NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged**:**	Interlocutory Application - Form 35 - Rule 17.01(1)(a)
Court of Filing:	FEDERAL COURT OF AUSTRALIA (FCA)
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File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Form 35
Rule 17.01(1)

Amended Interlocutory Application

No. NSD 689 of 2023

Federal Court of Australia

District Registry: New South Wales

Division: General

Ben Roberts-Smith VC MG

Appellant

Fairfax Media Publications Pty Limited and others named in the schedule

Respondents

To the Respondents

The Appellant applies for the interlocutory orders set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

Time and date for hearing:

Place: Federal Court of Australia, Law Courts Building, 184 Phillip Street, Queens Square Sydney, New South Wales 2000

Date: 28 April 2025

Signed by an officer acting with the authority of the District Registrar

Filed on behalf of (name & role of party) Ben Roberts-Smith VC MG, the Appellant
Prepared by (name of person/lawyer) Monica Allen
Law firm (if applicable) BlackBay Lawyers
Tel + 61 2 8005 3077 Fax -
Email monica.allen@blackbaylawyers.com
Address for service (include state and postcode) Level 17, 20 Martin Place, Sydney, New South Wales, 2000

Interlocutory orders sought

1. The Appellant is granted leave to reopen his case on the appeal to:

   (a) file the Amended Notice of Appeal the subject of order 2 below; and

   (b) adduce further evidence the subject of order 3 below.

2. The Appellant be granted leave to file the Amended Notice of Appeal in the form attached to this Interlocutory Application.

3. Pursuant to s 27 of the *Federal Court of Australia Act 1976* (Cth) and r 36.57 of the *Federal Court Rules 2011* (**FCR**), the appellant is granted leave to rely on the following further evidence in the appeal:

   (a) the affidavit of Monica Allen sworn 27 March 2025 and the exhibit thereto;

   (b) affidavit of Nicholas David McKenzie affirmed 14 April 2025 (subject to rulings on objections);

   (c) the affidavit of Nicholas David McKenzie affirmed 24 April 2025 (subject to rulings objections);

   (d) the oral evidence given by Messrs McKenzie, Bartlett and Levitan at the hearing of this amended interlocutory application; and

   (e) the affidavit of Monica Helen Allen sworn 28 April 2025 and the exhibit thereto.

4. Pursuant to r 1.34 of the FCR, the requirement in r 36.57(2) for the appellant to make the application to adduce further evidence at least 21 days before the hearing of the appeal is dispensed with

5. Any such further or other orders as are necessary to facilitate:

   (a) the reception of further evidence on the appeal; and

   (b) the further hearing of the amended grounds of appeal.

6. Costs.

Service on the Respondents

It is intended to serve this application on all Respondents.

Date: 28 April 2025

Signed by Victoria-Jane Otavski
Lawyer for the Appellant

Form 122
Rules 36.01(1)(b); 36.01(1)(c)

Amended Notice of Appeal

No. NSD 689 of 2023

Federal Court of Australia

District Registry: New South Wales

Division: General

On appeal from the Federal Court of Australia

Ben Roberts-Smith VC MG

Appellant

Fairfax Media Publications Pty Limited and others named in the schedule

Respondents

To the Respondents

The Appellant appeals from the Judgment as set out in this Notice of Appeal.

1. The papers in the appeal will be settled and prepared in accordance with the *Federal Court Rules* Division 36.5.

2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Federal Court of Australia, Law Courts Building, 184 Phillip Street, Queens Square Sydney, New South Wales 2000

Date:

Signed by an officer acting with the authority
of the District Registrar

The Appellant appeals from the whole of the Judgment of the Honourable Justice Besanko given on 1 June 2023 in Federal Court of Australia proceedings NSD 1485, 1486 and 1487 of 2018 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555.

Grounds of Appeal

Defence of Justification – Whiskey 108

1. The primary Judge erred in finding at J[712] and J[881(2)] that the Appellant directed Person 4 to execute EKIA 56.

2. The primary Judge erred in finding at J[881(3)] that the Appellant executed EKIA 57.

3. The primary Judge erred in finding at J[882] that imputations 2, 3, 4, 5, 6 and 9 were matters of substantial truth by reason of the findings concerning the Appellant's involvement in the deaths of EKIA 56 and EKIA 57.

4. The primary Judge erred in finding at J[1851]-[1854] that imputations 11 and 14 were substantially true by reason of the findings concerning the Appellant's involvement in the deaths of EKIA 56 and EKIA 57.

Defence of Justification – Darwan

5. The primary Judge erred in finding at J[1368(8)] that the Appellant kicked Ali Jan off a cliff.

6. The primary Judge erred in finding at J[1368(11)] that the Appellant and Person 11 agreed that Ali Jan would be shot and that Person 11 then shot Ali Jan.

7. The primary Judge erred in finding at J[1369] that the Appellant murdered Ali Jan.

8. The primary Judge erred in finding at J[1370] that imputations 1, 2 and 3 were matters of substantial truth by reason of the findings concerning the Appellant's involvement in the death of Ali Jan.

9. The primary Judge erred in finding at J[1851]-[1854] that imputations 11 and 14 were substantially true by reason of the findings concerning the Appellant's involvement in the death of Ali Jan.

Defence of Justification - Chinartu

10. The primary Judge erred in finding at J[1537] that the Appellant, through an interpreter, ordered Person 12 to shoot an Afghan male under detention, and that it occurred shortly after a cache was found by Person 14.

11. The primary Judge erred in finding at J[1538] that the Appellant murdered an Afghan male at Chinartu on 12 October 2012.

12. The primary Judge erred in finding at J[1539] that imputations 2 and 3 were matters of substantial truth by reason of the findings concerning the Appellant's involvement in the death of an Afghan male on 12 October 2012.

13. The primary Judge erred in finding at J[1851]-[1852] that imputation 11 was substantially true by reason of the findings concerning the Appellant's involvement in the death of an Afghan male on 12 October 2012.

Justification and Contextual Truth

14. The primary Judge erred in finding that imputations 1-6, 9 and 11 were matters of substantial truth.

15. The primary Judge erred in finding that the contextual imputations were matters of substantial truth.

16. The primary Judge erred in finding the defence of contextual truth had been made out.

Miscarriage of justice

17. There has been a miscarriage of justice and denial of a fair trial to the Appellant in the proceedings below by reason of the Second Respondent's misconduct.

Orders sought

1. Appeal allowed.

2. That the judgment for the Respondents be set aside.

3. In lieu thereof, Order that there be judgment for the Appellant in an amount to be assessed in this Court, or alternatively on remitter.

3A In the alternative, there be a new trial ordered pursuant to ss 28(1)(f) and 30 of the *Federal Court of Australia Act 1976* (Cth) and a direction made that the Second

Respondent give further verified discovery in accordance with the orders for discovery made on 2 August 2019 by Besanko J.

4. The Respondents pay the Appellant's costs in this Court.

5. That the Respondents pay the Appellant's costs in the Court below.

6. That the Appellant be heard on the form and the nature of the costs order in Prayers 4 and 5 above.

7. Such further or other Order or orders as to the Court seem fit.

Appellant's address

The Appellant's address for service is:

Place: Level 17, 20 Martin Place, Sydney, New South Wales 2000

Email: victoria.jane@blackbaylawyers.com and monica.allen@blackbaylawyers.com.

The Appellant's address is 19 Churchlands Avenue, Churchlands, Western Australia 6018

Service on the Respondents

It is intended to serve this application on all Respondents.

Date: 27 March 2025

Signed by Victoria-Jane Otavski
Lawyer for the Appellant

Annexure to the Notice of Appeal

Particulars

Defence of Justification – Whiskey 108 (Grounds 1 to 4)

1. The primary Judge erred by impermissibly construing the evidence of Person 41 (who was the only person who gave evidence claiming to have witnessed the execution of EKIA 56) to resolve the inconsistency between, on the one hand, there being multiple Special Air Service Regiment (**SASR**) operators in the courtyard at the time the Afghan males emerged from the tunnel (including the Respondents' witnesses being Persons 18, 40, 42 and 43) and on the other hand, the absence of any other eyewitnesses to the execution of EKIA 56. According to Person 41 only a *"minute or two"* (J[555]) elapsed between his leaving the courtyard (after the men emerged from the tunnel) and returning to observe the execution of EKIA 56. The primary Judge impermissibly construed Person 41's evidence when finding that *"Person 41 was not using the expression 'minute or two' literally"* and "*[i]t was a short period, but a sufficient time for the majority of people in the courtyard area to disperse*" (J[556], J[660]). In doing so, the primary Judge added to and cherry picked the evidence of a witness whose evidence he otherwise found to be reliable without adequately explaining the basis for doing so (J[868]). If Person 41's evidence were accepted without modification, and the execution of EKIA 56 occurred within a minute or two of two Afghan males emerging from the tunnel, it is improbable that none of the other of the Respondents' witnesses observed it.

2. The primary Judge erred in finding that Person 41 was an independent witness who had no interest in the result (J[868]). Person 41, by his own evidence, aided and abetted the execution of EKIA 56:

    (a) he provided a device (a suppressor) to Person 4, which Person 4 then attached to his weapon to shoot EKIA 56; and

    (b) he apprehended that Person 4 intended to use his weapon, with Person 41's suppressor attached, to shoot EKIA 56.

3. The consequence of this error is that the primary Judge should not have accepted Person 41's evidence about the execution of EKIA 56 as that evidence was not corroborated by any other eyewitness (the Appellant denied the allegation and Person 4 did not give evidence on this topic).

4. The primary Judge erred in relying upon an improbable aspect of Person 41's evidence to bolster his reliability. This involved circular reasoning. Person 41's evidence was that Person 4 requested to borrow a suppressor prior to the execution of EKIA 56. The

primary Judge agreed the evidence did not establish a reason why Person 41 would wish to borrow a suppressor (J[698]) and that while this was a matter to be taken into account (without explaining how he would do so), there was *"considerable force*" in the submission that Person 41's inclusion of this *"very strange*" detail in his account only enhanced its credibility (J[698]). In effect, the primary Judge relied upon an improbable aspect of Person 41's evidence to bolster the reliability of his other evidence about the occurrence of an improbable event, being the authorised, undisguised execution of an unarmed PUC by two professional SASR operators in breach of the laws of armed conflict. The primary Judge's reasoning is circular and erroneous. Moreover, the primary Judge failed to adequately explain this improbable aspect of Person 41's evidence where the weight of evidence indicated that there was no logical or operational reason for an operator to borrow someone else's suppressor.

5. The primary Judge erred in failing to adequately consider, as a matter affecting the reliability of Person 41's evidence generally, the rejection of Person 41's evidence about the entry point for the assault on W108 (at J[351] and J[354]).

6. The primary Judge erred in failing to address the Appellant's submission that Person 24's evidence has been contaminated by his discussions with Person 14 over the years (J[678]). Although the primary Judge accepted that the evidence of Person 14 and Person 24 must be approached with care and caution for reasons relating to their own individual credit (J[869]), the primary Judge treated the evidence of Persons 14 and 24 as independent and corroborative of each other's evidence, as well as the evidence of Person 41 (J[786], J[791]-[800], J[869]). In doing so, the primary Judge erroneously avoided resolving the question of contamination of evidence as between Persons 14 and 24. The primary Judge's approach to the treatment of Person 14's and Person 24's evidence was irrationally inconsistent with his approach to the potential contamination of the evidence of the Appellant's witnesses.

7. The primary Judge did not adequately deal with the improbability that there was a widespread conspiracy to conceal the truth concerning the deaths of EKIA 56 and EKIA 57 in the official reporting of the mission. The official contemporaneous reports record that only one fighting aged male was located at W108 and that EKIA 56 and EKIA 57 were *"2 squirters*" who were engaged while attempting to squirt during the clearance of W108 (J[683]). The primary Judge found the likely source of this information (which would have been disseminated at a patrol debrief) was Person 5 and the Appellant (J[588] and J[683]), but he also accepted Person 81's evidence that he relied on all of the patrol commanders to tell him about the events of the mission which were then summarised in a report that Person 81 *"cleared"* (J[668] and J[669]). The

persons said to be present at the time or shortly after the men emerged from the tunnel included Persons 40, 41, 42, 43 and (possibly) the Troop Commander Person 81 (not including the Appellant's witnesses). Later according to Person 14, Person 6 (a patrol commander) actually witnessed the killing of EKIA 57 outside the compound (in addition to Persons 24, 73, 80, 68 and 41).

8. It is improbable that none of Person 81 or the other patrol commanders (not including Person 5) were unaware that the official report of one fighting aged male being located at W108 or of the engagement of *"2 squirters"* was obviously false. The Judge conceded that there was *"obvious force*" in the point (J[674]). The primary Judge did not adequately deal with this improbability or explain how a large number of SASR operators must have known about the executions (on the version of the Respondents) and did not report them or do anything about them (J[674]). The primary Judge's approach in this regard contrasted with the way in which he described as a *"minor detail"* Person 14's evidence that Person 6 (the patrol commander) witnessed the execution of EKIA 57 (J[762]).

9. The primary Judge erred in relying on the inconsistencies between the Respondents' witnesses to infer that it made their account more plausible. In particular:

   (a) Person 40 observed two men emerge from the tunnel J[438]. Person 42 observed two to three men J[459]. Person 43 observed one man (J[461], J[489]). The primary Judge does not seem to have considered the significance of the inconsistency and in fact found *"although the witnesses' evidence did not accord in all respects it is a coherent and plausible account of two Afghan men being in the tunnel*" (J[480]). The reasoning is circular. The proof of the fact (that two men emerged from the tunnel) is established by inconsistent evidence (that one or two to three men emerged from the tunnel), which is only inconsistent if one assumes the truth of the fact. Further the primary Judge's reference to a "*plausible account*" is speculative and inconsistent with making a finding of fact on the balance of probabilities. The subsequent finding that the inconsistencies can be excused because "*they were in a highly tense situation attending to different tasks*" elides the problem with the reliability of the witnesses and the evidence generally. What the primary Judge did not adequately explain is the inconsistency, on the one hand, of accepting the evidence of Persons 40, 42 and 43 (which he did), and his finding, on the other hand, that two men emerged from the tunnel.

(b) Person 14 stated that he observed three soldiers in the vicinity when the Appellant executed EKIA 57. Each of Person 24 and Person 41 observed only the Appellant at this moment. The primary Judge *"carefully considered"* the difference but observed that the similarities outweighed the differences (J[798]). Again the primary Judge could not have accepted the evidence of all three witnesses (which he did) (J[523]). The primary Judge then speculated that Person 14 may have seen Person 41 and perhaps Person 40 in the area (J[763] and J[798]).

10. The primary Judge erred in finding that Person 81's evidence does not rule out a finding that two Afghan males were taken from the tunnel (J[492]). The primary Judge should have found that Person 81's evidence was inconsistent with any such finding. Person 81, who was not the subject of any adverse credit findings, recalled seeing fighting aged males as he moved through the compound but was not sure where this occurred (J[491]). He said that he was not informed as to whether there were any fighting aged males found in the tunnel and did not see any men come out of the tunnel. The primary Judge's finding about the effect of Person 81's evidence overlooks the improbability that as the Troop Commander, he would likely have been told about the discovery of two Afghan men hiding in a tunnel that contained ordnance, yet his evidence was to the contrary. Also, if only a minute or two elapsed between the emergence of two men from the tunnel and their execution, then Person 81 must have been aware of the executions given that Person 40 (whose evidence was accepted by the primary Judge) said that Person 81 was in the tunnel courtyard when two men emerged from the tunnel.

11. The primary Judge, when assessing the reliability of Person 14's evidence in relation to the W108 mission, failed to take into account the implausibility of his evidence about the Chinartu mission. The primary Judge also failed to adequately explain how he *"took into account"* when assessing Person 14's honesty and reliability (J[759]) the fact that he told Chris Masters in 2018 that he understood Person 4 had shot the man with the prosthetic leg rather than the Appellant (see J[743]-[745], J[750], J[754]-[760]).

12. The primary Judge found that it was improbable that two insurgents would appear so close to a compound at almost the precise moment the Appellant exited (J[823]). There was no evidence before the Court permitting the Judge to make conclusions about the probable behaviour of members of the Taliban in the moments after their hiding place had been attacked.

13. The primary Judge's finding that there was no evidence of a *"plausible motive to lie or collude*" in the case of Persons 40, 41, 42 and 43 took into account irrelevant considerations (J[864], J[724] and J[731]). The fact that the Appellant was unable to suggest a reason why Persons 40, 41, 42 and 43 might lie about seeing Afghan men coming out of or in the vicinity of a tunnel is an unsafe basis upon which to reason factually. The Appellant was not in a position to see into their minds. Witnesses may give unreliable evidence for a number of reasons. The primary Judge did not take into account the possibility that the witnesses' memory had become distorted or polluted over time because of intervening events.

14. The primary Judge failed to give adequate reasons explaining why he accepted the evidence of certain witnesses regarding uncorroborated conversations that occurred in 2009 in circumstances where human experience tells against the possibility of remembering such matters. In particular, the primary Judge accepted the evidence of Person 14 and Person 24 about what they heard Person 5 say in 2009 about *"blooding the rookie"* prior to the W108 mission. The primary Judge approached the fact-finding exercise on the basis that where there was a conflict between the evidence of Person 14 (J[257]) and Person 24 (J[265]) on the one hand, and Person 5 on the other, the evidence of Person 14 or Person 24 should be accepted as reliable and truthful because Person 5 lacked credibility. The primary Judge adopted a similar flawed approach in finding that Person 5 said that he had *"blooded the rookie"* following the mission (J[282], J[283]). The primary Judge then relied upon his findings about what Person 5 said pre and post mission to infer that Person 5 knew before the execution of EKIA 56 that it was to take place and later that it had taken place (J[712]).

15. The primary Judge's determination that Person 4 was not required to give evidence about events at W108 denied, as a matter of procedural fairness, an opportunity to the Appellant to confront Person 4 in circumstances where the primary Judge made serious criminal findings against the Appellant in relation to matters alleged by the Respondents to involve Person 4.

16. The primary Judge erred in finding at J[244] and J[248] that no *Jones v Dunkel* inference should be drawn from the Respondents' failure to ask Person 4 whether Person 5 called him a *"rookie"* in 2009 on the basis of speculation about what Person 4 might have said if asked that question.

17. The primary Judge erred in failing to find that Person 4 had been involved in the engagement of Objective Depth Charger prior to W108 at J[270] and J[274], such that he could not have been a *"rookie"* during the W108 mission. The primary Judge failed to

give any reasons or adequate reasons as to why he rejected the evidence of Person 4 that he had been involved in the engagement of Objective Depth Charger.

18. The primary Judge erred in making global findings about the credibility of Persons 5, 27, 29, 35, 38 in relation to W108. In so doing, the primary Judge erred by approaching the fact-finding process on the basis that because the Appellant's witnesses were unreliable about some specific matters, that they were unreliable about all matters concerning W108.

19. The primary Judge erred in failing to properly apply section 140 of the *Evidence Act 1995* (Cth) and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 in making findings that the Appellant had engaged in war crimes at W108, in circumstances where the Court was invited by the Respondents to make findings of criminal conduct in civil proceedings, notwithstanding that the Appellant was entitled to the presumption of innocence.

Defence of Justification – Darwan (Grounds 5 to 9)

20. The primary Judge placed significant weight on the evidence of the Afghan witnesses, including particularly relying on their evidence as corroborating the account of Person 4 (J[1176], J[1187], J[1367]) when the evidence of those witnesses was not reliable to provide any corroboration:

    (a) The primary Judge accorded insufficient weight to the discrepancies in the evidence of Mangul Rahmi and Mohammad Hanifa at Closed Court J[106]-[108] and J[112]-[133].

    (b) The primary Judge accorded no or insufficient weight to a material inconsistency in the evidence between the Afghans and Person 4. According to Person 4 the southernmost compound had been empty until a man arrived on a donkey, and at some point after that a second fighting age male was placed under control (J[1033], J[1041] and J[1047]). However, according to the Afghan witnesses, multiple persons including Mohammad Hanifa, Mangul Rahmi, Ali Jan and women and children had been present (J[1036]-[1039]).

    (c) The high number of soldiers claimed by Mohammad Hanifa and Shahzada Fatih to have been in the southern compounds of Darwan, and to have been in a position to observe Ali Jan be kicked off the cliff (J[1193] and Closed Court judgment J[134]), was inconsistent with the evidence of Persons 4 and 56 and inherently improbable.

(d) The Afghan witnesses each gave evidence of events that were inherently improbable and/or inconsistent with SASR practice including:

i. observing the firing of shots from helicopters (or planes) (each of Mohammad Hanifa, Mangul Rahmi and Shahzada Fatih J[1167]-[1169], J[1181] and J[1195]);

ii. observing three soldiers firing into the air at or about the time Ali Jan's body was dragged across the riverbed (Mohammad Hanifa J[1161]-[1163]);

iii. observing a big soldier fire shots as he came down the mountain (Shahzada Fatih J[1189]-[1190]);

iv. speaking with the Appellant in Pashto (Shahzada Fatih J[1191]); and

v. observing (despite poor eyesight), Ali Jan be kicked off a cliff at a distance of 250 metres (Shahzada Fatih J[1192]).

(e) The primary Judge engaged in speculation at J[1169], J[1181], J[1195] by finding that the explanation proffered by the Respondents for the evidence of the Afghan witnesses suggesting they observed and heard firing from planes or helicopters, namely that at or about this time the Task Force had destroyed some caves was "*a possible explanation*".

(f) Darwan had experienced multiple raids and the primary Judge did not advert to the possibility that many of the details the Afghan witnesses described (see for instance J[1175(1)-(4) and (7)] and J[1186(1)-(2) and (4)]) and upon which the primary Judge relied as corroborating their accounts, could have been drawn from these other raids.

(g) The primary Judge did not accord sufficient weight to the two motives the Afghan witnesses had to lie, or alternatively which might at least have affected their reliability, being their hatred of infidels and the extended period during which they and their families had been financially supported by the Respondents' agent Dr Sharif (J[1174], J[1184]).

21. The primary Judge rejected the account of a legitimate engagement in the official contemporaneous records. He did this notwithstanding the Appellant's submission, recorded at J[1322], that it was improbable that not a single person at the patrol commanders' meeting would have rejected the Appellant's account. The primary Judge

did not give appropriate weight to the evidence of the Afghan witnesses (whose evidence he generally accepted), to the effect that on their version of events, many soldiers would have witnessed Ali Jan be kicked off the cliff, and the consequent effect of that evidence on the probability of the Appellant's account of a legitimate engagement surviving scrutiny at a patrol commanders' meeting.

22. According to Person 4, he observed an ICOM be retrieved from a man killed by the Appellant on the other side of the Helmand River earlier that day. He further observed that ICOM be handed over to the troop sergeant in an evidentiary bag some time during the course of the morning. He also observed that ICOM (in a waterlogged state) be planted on the body of Ali Jan after he was shot and moments before extraction. The primary Judge (J[1119]) did not sufficiently consider the significance of this inconsistency in assessing the overall reliability of the version of Person 4. Nor was proper or adequate weight accorded at J[1333]-[1335] to the absence of any evidence that Person 11 was observed carrying an ICOM radio that day.

23. The primary Judge speculated at J[1142] in rejecting the evidence of Person 100, that no complaints had been made concerning war crimes or a PUC being kicked off the cliff at meetings in 2013 involving Person 7, on the basis of any of: a memory failure, perhaps aided by a desire to shut down a sensational allegation, or *"consciously covering up his own failure to act*" to avoid scandal or wishing to avoid engendering *"the animosity of the Appellant's powerful friends and associates*". The consequence is that the evidence of Persons 7 and 18 to the effect that Person 4 raised his allegation in 2012-2013 was incorrect and that Person 4 did not raise his allegations about Darwan until 2016 (Person 7) and 2019 (Person 18). That delay is significant in terms of its effect on the reliability of Person 4's allegations.

24. The primary Judge erred in making a finding about the likelihood of the SASR's aerial scanning abilities to detect a human presence in a corn field in the absence of any expert evidence and in circumstances where there was evidence that the scanning assets had failed to detect insurgents on previous missions (J[1330]-[1334]).

25. The primary Judge erred in not according sufficient weight to:

    (a) the practice of the SASR to photograph and record PUCs and then to either release them or take them back to Tarin Kowt for questioning; and

    (b) the absence of any record or photograph of Ali Jan, Mohammad Hanifa or Mangul that corroborated their claim to have been placed under control by members of the SASR during that mission. The primary Judge did not

adequately consider the impact of these matters on the probabilities of the allegation of the assault and murder of Ali Jan.

26. At J[1300], and notwithstanding J[932], the primary Judge erred in taking into account irrelevant considerations, being the findings in relation to the murders at W108 and pre-deployment training, to infer that the Appellant had a tendency to execute persons he thought were or were likely to be Taliban.

27. At J[1300], the primary Judge erred in finding that the Appellant's motive for killing Ali Jan was that he *"would execute persons he thought were Taliban or likely to be Taliban*" notwithstanding that:

(a) this motive was not put to the Appellant as the reason for killing Ali Jan; and

(b) the Respondents' case was that Ali Jan was a farmer and not a member of the Taliban.

28. At J[1335], and notwithstanding J[932], the primary Judge erred in taking into account an irrelevant consideration, being the findings in relation to pre-deployment training, to infer that the Appellant had a tendency to use "*throwdowns*" to conceal an unlawful kill.

29. The primary Judge erred in making global findings about the credibility of Person 11 and Person 100 in relation to Darwan. In so doing, the primary Judge erred by approaching the fact-finding process on the basis that because the Appellant's witnesses were unreliable about some specific matters, that they were unreliable about all matters concerning Darwan.

30. The primary Judge erred in failing to properly apply section 140 of the *Evidence Act* 1995 (Cth) and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 in making findings that the Appellant had engaged in war crimes at Darwan, in circumstances where the Court was invited by the Respondents to make findings of criminal conduct in civil proceedings, notwithstanding that the Appellant was entitled to the presumption of innocence.

Defence of Justification – Chinartu (Grounds 10 to 13)

31. The primary Judge found at J[1522] and J[1524] that two caches were discovered during the mission to Chinartu, one by the engineers and another by Person 14. That finding was glaringly improbable or failing that, the evidence could not permit the Respondents to discharge the burden of proof as required by section 140 of the *Evidence Act* 1995 Cth and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

(a) According to Person 14 the cache he discovered was handed over to the engineers. For this finding to be correct, the engineers would have had to have exploited and reported upon one cache and yet on the same day, in respect of the virtually identical cache discovered by Person 14 shortly afterwards, proceeded to inspect that cache yet failed to mention it or report upon it.

(b) At J[1446] the primary Judge accepted as a "*probable explanation*" that the AK47 and the binoculars from the photographed cache were wrongly attributed to the relevant EKIA (in the OPSUM for the 14:05 DE engagement). This was engaging in speculation. In any event, this finding is inconsistent with the later finding that the photographed cache was not the one discovered by Person 14 – and was therefore not connected to the site of the execution.

(c) The primary Judge did not consider the necessary implication of this finding, which was that the photographed or documented cache must still have been discovered on the mission, and that if it was not connected to the engagement recorded in the OPSUM at 14:05 DE (which the primary Judge found at J[1438] did not occur) then there was no other plausible explanation for its existence.

(d) The primary Judge did not consider the Appellant's submission that Person 14 invented the second cache and that the Respondents (Senior Counsel for the Respondents having put to the Appellant in cross examination that the cache discovered prior to the execution was indeed the one photographed) changed position when the official records made it plain that the documented cache had been discovered by engineers using particular equipment, and also that it had been photographed at about 15:24-15:26 DE, well before Person 14 claimed to have made the discovery.

(e) Person 14 was the sole eyewitness relied upon by the Respondents. The Appellant, Person 11 and Person 32, each of whom were alleged by Person 14 to be present, denied the allegation of an execution. Person 14's allegation depended upon the discovery of the cache. According to Person 14, the murder followed very shortly after this discovery by him. If the evidence did not support the discovery of a cache by Person 14 at the particular time he nominated (being after 15:34 DE), the allegation of murder collapsed.

32. The primary Judge at J[1531] accepted the evidence of Person 14 that in five minutes (between 15.34 DE when the helicopters left Tarin Kowt) and 15.39 DE (when the EKIA was actually reported) that he moved from a waiting area to the TQ compound (to inquire after the whereabouts of his patrol), then a further 80-100 metres to the

compound where he looked in the room, discovered the cache and witnessed the execution. In fact, Person 14 also said he spoke with Person 32 and observed the engineers work on the cache during this period as well as listening to the Appellant relay his orders through a translator (J[1415]-[1418]). His Honour observed that it was *"not impossible*" that all these events would have happened within that five-minute period. That finding was glaringly improbable or failing that, the evidence could not permit the Respondents to discharge the burden of proof as required by section 140 of the *Evidence Act 1995* (Cth) and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

33. The primary Judge found at J[1536] that Person 14's evidence that a last minute change in the number of persons of interest being returned to Tarin Kowt (from three to four persons to two persons) annoyed the troop sergeant and that *"this provides clear and strong support for the account of Person 14*". The primary Judge did not consider why a reduction in the (already uncertain) number of prisoners would cause annoyance. More critically, without any proper or rational basis, the primary Judge relied on Person 14's own evidence as corroborating himself in circumstances where the other three eyewitnesses alleged by Person 14 to be present, gave evidence denying they witnessed an execution.

34. The primary Judge erred in making global findings about the credibility of Persons 11, 32 and 35 in relation to Chinartu. In so doing, the primary Judge erred by approaching the fact-finding process on the basis that because the Appellant's witnesses were unreliable about some specific matters, that they were unreliable about all matters concerning Chinartu.

Miscarriage of justice and unfair trial (Ground 17)

35. The Second Respondent, Mr McKenzie, engaged in wilful misconduct in the proceedings below by improperly and unlawfully obtaining, ~~and~~ retaining and using the Appellant's confidential and privileged communications with his legal representatives, and further, or alternatively, information derived from the Appellant's confidential and privileged communications with his legal representatives. ~~information concerning the Appellant's legal strategy concerning the trial that was confidential and privileged to the Appellant.~~

36. The Appellant was unaware of the Second Respondent's misconduct until after the trial and the hearing of the appeal.

36A The Second Respondent failed to comply with his discovery obligations in accordance with the order for discovery made on 2 August 2019 by Besanko J and the *Federal Court Rules 2011* (Cth) by reason of his:

(a) failing to discover communications with sources including Danielle Scott, Emma Roberts and Person 17, including communications conducted using the encrypted messaging application Signal, and failing to disclose the destruction or loss of such communications and to state when those documents were last in his control and what became of them, as required by r 20.17(2)(b);

(b) failing to discover communications and documents relating to the receipt and transmission of screenshots, images and other media files obtained from Danielle Scott, Emma Roberts and Person 17 including the means by which such material was received and forwarded to his solicitors;

(c) failing to discover file notes or records of the meeting held with Emma Roberts and Danielle Scott on 14 March 2021, or alternatively failing to disclose those documents and claim any privilege over them as required by r 20.17(2)(c); and

(d) verifying by affidavit that his Lists of Documents were complete and accurate when, in truth, material categories of directly relevant documents were omitted, thereby providing a false and misleading verification contrary to r 20.22.

37. There is at least a real possibility that, had the Second Respondent not engaged in such misconduct or had given proper discovery, the result of the trial would have been different, in that:

(a) Had the Second Respondent's misconduct or failure to give proper discover been known, the Appellant would have moved the Court below to strike out the Respondents' defences or seek other sanctions or orders for further verified discovery by reason of that misconduct or failure to give proper discovery, the outcome of which cannot now be ascertained;

(b) By reason of the Respondents' improper access to the Appellant's confidential and legally privileged information, there is a real possibility that they made forensic decisions below, which they would not otherwise have been in a position to make, which were to the advantage of the Respondents and/or the disadvantage of the Appellant;

(c) Had the Respondents' improper access to his confidential and legally privileged information been known, there is a real possibility that the Appellant would have made different forensic decisions at trial to his benefit;

(d) There is a real possibility that the primary Judge's assessment of the credit of Ms Roberts and/or Person 17 would have been different;

(e) Because there is a real possibility that his Honour's assessment of Ms Roberts' and/or Person 17's credit may have been different, there is also a real possibility that his Honour's assessment of the Appellant's credit in relation to one or more, or all, issues in the trial may have been different;

(f) Because there is a real possibility that his Honour's findings as to credit may have been different, there is a real possibility that his Honour's findings of fact in relation to the defences of justification and contextual truth may have been different; and

(g) Because the Second Respondent's discovery defaults were only revealed after the conclusion of the trial and the hearing of the appeal, and have not been properly remedied, there remains a realistic possibility that further undisclosed communications or documents relevant to privilege misuse, credit, or forensic advantage exist or existed and has accordingly caused substantial prejudice to the Appellant's ability to fairly meet the Respondents' case.

38. In the circumstances, including the seriousness of the misconduct, the nature of the information improperly obtained, and its concealment until after the conclusion of the trial and appeal, it is in the interests of justice – both as between the parties and more broadly in relation to the administration of justice – that the matter be retried.

Schedule

No. NSD 689 of 2023

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

Respondents

Second Respondent:	Nick McKenzie
Third Respondent:	Chris Masters
Fourth Respondent:	David Wroe

Date: 28 April 2025