-Smith. The Respondents’ approach to proof of the matters lacks any focus or nuance – an approach fraught with difficulties in a case where the defamatory sting of the imputations is very serious. In similar vein, the Respondents have failed to explain *how* the “united force of all the circumstances put together” (RS Section XIII [185]) is tethered or tie in with the proof of the criminal allegations.
117. Significantly, the allegations that the Respondents have levelled against Mr Roberts-Smith in their truth defence (including the murder (or complicity in the murder) of six persons and violent assaults that are both alleged to contravene Art 3 of the Third and Fourth Geneva Conventions, as well as bullying and domestic violence) are extremely grave allegations. They allege very serious criminality close to the highest end of objective seriousness.

¹⁴⁴⁶ *Defamation Act 2005* (NSW) ss 4 and 25.

¹⁴⁴⁷ *Howden v “Truth” & “Sportsman” Ltd* (1937) 58 CLR 416 at 420-421 (Dixon J).

¹⁴⁴⁸ *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [274] (Gillard AJA, with whom Winneke ACJ and Warren AJA agreed); *Gacic v John Fairfax Publications Pty Ltd* [2011] NSWCA 362 at [104]-[105] (McColl JA, with whom Giles JA and Sackville AJA agreed); *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [221]-[224] (Wigney J) (appeal in *Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432 dismissed).

¹⁴⁴⁹ *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981 (appeal dismissed in *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341, special leave refused in *Leyonhjelm v Hanson-Young* [2021] HCASL 114), citing *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232 at [138] (Spigelman CJ, Beazley JA, McColl JA, McClellan CJ at CL and Bergin CJ in Eq).

¹⁴⁵⁰ Paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim (Imputation 1).

¹⁴⁵¹ Paragraphs 9(b) and 11(b) of the Statement of Claim (Imputation 5).

¹⁴⁵² Paragraphs 9(a) and 11(a) of the Statement of Claim (Imputation 4).

118. Though the standard of proof is a civil one – on the balance of probabilities – the seriousness of the allegations, the inherent unlikelihood of the occurrence of the matters alleged, and the gravity of the consequences, both reputationally and legally, to Mr Roberts-Smith (and other witnesses) that flow from finding that those allegations are true requires a much higher standard of evidence.¹⁴⁵³
119. To find the allegations proved would necessarily subject Mr Roberts-Smith (and other witnesses) to a significant degree of “moral opprobrium” and disapproval not only in the domestic context but also the international context.¹⁴⁵⁴ As such, the degree of satisfaction required in determining that the standard of proof (being, the balance of probabilities) has been discharged is much higher.¹⁴⁵⁵ It follows that the Court ought to have regard to those considerations in “determining what inferences to draw from the primary facts”.¹⁴⁵⁶ There must be clear, cogent or strict proof in order to establish the facts on the balance of probabilities.¹⁴⁵⁷ The Respondents’ allegations cannot be discharged by “inexact proofs, indefinite testimony, or indirect inferences”.¹⁴⁵⁸
120. Yet, this is exactly how the Respondents seek to prove their case – that the alleged attempts of witness intimidation is somehow evidence of consciousness of guilt upon which the Court can rely to prove the truth of the Respondents’ allegations concerning W108 and the bullying of Person 1 (RS Section XIII [176]-[178]), and that the alleged destruction and concealment of relevant material is somehow an implied admission that can be used to “provide [sic] the truth of the Respondents’ case” including but not limited to W108 and the Person 17 assault allegation (RS Section XIII [181]-[184]).
121. *Secondly*, great caution needs to be exercised in using evidence of conduct such that it suggests a consciousness of guilt. For example, in *McHale v Watson* (1964) 111 CLR 384 (which concerned a claim of trespass to the person and negligence), Windeyer J refused to draw an adverse inference from the fact that the defendant discarded the metal dart that allegedly struck the plaintiff’s eye on the basis that it was a misinterpretation of the facts to infer that it was thrown away “in order to suppress evidence”. Rather, his Honour opined that it was thrown away as a “natural reaction” to discard of something which had done harm (at 399).
122. More generally, an innocent explanation can nullify the force of evidence that otherwise suggests consciousness of guilt.¹⁴⁵⁹ Thus, in the context of *lies*, Beazley, Giles and Santow JJA opined (at [83]-[84]), in *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 the following:

[83] The authorities caution that particular care has to be taken when directing a jury as to the circumstances in which a lie may amount to corroboration. In Buck v R (1982) 8 A Crim R 208, Burt CJ said at 214:

*“A jury, in my opinion, requires a very careful direction upon the circumstances in which a lie told by an accused person in or out of court can amount to corroboration. **It has been said that to be capable of amounting to corroboration the lie must be deliberate, it must relate to a***

¹⁴⁵³ *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [229] (Wigney J); *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (Dixon J). *Evidence Act 1995* (Cth) s 140.

¹⁴⁵⁴ *Australian Communications and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong* (No 8) (2010) 275 ALR 293 at [9] (Logan J).

¹⁴⁵⁵ *Qantas Airways v Gama* (2008) 167 FCR 537 at [110] (French and Jacobson JJ, with whom Branson J agreed at [122]).

¹⁴⁵⁶ *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339 at 438 (Heerey and Sackville JJ, with whom Emmett J agreed at [451]), followed in *ACCC v Leahy Petroleum* (2004) 141 FCR 183 at [77] (Merkel J).

¹⁴⁵⁷ *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [59] (citing *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 (Mason CJ, Brennan, Deane and Gordon JJ)).

¹⁴⁵⁸ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (Dixon J), cited in *Australian Communications and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong* (No 8) (2010) 275 ALR 293 at [8] (Logan J).

¹⁴⁵⁹ *Cooper v The Queen* (2012) 293 ALR 17 at [86] (Heydon J) citing *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 391-392 (Gibbs J).

material issue, the motive for the lie must be a realisation of guilt and a fear of truth and the lie must be established as such by evidence independent of the witness to be corroborated or by admission made by the accused."

[84] This statement was approved in *R v Sutton* (1986) 5 NSWLR 697 at 701. In that case, after referring to *Buck*, Street CJ said:

"... reliance by the Crown on collateral conduct eloquent of guilt, such as flight or a lie, is fraught with the risk of miscarriage. The link between such conduct and the crime in question must be demonstrable."

(emphasis added).

123. In *Edwards v The Queen* (1993) 178 CLR 193, Deane, Dawson and Gaudron JJ (at 209) set out the "rules" concerning when a *lie* is probative of guilt:

A lie is a deliberate untruth. To conclude that a statement is a lie is to conclude that the truth lies elsewhere. In some circumstances, a finding that a person lied will necessarily involve acceptance of the contrary. However, the fact that a person has lied does not of itself establish a specific contrary proposition.

Ordinarily, the telling of a lie will merely affect the credit of the witness who tells it. A lie told by an accused may go further and, in limited circumstances, amount to conduct which is inconsistent with innocence, and amount therefore to an implied admission of guilt. In this way the telling of a lie may constitute evidence. When it does so, it may amount to corroboration provided that it is not necessary to rely upon the evidence to be corroborated to establish the lie. At one time it was thought that only a lie told out of court could amount to an implied admission, but the distinction is not logically supportable and is no longer drawn. When the telling of a lie by an accused amounts to an implied admission, the prosecution may rely upon it as independent evidence to "convert what would otherwise have been insufficient into sufficient evidence of guilt" or as corroborative evidence.

But not every lie told by an accused provides evidence probative of guilt. It is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him. In other words, in telling the lie the accused must be acting as if he were guilty. It must be a lie which an innocent person would not tell. That is why the lie must be deliberate. Telling an untruth inadvertently cannot be indicative of guilt. And the lie must relate to a material issue because the telling of it must be explicable only on the basis that the truth would implicate the accused in the offence with which he is charged. It must be for that reason that he tells the lie. To say that the lie must spring from a realization or consciousness of guilt is really another way of saying the same thing. It is to say that the accused must be lying because he is conscious that "if he tells the truth, the truth will convict him".

(emphasis added, footnotes omitted)

124. The rules set out in *Edwards* were summarised by Simpson J in *R v Lane* (2011) 211 A Crim R 309 at [56] as follows:

- (a) the lie must be deliberate;

- (b) the lie must relate to a material issue;
- (c) the motive for the lie must be a realisation of guilt and a fear of the truth;¹⁴⁶⁰ and
- (d) the statement said to constitute a lie must clearly be shown to be a lie by admission or by evidence. Where evidence of the lie is tendered as corroboration of the evidence of a witness, the evidence showing that the statement is a lie must be from a person other than that witness.

125. The link between the subject matter of the lie (or conduct eloquent of guilt, such as flight) and the crime in question must be demonstrable.¹⁴⁶¹ The consciousness is of, unequivocally, the consciousness of guilt of the specific offence (charged) and not, for example, of some other offence or some other discreditable conduct.¹⁴⁶²
126. The issue of whether the reception of admissions by conduct *other than lies* is regulated by rules which are similar to those employed in relation to lies (i.e. *Edwards*) has not been resolved.¹⁴⁶³ However, the rules should at least guide – if not apply equally to – admissions by conduct (not only lies), such as witness intimidation and the destruction and concealment of evidence. This is in circumstances where the Court has held that the same directions given to jury (concerning lies relied upon for evidence of consciousness of guilt) should be given in respect of evidence of flight that is likewise relied upon as evidence of consciousness of guilt.¹⁴⁶⁴
127. An adverse inference of guilt – whether it be a lie or some other type of conduct – can be drawn if no other rational inference may be drawn other than it being told or done out of a consciousness of guilt. Thus, in *R v Liddy* (2002) 81 SASR 22, Mullighan J (with whom Williams and Gray JJ generally agreed) held:

[242] It is unnecessary to set out the circumstances in which a deliberate lie told by an accused person may amount to positive evidence of guilt as opposed to adversely reflecting upon the accused's credibility. The telling of relevant lies is a piece of circumstantial evidence from which an adverse inference of guilt may be drawn if the lie is told out of a consciousness of guilt and no other rational inference may be drawn.

[243] There are other types of conduct of an accused person which may also constitute circumstantial evidence from which an adverse inference of guilt may be made subject to the same proviso: R v Nguyen (2001) 118 A Crim R 479...

(emphasis added)

128. The Respondents assert at RS Section XIII [179] that Mr Roberts-Smith told deliberate lies on material facts. The assertions contained in this submission should be rejected. The substance of their assertions is dealt with elsewhere in the submission when analysing the evidence concerning the allegation which had been pleaded. The Respondents have not established that any of the matters set out in RS [179] were “deliberate untruths”.¹⁴⁶⁵ Even if the matters set out in RS Section XIII [179]

¹⁴⁶⁰ See too: *R v Heyde* (1990) 20 NSWLR 234 at 243-244 (Clarke JA, with whom Gleeson CJ (at 236) and Studdert J (at 249) agreed).

¹⁴⁶¹ *R v Sutton* (1986) 5 NSWLR 697 at 701 (Street CJ, with whom Lusher J and Campbell J agreed at 702).

¹⁴⁶² *Ng v R* [2019] NSWCCA 172 at [62] (Gleeson JA, with whom Harrison J (at [70]) and N Adams J (at [71]) agreed).

¹⁴⁶³ *Cooper v The Queen* (2012) 293 ALR 17 at [88] (Heydon J).

¹⁴⁶⁴ *R v Cook* [2004] NSWCCA 52 at [25] and [50] (Simpson J, with whom Ipp JA (at [1]) and Adams J (at [73]) agreed), followed in *Martinez v R* [2019] NSWCA 153 at [94]-[95] (Macfarlan JA, with whom R A Hulme J (at [132]) and Adamson J (at [133]) agreed).

¹⁴⁶⁵ *Edwards v The Queen* (1993) 178 CLR 193 at 209.

were not correct or lies (which is strenuously rejected), they are not probative of guilt in relation to the pleaded allegations.

129. Similarly, Mr Roberts-Smith did not engage in witness intimidation as contended at RS Section XIII [176]-[178] for the reasons advanced in these submissions.
130. Nor did Mr Roberts-Smith deliberately conceal or destroy evidence as contended at RS Section XIII [181]-[184]. There were reasonable and innocent explanations, inconsistent with a consciousness of guilt, for his actions which are dealt with in these submissions.
131. *Thirdly*, the “totality of the conduct”, as asserted by the Respondents (RS Section XIII [174] and [185]), does not give rise to an inference of guilt that is sufficient to discharge the onerous burden that the Respondents bear in the particular circumstances of this matter. In *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219, Mahoney JA (at 234) attenuated his conclusion that the probative force of circumstantial evidence may become greater as the individual items of evidence increase in number with the following statement:

But there is, in the present case, an additional matter. Mr McHugh's argument laid emphasis upon the fact that the matters on which the defendant relies were all capable of an innocent explanation; the defendant's argument, accepting this, pointed to the cumulative effect of those matters, each plausibly suggesting guilt. But it is important, in the testing of circumstantial evidence, to consider whether there is any evidence inconsistent with the guilty inference, that is, whether the plaintiff's conduct, or any of the facts, are not merely consistent with innocence, but inconsistent with guilt: see Wigmore (par 33, at 422). This may be of particular weight where the matters in evidence extend over a substantial area and there is yet found nothing which is inconsistent with the guilty inference. It was not argued by the plaintiff in the present case that there was anything inconsistent with the inference of guilt in this sense.

*There is an additional consideration. The defendant's case did not prove the plaintiff's participation in the fraud to the point of demonstration. But the plaintiff's submission in this Court must be that, as evidence of such participation, the defendant's case not merely did not demonstrate such participation, but fell below what was sufficient to admit of the jury's finding such participation. The plaintiff's argument at this point accepted that the various matters relied upon were admissible as evidence having enough probative force to warrant them being placed before the jury: Wigmore (par 28 at 409-410). But he submitted that, taking all the admissible material, it was capable of an innocent explanation or otherwise such as not to amount in law to a basis sufficient to allow the jury to infer guilty participation. **His argument, in effect, is that even accepting that there be admissible evidence, it is for the Court to determine whether, having regard, inter alia, to the gravity of the allegations and otherwise the burden of proof on the defendant, a reasonable jury could or could not find the proofs submitted sufficiently strong to base the inference.***

(emphasis added)

132. That is, in considering the totality of the evidence, it is crucial to take into account any evidence inconsistent with the guilty inference, including conduct or facts that are not merely consistent with innocence but also inconsistent with guilt. This is to be weighed against the gravity of the allegations (as stated above).

133. Moreover, Courts have warned against compartmentalising circumstantial facts and instead, opined that the true picture can only be derived from “standing back and assessing the broader picture”,¹⁴⁶⁶ as described by Tadgell JA in *Transport Industries Insurance Company Ltd v Longmuir* [1997] 1 VR 125 at 141:

The overall effect of the detailed picture can sometimes be best appreciated by standing back and viewing it from a distance, making an informed, considered, qualitative appreciation of the whole. The overall effect of the detail is not necessarily the same as the sum total of the individual details: cf. Hall (Inspector of Taxes) v Lorimer [1992] 1 WLR 939 at 944; Shepherd v R (1990) 170 CLR 573 at 579-80.

134. As such, and where the Respondents bear a heavy onus by reason of the very grave allegations levelled against Mr Roberts-Smith, the totality of the circumstances does not speak or come close to leading to an inference of consciousness of guilt such that the Respondents’ allegations in its defence are true (cf. RS Section XIII [185]). The circumstances do not speak with a “united force”. The Respondents’ submissions adopt an unprincipled and vague approach which would lead the Court into error.

¹⁴⁶⁶ *Australian Broadcasting Corporation v Wing* (2019) 271 FCR 632 at [134] (Besanko, Bromwich and Wheelahan JJ) (special leave refused).

SECTION XIV: CONTEXTUAL TRUTH

1. In response to RS Section XIV [2]-[5] the Applicant accepts the contextual imputations arise and that they differ in substance from the Applicant's imputations and that these parts of the Section 26 requirement are met.
2. As to the truth of the contextual imputations the Applicants rely on the submissions above in respect of W108, Darwan, Chenartu and Fasil. The Applicant does not dispute that findings that murders occurred would justify these imputations. None of the other pleaded conduct rises sufficiently high to justify the imputation that the Applicant "*disgraced his country Australia*". Depending upon the precise facts found, if the Court finds that one or more the assaults occurred it is possible that conduct could justify the contextual that the Applicant "*broke the moral and legal rules of military engagement and is therefore a criminal.*"
3. As to the section of the RS Section XIV in C dealing with "*further harm*", the ultimate analysis will obviously depend upon the Court's decision as to whichever of the Applicant's imputations and the contextual imputations that are conveyed are matters of substantial truth, and the reasons for those findings. Otherwise:
 - a. In response to RS Section XIV [9], while obviously any finding involving the commission of a murder is exceptionally serious, depending upon the facts found it may be possible that further damage to reputation could be done if for instance only one murder is found to have occurred in particular extenuating circumstances and none of the others are found to have occurred at all
 - b. At RS Section XIV [10]-[11] the submission is made that an allegation of domestic violence could not do further damage to the Applicant's reputation assuming he has found to have committed murder in Afghanistan. That submission is incorrect. The Applicant's alleged private conduct in an Australian hotel room towards a woman with whom he was having a relationship is in a completely different sector of his reputation than his behaviour whilst on missions as a soldier in Afghanistan. His conduct towards women in his personal life and his conduct as a soldier involve distinct sectors of reputation. See *O'Brien v Australian Broadcasting Corporation* (2017) 97 NSWLR 1 at 45-46; [2017] NSWCA 338 at [224]-[225].

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