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No. NSD 689, 690 and 691 of 2023

Federal Court of Australia

District Registry: New South Wales

Division: General

On appeal from the Federal Court of Australia

BEN ROBERTS-SMITH

Appellant

FAIRFAX MEDIA PUBLICATIONS PTY LTD ACN 003 357 720 and Ors

Respondents

RESPONDENTS' SUBMISSIONS ON APPLICATION TO REOPEN THE APPEAL

I. INTRODUCTION

1. The Appellant seeks to reopen this appeal, leave to file a proposed Amended Notice of Appeal (**PANoA**) and to adduce further evidence under s 27 of the *Federal Court of Australia Act 1976* (**FCA Act**) based upon a suspicion that the Second Respondent, Mr McKenzie, "wilfully" obtained and retained "information concerning the Appellant's legal strategy concerning the trial that was confidential and privileged to the Appellant" (PANoA, [35]).

2. In order for the interlocutory application and the proposed new ground of the appeal to succeed, the Appellant must establish:

   (a) the further evidence is **admissible**;

   (b) Mr McKenzie improperly obtained and retained **privileged information concerning the Appellant's legal strategy concerning Person 17** (that is, PANoA [35] as narrowed by the further evidence sought to be relied upon);

   (c) Mr McKenzie engaged in **wilful misconduct** in obtaining and retaining information, which requires knowledge that the information was privileged;

   (d) the Appellant was **not aware** of the alleged misconduct at the time of trial;

   (e) the Respondents **actually used** the alleged privilege information in making forensic decisions to their advantage or the Appellants' disadvantage;

   (f) it is very probable or a real possibility that the actual use of the information in the proceedings **affected the result**; and

   (g) a **retrial** is therefore warranted under s 28 of the FCA Act.

3. For the reasons given below, the application fails at every step.

4. In summary, as regards the Appellant's theory that Mr McKenzie received privileged information from his RS Group email account concerning his legal strategy on Person 17, through his ex-wife Emma Roberts or her friend Danielle Scott: Mr McKenzie did not obtain or retain *any* of the Appellant's privileged information; there is no basis for a finding of wilful misconduct in the evidence; there are no particulars, and there is no evidence, of actual use of the alleged privilege information; nor is there any basis for concluding that the result of the trial very probably or even as a real possibility would have been different but for the alleged misconduct.

5. Underlying the appellant's suspicion of misuse of privileged information is a supposition that Ms Roberts, and her friend, Ms Scott, provided Mr McKenzie with the privileged information derived from the Appellant's RS Group email account, which the Respondents used in the proceedings below for forensic advantage (Appellant's written submissions filed

24 April 2024 (**AS**) [1.3]).

6. The Appellant's position is that "[t]he extent to which this occurred is not presently knowable" (AS [1.4]). Nevertheless, he attempts to redress the absence of evidence in support of his speculative theory by resort to an asserted reversal of onus and the invocation of adverse inferences (AS [3.12]). That approach is erroneous at many levels.

7. The Appellant's Interlocutory Application also depends upon a lawyerly construction of the phrase "legal strategy" as used by Mr McKenzie — who is not a lawyer — in a snippet of conversation that was surreptitiously recorded. The phrase "legal strategy" *might* refer to a *privileged* legal strategy; but it does not invariably have that meaning, particularly when used by non-lawyers. In the context of long running and hard fought litigation, the phrase "legal strategy" could equally describe a party's own strategy, or strategy devised by friendly corporate executives with legal qualifications (like Mr McWilliam). Mr McKenzie does not say in the recording that the "legal strategy" he is referring to is privileged or the product of the Appellant's lawyers' work. His evidence as to why he can now be confident that that was not what he meant is cogent and credible. Further, the Court ought to recall that the unknown actor who gifted this recording to the Appellant saw fit to edit it down to a decontextualised snippet. That editing, together with the provision of the recording to the Appellant, suggests that the recording may have been engineered to remove the relevant context so as to provide maximum benefit to the Appellant and harm to Mr McKenzie.

8. In opposition to the application, the Respondents rely on an affidavit of Nicholas David McKenzie affirmed on 14 April 2025 (**NM**), Exhibit **NM-1**, Confidential Exhibits **NM-2** and **NM-3**, and a tender bundle of supplementary documents (**TB**).

9. The Respondents respectfully seek leave to exceed the page limit for two reasons. *First,* it is necessary to explain why each individual piece of information to which Mr McKenzie is alleged to have had improper access either is not privileged or was not accessed by Mr McKenzie at all. *Secondly*, the Appellant's submissions do not develop any of the six counterfactuals at PANoA [37]. It falls to the Respondents to explain why each of them fails.

II. FACTUAL BACKGROUND

10. The Appellant's Interlocutory Applicant and PANoA raise aspects of the proceeding at first instance that have not been the subject of the appeal to date. They concern Imputations 7 and 8, which related to an allegation that the Appellant had committed an act of domestic violence. The Respondents relied on defences of justification and contextual truth in response to those imputations. Their justification case was that the Appellant punched Person 17, a woman with whom he was having an affair, on 28 March 2018 in a room at the Hotel Realm in Canberra. This defence failed (J [2226]) and the Respondents have brought no cross-appeal in relation to that conclusion.

11. Given the Full Court has not been required to consider the domestic violence allegation in

the appeal to date, we have set out the detail in a separate chronology.

III. LEGAL PRINCIPLES

12. Section 27 of the FCA Act provides that the Court has a discretion to receive further evidence in an appeal, including on affidavit. The principles governing the exercise of that discretion are well-established and were restated in *Northern Land Council v Quall (No 3)* [2021] FCAFC 2 at [16] (Griffiths and White JJ). A critical question is whether the further evidence, if it had been adduced at trial, would have led to a different outcome. The evidence generally must be such that the result would "very probably" have been different. The party seeking to adduce the evidence must generally demonstrate that it was unaware of the evidence and could not have been, with reasonable diligence, made aware of the evidence. The provision should not be construed in such a way as to obliterate the distinction between original and appellate jurisdiction: ***Sobey*** *v Nichol* (2007) 245 ALR 378; [2007] FCAFC 136 at [71]; ***CDJ*** *v VAJ* (1998) 197 CLR 172 at [111] (McHugh, Gummow and Callinan JJ).

13. Section 28(1)(f) of the FCA Act permits the Full Court to "grant a new trial…on any ground upon which it is appropriate to grant a new trial". An order for a retrial is an order of last resort: ***CDJ*** *v VAJ* (1998) 197 CLR 172 at [102] (McHugh, Gummow and Callinan JJ). In order for further evidence to warrant a new trial, generally it must be "reasonably clear" that if the evidence had been adduced at the trial, an opposite result would have been produced, and the unsuccessful party must have exercised reasonable diligence to procure the evidence: *Commonwealth Bank of Australia v* ***Quade*** (1991) 178 CLR 134 at 140 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *CDJ* at [11].

14. The test is different where the trial has miscarried through "misdirection, misreception of evidence, wrongful rejection of evidence or other error" or through "surprise, malpractice or fraud", or where the material constituting the further evidence was unknown to the unsuccessful party because of misconduct on the part of the successful party: *Quade* at 140-141. The High Court in *Quade* disavowed any general rule in those cases. The appellate court must assess what will best serve the interests of justice, either particularly in relation to the parties, or generally in relation to the administration of justice, in the circumstances of the case: *Quade* at 142. *Quade* concerned a failure to discover relevant material. In that context, the High Court observed that in addition to general considerations as to the administration of justice, considerations will include the *degree of culpability* of the successful party, any *lack of diligence* on the part of the unsuccessful party and the extent of any *likelihood that the result would have been different* if the non-disclosed material had been made available. Critically, a verdict will not be set aside if it does not appear that there is at least a "real possibility" that the opposite result would have been produced: *Quade* at 143.

15. In respect of both ss 27 and 28, the onus is on the party seeking the order to persuade the Court it should be made. The Appellant erroneously suggests otherwise at AS [4.8], relying on ***Clifton*** *v Kerry J Investments Pty Ltd* (2020) 379 ALR 593; [2020] FCAFC 5 (Besanko,

Markovic and Banks-Smith JJ). The Full Court made clear that its decision turned on its own "unique and different" facts ([196]), where there was a finding of a "not *de minimis*" and ongoing failure to comply with discovery orders, and a failure by the defaulting party to search or adequately search the repository of material ([182]-[187]). The Court made clear that its role was to consider what would best serve the interests of justice having regard to the facts of the case ([196]). What was said at [203] was not an exposition of general principle: see *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International BV* (2021) 389 ALR 612; [2021] FCAFC 77 at [385] (Katzmann, Beach and Markovic JJ).

IV. THE DISCRETION TO ADMIT NEW EVIDENCE IS NOT ENLIVENED

16. The further evidence sought to be adduced is substantially inadmissible on the appeal. The grounds for objection are set out in the Respondents' separate schedule of objections. As the evidence is substantially inadmissible, the discretion under s 27 of the FCA Act is not enlivened, and the whole of the Appellant's Interlocutory Application consequently fails.

V. MR MCKENZIE DID NOT HAVE PRIVILEGED STRATEGY INFORMATION (PANoA [35])

17. Next, the Interlocutory Application fails as the Appellant cannot establish that Mr McKenzie had access to information "concerning the Appellant's legal strategy concerning the trial that was confidential and privileged to the Appellant" (PANoA, Annexure [35]).

18. Despite the acknowledged need for clarity in identifying the information said to have been privileged and wilfully misused, and despite the efforts of Perram J to achieve such clarity on the hearing concerning the Appellant's subpoenas and notices to produce, the Appellant's case remains obscure (as evidenced by the differing conclusions in this regard in the submissions of Senior Counsel for Mr Levitan (paragraph [10]) and Senior Counsel for Mr Bartlett (paragraph [21]) in support of setting aside the subpoena addressed to each of them). Doing our best, in **Annexure A** to these submissions we set out eight allegedly privileged communications referenced by Senior Counsel for the Appellant in the hearing on 24 April 2025 at T.65-67, or in written submissions. They are the *only* instances the Appellant has been able to identify.

19. There is no dispute that Ms Roberts or Ms Scott accessed the RS Group email hosting account in 2020 and early 2021. Ms Roberts candidly accepted in cross-examination that Ms Scott accessed the RS Group email hosting account at least 100 times: T.1988.40-41 (the precise number alleged by the Appellant is 101: MHA-1 at 412-413). Importantly, access to the RS Group email hosting account does not equate to access to the Applicant's own individual RS Group email account. Rather, access to the RS Group email hosting account enabled an administrator to access all individual RS Group email accounts and read all emails sent to or from that individual email account without the need to input a password for the individual account: MHA-1 at 13. The Appellant, Ms Roberts and Mr Adam Veale (an

accountant) all had RS Group individual email accounts: MHA-1 at 13.

20. The high point of the Appellant's evidence is that the RS Group hosting account was accessed on 101 occasions. But there is no evidence from which to infer that *any* of those 101 occasions were at the request of Mr McKenzie; that any *privileged* material was accessed; or that Mr McKenzie received any information derived from the Appellant's individual RS Group email account, much less any *privileged* information from that source.

21. *First*, 92 of the 101 occasions on which the RS Group email hosting account was accessed were pre-August 2020. The last was 30 April 2020, several months before the first contact between Mr McKenzie and Ms Scott on 9 August 2020. That comes from the Appellant's own evidence at MHA-1 at 412-413. The Court would readily infer that these 92 occasions had nothing to do with Mr McKenzie.

22. *Secondly,* there is no logical reason to infer that either Ms Roberts or Ms Scott had a different purpose for accessing the RS Group email hosting account on the nine occasions (across seven dates) post August 2020 compared with the previous 92 times. Some of those earlier 92 occasions concerned Ms Roberts asking Ms Scott to check both her own and the Applicant's individual RS Group email accounts on her behalf in relation to their marriage breakdown: T2043.4-8. The reason for the balance of the 92 access dates is unknown.

23. Notably, the Commonwealth objected to questions concerning both Ms Roberts and Ms Scott that may or may not have revealed that they accessed the RS Group email hosting account for law enforcement purposes: T.1945/38-1946/35; T.2041/37-2042/11. We also note that Ms Roberts had a natural interest in the possibility that the Appellant was conducting an affair with his solicitor: see eg NM-1 at 203, 212. All this is merely to underscore that Ms Scott and Ms Roberts may have had multiple purposes for checking the RS Group email hosting account other than obtaining privileged information to pass on to the Respondents. And whatever purpose Ms Scott and Ms Roberts had for checking the emails pre May 2020, there is no reason to infer that their purpose changed after that time.

24. *Thirdly*, not one of the seven dates on which the RS Group email hosting account was accessed after August 2020 aligns with the date of a meeting or conversation between Ms Roberts, Ms Scott, or Mr McKenzie. The email hosting account was accessed twice on 11 August 2020; twice on 16 December 2020, and once on each of 28 to 30 March 2021, 22 April and 27 April 2021: MHA-1 at 413-414. Notably, it was not accessed on 5 March 2021 when Mr McKenzie travelled to Cairns and met Ms Scott in person to discuss the USBs. Nor was it accessed on 14 March 2021, the day of the first meeting between Mr McKenzie, Ms Roberts, Ms Scott, and MinterEllison at Ms Roberts' home in Queensland.

25. Pausing there, Ms Roberts' evidence was *not* that the first meeting with Mr McKenzie and MinterEllison occurred in late March 2021: cf AS [2.8], [2.14]. She merely said it occurred in February or March 2021: T1976.47. This misstatement of Ms Roberts' evidence is relied on at AS [2.14] to found an erroneous submission that the RS Group email hosting account was

accessed at around the date of this meeting. That is wrong. On the Appellant's own evidence, there was no access to the RS Group email hosting account on or around 14 March 2021. In fact, the hosting account had not been accessed for three months at that point.

26. *Fourthly,* the Appellant's theory that the 19 April 2021 notice to produce was the product of unlawful access to his emails, which formed the basis of the Bromwich J Proceedings, is wrong. The basis of each category is identifiable, and none is drawn from privileged communications in the RS Group email account. This is set out in the chronology.

27. *Fifthly,* so far as inferences are concerned, given the genesis of this application there is plainly no basis to treat Person 17 as currently being in the Respondents' camp – if she ever was (*cf* AS [3.12]). It would be equally wrong to draw a *Jones v Dunkel* inference from the Respondents' failure to adduce evidence from Ms Roberts or Ms Scott. That each may have been prepared to give evidence against the Appellant at the trial is not sufficient to put them in the Respondents' "camp" for *current* purposes (*cf* AS [3.12]). And given the poverty of the Appellant's material, no occasion for calling them has arisen – there is no "case to answer": see *Cross on Evidence*, [1215] at n 44. As for the suggestion at AS [3.13] that an inference can be drawn from a refusal to waive privilege, this is a basic error of law: *Wentworth v Lloyd* (1864) 10 HL Cas 589; 11 ER 1154; *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87 at 93–5.

28. *Finally,* in his written submissions, the Appellant points to "examples" of the "kind of privileged information likely to have been made available to Mr McKenzie" (AS [3.14]). Not one of these examples, or the other communications in Annexure A, supports his theory. We turn to address these eight items now.

1. The "flagged email" from Mr Moses SC: AS [2.13]

29. The first item is an email from Mr Moses SC to the Appellant dated 19 April 2021 which is said to have already been "flagged" when the Appellant opened his email the following day: AS [2.13], [3.16]. The Court is asked to infer that Ms Roberts or Ms Scott accessed the email and flagged it "for future reference": AS [3.16]. This is said to be an "example" of the "kind of privileged information likely to have been made available to Mr McKenzie": AS [3.14].

30. The Appellant's own evidence falsifies this submission. The access logs for the RS Group email hosting account are at MHA-1 at 416-419. The Appellant's own analysis of that log shows that the account was only accessed once between 30 March and 22 April 2021, when the Appellant himself accessed it on 20 April 2021: MHA-1 at 412-414 and 452. In other words, on his own evidence, no one other than the Appellant accessed the RS Group email account in the period in which he invites the Court to infer that Ms Roberts or Ms Scott improperly accessed his email.

31. There is no basis for the inference sought at AS [3.16], nor for the assertion at AS [3.14] that the information is likely to have been passed on to Mr McKenzie.

32. In any event, all the evidence in support of this item is inadmissible hearsay, the evidence is in no sense "fresh", and absent evidence of the contents of the email (*cf* MHA-1 p 146), there is no evidentiary basis to conclude that its contents were in fact privileged (including because, unbeknownst to the lawyer, the contents might have concerned topics that fall within the fraud exception – see [50] below), or amounted to "legal strategy" or might have been of any forensic use to the respondents.

2. The IGADF file note: AS [3.17]

33. This is a privileged file note that Ms Roberts produced in response to a subpoena issued by the Appellant. The Appellant refers to Ms Roberts accessing the email account for her Family Court proceeding, and queries what "personal interest" she could have had in accessing it for a family law case (AS [3.18]). This is said to be another example of the "kind of privileged information likely to have been made available to Mr McKenzie" (AS [3.14]).

34. This submission ignores the evidence of Ms Roberts at trial that she accessed the RS Group email hosting account on advice from Queens Counsel in circumstances where she had been subpoenaed by the Appellant, and she was a director of the RS Group: T.1944/1-36. In her lawyer's presence, she logged into the RS Group email hosting account on his computer and identified documents responsive to the subpoena: T.1944/15-1945/31. She then delivered the responsive documents to the Federal Court Registry. The IGADF file note was identified as sensitive and that it "may be subject to a claim for legal professional privilege". The file note was placed into a sealed envelope and marked Packet S39 (see the chronology).

35. In these circumstances, there is no evidentiary basis for a submission that Ms Roberts accessed the IGADF file note improperly or provided it to Mr McKenzie. Nor is there any evidentiary basis for a submission that Mr McKenzie improperly accessed the IGADF file note at some other time. Rather than suggesting any impropriety on the part of Ms Roberts, the evidence indicates that she was careful and took advice before disclosing information that might be privileged to her ex-husband.

36. The points made in paragraph [32] above are also applicable to this item.

3. The meeting with Person 29 and Monica Allen: NM-1 at 209

37. The third item is an entry in an email from Mr McKenzie to MinterEllison referring to a meeting between the Appellant, Person 29 and Monica Allen. This entry has nothing to do with the Appellant's case on improper email access. It is based on something the Appellant told Ms Roberts orally. In any event, the assertion of privilege over this entry is inconsistent with the position taken by the Appellant at trial. No privilege claim was made; and the Appellant (through his Counsel) denied that he ever gave notes to Person 29.

38. The Appellant's evidence was that he had dinner with Ms Allen and Person 29 after his second IGADF interview in December 2019. He said he did not discuss or disclose any part

of his IGADF interview with Person 29: T668/4-23. Later in the trial, Ms Roberts gave evidence that the Appellant told her "he gave Person 29 a copy of his notes from the IGADF that day": T1941/36-37. There was no assertion of privilege over that evidence. Instead, it was put to Ms Roberts in cross-examination that the Appellant never made that statement: T2081/44-45. Person 29, for his part, denied receiving any notes at the dinner: T.5570/18-19. Then, in his written closing submissions, the Appellant asked the primary judge not to accept Ms Roberts' evidence on this point: Section XIII at [106]. The Court should reject the current assertion of privilege where it is inconsistent with the position taken at trial. Not only was no privilege claim made, the handing of notes to Person 29 was positively denied.

39. The Appellant's conduct in disclosing his IGADF notes to Person 29 (which the primary judge found did occur: J [2458]-[2460]) was incapable of attracting privilege in any event. The notes were evidently given to Person 29 to help *him* prepare for *his* IGADF interview; not for the Appellant to obtain legal advice or material for use in litigation. Further, the disclosure could never be privileged when doing so violated the non-disclosure directions that were given by the IGADF to every witness before that inquiry under s 21 of the IGADF Regulation 2016 (T6720/25-26), including to the Appellant himself (T.664/28-31).

40. Again, the points in paragraph [32] above are applicable.

4. Selecting and providing images to the IGADF: NM-1 at 215

41. The first part of this communication concerns the receipt of USBs from other SASR members. That cannot be privileged information. The Appellant volunteered an account of receiving the USBs in his evidence in chief: T.321/18-323/20.

42. The balance of the communication cannot be privileged either. The Appellant has adduced no evidence to establish the starting premise that he did, in fact, provide photographs from the USBs to the IGADF. At trial, the Appellant was asked what he did with the USBs, and he said he "used them predominantly with the lawyers to ascertain – or used them to explain to the lawyers how Whisky 108 looked": T321/41-42. (That use does not make the images privileged, as opposed to what was said about them to the lawyers.) He did not say he used them to give production to the IGADF. There is no basis to infer that he did so in the absence of evidence, particularly where he was asked a direct answer that ought to have elicited the response.

43. In any event, even if the photographs were provided to the IGADF, the entry at NM-1 does not disclose any privileged communication. There is no evidence that Ms Scott's knowledge of the fact of providing photographs to the IGADF was sourced from his RS Group emails. It makes no reference to the involvement of lawyers. The entry suggests that the Appellant selected the photographs himself, and then gave them to a third party, the IGADF. None of those matters are privileged.

44. Again, the evidence is not "fresh", and absent evidence of the contents of the allegedly

privileged communication there is no evidentiary basis to conclude that its contents were in fact privileged, or amounted to "legal strategy" or might have been of any forensic use to the Respondents.

5. The reference to Mick Keelty: NM-1 at 215

45. The Appellant's extensive reliance on the Mick Keelty reference is misconceived in at least three ways. As a threshold matter, Appellant has adduced no evidence to establish that there *was* any such privileged communication from Mark O'Brien Lawyers to him concerning an interview with the AFP about Mr Keelty. There is no evidence from him or his former lawyers attesting to its existence. Nor has he served a copy of the email itself.

46. In any event, the reference provides no support for the Appellant's theory that Ms Roberts or Ms Scott were unlawfully accessing privileged material in his email account and passing it to the Respondents. There are two relevant messages a NM-1 at 200-202. The first shows that on 31 July 2019 at 7.03pm, Ms Roberts sent a text message to Ms Scott stating, "MOB just sent BRS an email saying afp want to speak with him". One minute later, there is a second message stating, "he thinks it's got to do with coffee date". It is apparent from the second message that the Appellant has discussed the email with Ms Roberts and told her his view of what he thought the AFP wanted to speak to him about, being the "coffee dates" with Mr Keelty. This second message shows that the Appellant discussed the email with Ms Roberts. Her access to it was not unlawful or underhanded. It does not support, in any way, a theory that Ms Roberts or Ms Scott at a later time accessed the RS Group account to pass privileged information to Mr McKenzie.

47. It is striking that the Appellant's primary example of privileged information he says was obtained from his email is simply a case where the information came not from an email, but from something the Appellant himself told Ms Roberts, who in turn texted Ms Scott. While the Appellant urges the Court to speculate about subterfuge, the evidence suggests something more plausible and banal: casual, intentional and voluntary disclosures that were recalled by Ms Roberts and Ms Scott after the end of the Appellant's marriage to Ms Roberts.

48. Again, absent production of the actual email, it is impossible to find that its contents were privileged, or concerned the Appellant's legal strategy, or that if disclosed, they would confer a forensic advantage on the Respondents.

6. "Monica writes to ERS": NM-1 at 218-219

49. Both the 12 and 22 March 2021 emails from Mr McKenzie to MinterEllison contain two entries commencing with the words "Monica writes to ERS". Both entries recorded efforts by Ms Allen to obtain documents establishing Ms Roberts was separated at the time of the Appellant's relationship with Person 17 (which was untrue, but that fact was not known by Ms Allen). These messages again do not support a theory that Ms Roberts or Ms Scott were unlawfully accessing privileged material in his email account. They were sent by Ms Allen

to Ms Roberts. She could access them in her own account.

50. These communications are incapable of attracting privilege by reason of the fraud exception in any event. Legal professional privilege will be displaced where there is a "*prima facie*" case or "reasonable grounds" to believe that the communication was created in furtherance of a fraud or deception: *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 (***Propend***) (Brennan CJ at 514); Dawson J at 521-522; Toohey J at 534; Gaudron J at 547; McHugh J at 556; Gummow J at 575). See also ***Southern Equities*** *Corporation Ltd (in liq) v Arthur Andersen & Co* (1997) 70 SASR 166 at 174. "Fraud" in this context extends to a "range of legal wrongs that have deception, deliberate abuse of or misuse of legal powers, or deliberate breach of a legal duty at their heart": *Southern Equities* at 174. It is not necessary to show that the solicitor in question is implicated. What is in issue is the purpose of the client: *Southern Equities* at 174. The communication must be made, or the document prepared, with the intention of facilitating the fraud, in the sense of "helping it, advancing it or assisting it": If the document is prepared as "part of the process or scheme of the fraud", then it will be made "in furtherance of it": *Kaye v Woods (No 2)* [2016] ACTSC 87 at [38].

51. Applying these authorities, the "Monica writes to ERS" emails cannot ever have been privileged. The Appellant's conduct in lying about the separation and asking Ms Roberts to give false evidence about the separation (see J [2588]), fits within the definition of fraud as set out in *Southern Equities*. It involved a deliberate breach of a legal duty not to give false evidence or to suborn another witness to give false evidence. Ms Roberts, by her own admission, was also acting in furtherance of the fraud at that time, having approved outlines of evidence asserting matters she knew to be false. Ms Allen then sought documents from Ms Roberts, it may be inferred on the Appellant's instructions, to advance his fraudulent purpose. It is irrelevant that Ms Allen herself did not know that she was being used in this way.

7. The "tactic" devised by Mr McWilliam or Mr Moses SC: Conf. Exh NM-3

52. As with previous items, the Appellant has adduced no evidence to establish the claim for privilege. The submission fails at the first hurdle. He has not established that any part of his strategy involved a "tactic" that the domestic violence allegation was "not really important here", or that the case was "nothing" unless the Appellant was charged by the AFP.

53. Even if such a rudimentary tactic was part of the Appellant's legal strategy, he has not established that it was a *privileged* aspect of that strategy. Ms Scott said the tactic was devised by either Bruce McWilliam, an officer from Seven Network who oversaw the funding arrangements for the Appellant and some of his witnesses (J [2392]), or by Mr Moses SC. If the "tactic" was devised by Mr McWilliam, it could not be privileged. There is no evidence from the Appellant or his lawyers to support a finding that it was devised by Mr Moses SC.

54. Further, if the tactic was part of the Appellant's privileged legal strategy, Ms Scott's knowledge of the tactic involved a waiver. The Court would not infer that Senior Counsel

disclosed the tactic to Ms Scott himself; otherwise, she would know that the tactic was his creation rather than Mr McWilliam's. The more likely inference is that the "tactic" (if it ever existed) was disclosed by the Appellant either directly to Ms Scott, or to Ms Roberts who in turn told her friend. On either case, by openly disclosing the tactic to Ms Roberts or Ms Scott, the Appellant has acted inconsistently with the maintenance of the confidentiality which the privilege is intended to protect, and a waiver has occurred, even if he did not intend that consequence: ***Expense Reduction*** *Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* (2013) 250 CLR 303 at [30].

55. One final point should be made about the recording in which the "tactic" comment is made by Ms Scott. The Appellant submits that the Respondents contravened their discovery obligations below by not discovering the recordings at trial, and the Court should more readily draw adverse inferences as a result: AS [2.4], [3.21]. The criticism is misplaced. The recordings were created after discovery had been given by the Respondents (see the chronology). They were privileged because they were (a) communications passing between the party (Mr McKenzie) and a third person; (b) they were made with reference to litigation already commenced; and (c) they were made for the purpose of being put before the solicitor with the object of enabling him to defend an action (that is, the proceedings below): *Trade Practices Commission v Sterling* (1979) 36 FLR 244. There is no obligation to discover a privileged document created after the proceedings started: Rule 20.20(2) of the *Federal Court Rules 2011*.

8. The Audio Recording

56. The final piece of information is the Audio Recording.

57. The analysis set out at paragraphs 17 to 55 above reveals that Mr McKenzie has not been shown to have received any privileged material (whether from the Appellant's email account or any other source). That is consistent with Mr McKenzie's own evidence: NM [41]. Mr McKenzie's evidence is that he has never, to his knowledge, had information of that kind: NM [41]. Nor so far as he is aware, have any of the Respondents, their solicitors, or their barristers, had information of that kind: NM[41]. His statement in the Audio Recording that "I've just breached my fucking ethics in doing that" is a reference to the disclosure he had just made to Person 17, not his dealings with Ms Roberts or Ms Scott or being in possession of any privileged information of the Appellant: NM [68].

58. The matter is clarified by the 22 March 2021 email: NM-1 at 215 to 222. Contrary to the complaint at AS [3.12] that the Respondents have not disclosed exactly what was received from Ms Roberts and Ms Scott, this is precisely what this email does. This email sets out every piece of information that Mr McKenzie received from Ms Scott, and Ms Roberts through Ms Scott, and which he considered to be important or significant or relevant to the proceedings. It is a contemporaneous communication that Mr McKenzie would have expected to remain privileged and confidential. It may be taken to be entirely frank. Not one of the matters concerning Person 17 that are referred to in the 22 March 2012 email is

privileged. That including the two matters Mr McKenzie recalls being of significance, being the separation lie, and that the Appellant thought that Person 17 lied about being pregnant during their relationship: NM [42].

59. For all the reasons outlined above, Mr McKenzie did not receive any privileged information at all, let alone privileged information concerning the Appellant's legal strategy in respect of Person 17. The application should be dismissed on this basis alone.

VI. MR MCKENZIE DID NOT ENGAGE IN WILFUL MISCONDUCT: PANoA [35]

60. As none of the material Mr McKenzie from Ms Scott or Ms Roberts was privileged, the receipt of that information by Mr McKenzie could never be considered misconduct, let alone wilful misconduct.

61. But even if the Court were to find that one or more pieces of information set out in Annexure A was privileged, there is still no basis for a finding of "wilful" misconduct. "Wilful" misconduct requires knowing and intentional misconduct: *Transport Commission (TAS) v Neale Edwards Pty Ltd* (1954) 92 CLR 214 at 227-8 (Kitto J). There is no basis for a such a finding here. Mr McKenzie did not think that the communications he received from Ms Scott or Ms Roberts were privileged. He has never knowingly had such information: NM [41], [43], [55]-[56], [60], [61]. Ms Scott received information from Ms Roberts, and Mr McKenzie thought Ms Roberts was free to tell others about things she knew, particularly in relation to the separation lie and requests of Ms Roberts to substantiate that lie NM [55].

VII. MR ROBERT-SMITH WAS AWARE OF THE ALLEGED MISCONDUCT: PANoA [36]

62. The Appellant bears the onus of demonstrating that he was unaware of the evidence and *could not have been, with reasonable diligence, made aware of it*: *Quall* at [16(4)]. That onus has not been discharged. The content of the Audio Recording adds nothing substantive to the Appellant's knowledge at the time of the trial. The task the Appellant undertakes here is in substance the same task as he undertook unsuccessfully before Bromwich J; and the very cross-examination that his Senior Counsel undertook of Ms Roberts in the trial below.

63. In the Bromwich J Proceeding, the Appellant gave sworn evidence that Ms Roberts was accessing his emails, which he said contained privileged material, and was "divulging those communications without my consent to Minter Ellison". That was put to Bromwich J as a statement of fact, not a suspicion: MHA-1 at 14 (paragraph [18]). In short, in June 2021, the Appellant claims to have had evidence of the very same misconduct that he now seeks to establish on the appeal in support of PANoA [35].

64. Next, the Appellant has also known, since April 2021, that Ms Roberts and Ms Scott had been actively briefing the Respondents. So much was evident from the service of their outlines. In addition, Ms Roberts was cross-examined extensively at trial about those briefings and her contact with the Respondents: T.1977/38-1980/46, 2052/25-29, 2053/26-

2057/32. For example, it was put to her that she gave information to Ms Scott to pass on to Mr McKenzie: T.2063/43-45. It was put to her that she passed on information directly to Mr McKenzie, including in the absence of lawyers: T.2064/3-5, 2066/8-11. Ms Roberts also made clear that Ms Scott was accessing the email account even after Ms Roberts and Ms Scott agreed to give evidence for the Respondents: T.2049/20-26. None of these matters are new.

65. Finally, the Appellant has acted with no diligence towards the Respondents: *cf* AS [4.6]. Despite expressly alleging in the Bromwich J Proceedings that the Respondents were being given privileged information from his email account, he never sought to join them to that case. Similarly, the Appellant never made the allegation against the Respondents in the proceedings below, despite having made it explicitly in the Bromwich J Proceedings and despite cross-examining Ms Roberts extensively about her and Ms Scott's access to emails and the extensive contact between her and Ms Scott and the Respondents. There is no explanation from the Appellant, or Ms Allen, as to why that was never done.

66. For those reasons, the Court would not accept that the Appellant was unaware of the substance of the matters raised in the Audio Recording. Nor could the Court be satisfied that the Appellant exercised *any* diligence vis-à-vis the Respondents when he failed to put the allegations to them in either the Bromwich J proceedings or the trial below. Had he done so, his conspiracy theory that Mr McKenzie was accessing his privileged emails would have been dispelled years ago.

VIII. THE RESULT WOULD NOT HAVE BEEN ANY DIFFERENT: PANoA [37]

67. Even if the Appellant were to establish wilful misconduct by Mr McKenzie and absence of knowledge on his own part (both of which are denied), it is neither "very probable" nor a "real possibility" that the result of the trial would have been any different: cf AS [3.26].

A. No evidence that Mr Robert-Smith would have acted differently: PANoA [37(a) and (c)]

68. The contention at PANoA [37(a)] should be immediately rejected. There is no evidence from the Appellant that he would have moved to strike out the Respondents' defences if he had known of the alleged misconduct. He bears the onus. There is no basis to infer that any such decisions would have been taken in the absence of evidence. In any event, it is not very probable or a real possibility that such an application would have succeeded. The only plausible (maximal) remedy is that Mr McKenzie would have been restrained from disclosing the privileged information and any lawyers who had seen the privileged information may have been restrained from acting.

69. The contention at PANoA [37(c)] is equally flawed. The Appellant has not given any evidence identifying a single forensic course of action (i) which is different from a forensic decision that was taken in fact; (ii) which is a real possibility of having been taken by the Appellant had he known of the alleged misconduct; and (iii) where it is very probable or a real possibility that the different forensic course of action would have changed the result of

the trial. Again, the Appellant bears the onus.

B. No basis to infer that the Respondents made favourable forensic choices: PANoA [37(b)]

70. There is equally no basis to conclude that the Respondents made any different forensic decisions based on any of the items at Annexure A. The Appellant cites a single example at AS [3.25] in support of this particular (the Keelty email at item 5 of Annexure A). But the analysis of that one example at AS [3.25] overlooks the single most important fact for present purposes: the evidence of the Appellant' meetings with Keelty (i.e., the "coffee dates") was introduced into the trial *by the Appellant himself* in his evidence in chief: T337/21-32. The adverse credit findings that flowed from his evidence on those meetings (J [2437], [2494]) were entirely self-inflicted. There is no basis to conclude that they are the consequence of any forensic decision by the Respondents based on any privileged material of the Appellant.

C. A different credit analysis could not have affected the result: PANoA [37(d)-(f)]

71. The final three particulars at PANoA [37(d)-(f)] are linked. They collectively fail for three reasons. *First*, the primary judge's analysis of Person 17 and Ms Roberts' credit would not have been any different if Mr McKenzie did not engage in the alleged misconduct. *Secondly*, even if Person 17 or Ms Roberts' credit was assessed differently, that would not impact on the assessment of the Appellant's own credit. The primary judge rejected Mr Robert-Smith's evidence on each topic for its inherent implausibility or dishonesty. *Thirdly*, even the Appellant's credit had been assessed differently on any matter on which Person 17 or Ms Roberts gave evidence, that still would not have affected the war crimes findings.

The credit analysis between Person 17 and the Appellant: PANoA [37(d)-(e)]

72. The primary judge's analysis of the domestic violence allegation appears in Section 11 of the trial judgement. The primary judge did not accept the Appellant's account. Nevertheless, he was not persuaded that Person 17's evidence was sufficiently reliable to form the basis of a finding that the alleged assault occurred: J [2226]. His Honour's conclusions were not interrelated; they were based on independent difficulties with each account: J [2222]-[2225] (Person 17) and J [2214]-[2220] (the Appellant).

73. In those circumstances, primary judge's credit findings on Person 17 cannot rationally be said to have been affected – positively or negatively - by Mr McKenzie's alleged misconduct. Even if Person 17's credit had been assessed differently, his Honour's conclusion on the Appellant's credit would not have changed. The primary judge independently rejected the Appellant's account due to a deliberate discovery failure and internal inconsistencies.

The credit analysis between Ms Roberts and the Appellant: PANoA [37(d)-(e)]

74. The primary judge's analysis of Ms Roberts' credit, and the corresponding analysis of the Appellant's credit, appears in Section 12 of the trial judgment. Ms Roberts gave evidence on five topics within this section: the intimidation of Person 6, the intimidation of Person 18,

witness collusion, concealment of evidence, and lies.

Intimidation of Person 6: J [2240]-[2270]

75. The intimidation of Person 6 involved the Appellant using an intermediary, John McLeod, to make anonymous complaints to the police and others that Person 6 had illegal weapons. The complaint was dismissed but not before the police raided Person 6's home: J [2240]-[2270]. Mr McLeod, Ms Roberts and the Appellant all gave evidence on this issue.

76. The primary judge's analysis of Ms Roberts' credit would have been no different if Mr McKenzie did not engage in the alleged misconduct. Ms Roberts' evidence on this topic was supported by a devastating contemporaneous document – a text message from the Appellant to Ms Roberts stating, "what happened to Person 6 will scare the others" (J [2263]) - as well as the evidence of Mr McLeod: J [2247]-[2260], [2264]. In any event, even if Ms Roberts' credit was assessed differently, that would have no effect on the Appellant's own credit. The primary judge rejected the Appellant's account because it was not credible: J [2247], [2252]-[2254]. He rejected the Appellant's explanation for the text message as implausible: J [2266]. He also described the Appellant's evidence "trying to distance himself from the results of a process he had set in train" as "most unimpressive": J [2254].

Intimidation of Person 18: J [2271]- [2346]

77. The intimidation of Person 18 occurred when the Appellant procured Mr McLeod to send two anonymous threatening letters to Person 18 at SASR headquarters: J [2271]-[2346]. Mr McLeod, Ms Roberts, the Appellant and Person 18 gave evidence on this topic. Person 18's evidence may be put to one side: it was relevant only to his receipt of the letters. The trial judge said this conduct "clearly" reflected adversely on the Appellant's credit: J [2346].

78. Again, the primary judge's analysis of Ms Roberts' credit on this topic would have been no different if Mr McKenzie did not engage in the alleged misconduct. Her evidence (J [2279]-[2280], [2340]-[2343]) was corroborated by Mr McLeod's evidence (J [2278]-[2296], [2312] 2339]) and documents. The text of the letters was in evidence, (J [2285]) as well as scraps of paper the Appellant gave to Mr McLeod on which the Appellant had handwritten the names of Person 18 and Person 1, their squadron and troop, and an arrow with the words "insert address": J [2284]. In assessing Ms Roberts' credit, his Honour expressly considered evidence on the RS Group email accounts: J [2342]. In any event, a different assessment of Ms Roberts' credit would have no effect on the Appellant's own credit. The primary judge rejected his account, in and of itself, as inherently unlikely: J [2304], [2344].

Witness collusion or contamination: J [2363]-[2467]

79. At J [2363]-[2467], the trial judge found that the Appellant and his witnesses Persons 5, 11, 29 and 35 had detailed discussions concerning their recollections of the missions in which they were involved, including missions to W108, Darwan and Chinartu.

80. Most of the evidence supporting the findings of witness collusion and contamination came from the Appellant and his own witnesses. Person 5 gave evidence of extensive interactions with the Appellant, including going through the W108 mission "step-by-step": J [2376], [2379], [2414]. Person 11 conceded having extensive interactions with the Appellant, after giving false evidence to the contrary: J [2370]-[2371], [2417]-[2421]. Person 29 gave evidence about discussions with the Appellant: J [2415]. The Appellant himself gave evidence of extensive contact with Persons 5, 11, 29 and 35 (J [2412], [2461]) including via burner phones: J [2435]-[2436], [2446]-2448]. The findings were supported by documentary evidence: J [2422]-[2422], [2441]-[2445], [2451]-2454].

81. The primary judge's findings on this issue were comfortably established on evidence other than from Ms Roberts. Her contribution was both limited and consistent with the evidence of the Appellant's witnesses (with the one exception of the IGADF notes handover): J [2377], [2422]-[2422], [2445], [2458]-[2460]. No change to the assessment of Ms Roberts' credit could ever have led to a different finding on the Appellant's credit on this point.

Concealing evidence: J [2468] to [2553]

82. There were three categories of deliberate non-disclosure by the Appellant: the USBs, material relating to Person 17, and W108-related documents. Ms Roberts' only material evidence on this topic was directed to the factual question of where the USBs had been kept. This was not relevant to the ultimate question of whether a discovery failure had occurred, but the primary judge nevertheless considered it to be "significant" to the credit of both the Appellant and Ms Roberts: J [2473].

83. The primary judge's analysis is set out at J [2483] to [2525]. His Honour accepted Ms Roberts' evidence at J [2518]. In so doing, he considered a range of matters that the Appellant said made Ms Roberts' account implausible: J [2503]-[2517]). The primary judge also analysed a range of matters that were said to affect Ms Roberts' credit, including her evidence about whether she accessed the RS Group email account: J [2520]-[2025]. The primary judge ultimately found that the Appellant lied about the location of the USBs and used that lie, in part, to infer that non-disclosure of the USBs was deliberate: J [2541].

84. Again, no change to the assessment of Ms Roberts' credit could have affected the ultimate finding that the Appellant deliberately concealed evidence. A finding that the USBs were in the desk drawer, rather than the backyard, would not have altered the finding that they were deliberately not disclosed. And even if his Honour had concluded that the USB disclosure failure was not deliberate, that *still* could not disturb the other findings of either deliberate or unexplained discovery failures in connection with other evidence: J [2550], [2553]. In these circumstances, no change to the assessment of Ms Roberts' credit could have led to a different conclusion on the Appellant's credit on this issue.

The separation lie: J [2559]-[2598]

85. The final topic on which Ms Roberts gave evidence was the "separation lie". The primary judge accepted that Ms Roberts' evidence should be approached with caution on this topic because of the lies in the two outlines of evidence filed on her behalf by the Appellant: J [2558]. His Honour nevertheless concluded that there was "strong evidence" that the Appellant and Ms Roberts were not separated, and the separation story was false: J [2588]-[2596]. As a result of this strong contrary evidence, his Honour rejected the Appellant's account: J [2597]. As with the above categories, there is no realistic possibility that a change to the assessment of Ms Roberts' credit on this issue would have altered the primary judge's decision to reject the Appellant's account. The "strong" documentary evidence cited at J [2590]-[2596] would inevitably have led to the rejection of the Appellant's account.

The war crimes findings are independent: PANoA [37(f)]

86. Even if the Appellant successfully establishes the first two steps of this counterfactual, it inevitably fails at the third. His Honour unambiguously excluded the possibility of a "domino effect" built into the trial judgment whereby a different credit analysis as between the Appellant and Person 17 or Ms Roberts in Sections 11 and 12 of the trial judgment could ever result in a different outcome on the defences of justification and contextual truth.

87. On W108, the primary judge rejected the Appellant's account for the reasons at J [815] to [844]. The Appellant's account of the engagements at W108 was "highly improbable" (J [821], [872]), and it was not consistent with the accounts given by his own witnesses (Persons 5, 29, 35 and 38) (J [845]-[862]). His Honour's conclusion is summarised at [872]:

> The applicant's account is highly improbable when all the matters I have identified previously are considered together. Furthermore, there are a series of inconsistencies between the applicant's account and the respective accounts of his witnesses which I have identified above.

88. At [873], his Honour made clear that although he had regard to the credit findings in Section 12 of the primary judgment (particularly the attempts to intimidate Persons 6 and 18), his conclusions were established without them in any event. He said this (emphasis added):

> I have made a number of adverse credit findings against the applicant in Section 12 of this Part. I take those findings into account and, in particular, the findings in relation to Person 6 and the threatening letters sent to Person 18. In addition, I have made a number of adverse findings against the applicant in other Sections of this Part. In terms of credit, I am entitled to take them into account, *although I would make the point that the conclusions I have expressed are established without them*.

89. On Darwan, the primary judge rejected the Appellant's account for the reasons set out at J [1231] to [1236]. Similar to his Honour's reasoning on W108, his Honour rejected the

Appellant's evidence on Darwan based on the improbabilities in the account, the unsatisfactory nature of one aspect of his evidence, his extensive discussions with Person 11, and its incompatibility with the Respondents' case. At J [1236], his Honour then made clear that his conclusions on the Appellant's account of Darwan were independent of any credit findings in any other part of the judgement, stating (emphasis added):

> Finally, for the purposes of credit, I am entitled to take into account my adverse credit findings concerning the applicant set out in Section 12 of this Part. In fact, I am entitled to take into account on credit all the adverse credit findings in relation to the applicant in these reasons, but *like W108, I strictly do not need to do so to reach the conclusions I have with respect to the events at Darwan*.

90. On Chinartu, the primary judge's findings, properly understood, are also independent of, though corroborated by, the general credit findings in Section 12 concerning intimidation, collusion, concealment and lies. His Honour said this at J [1535] (emphasis added):

> I do not accept the evidence of the applicant or Person 11 *for reasons already given*. I do not accept either of them as an honest and reliable witness. I refer to the findings in Section 12 of this Part and, indeed, the other adverse credit findings in relation to the applicant and Person 11 in other Sections of this Part. I do not accept the evidence of Person 32. He is a close friend of the applicant, and he persisted with his account of Person 12 being stood down towards the end of July 2012 in the face of overwhelming evidence to the contrary.

91. The "reasons already given" are plainly not a reference to Section 12 (which comes later in the judgment). Rather, they refer to the primary judge's rejection of the Appellant's case on the timing of the killing (see J [1438]-1447]) and the primary judge's finding that he colluded with another witness to put forward a false account (see J [1476], [1509]). That deliberate deception was known as the "Person 12" lie. The Person 12 lie amounted to one of the most serious credit findings against the Appellant in the entire trial judgment.

92. Thus, even if, contrary to the above, the trial judgment should not be read as saying that the Chinartu findings were supported independently of the Section 12 credit findings, the result in the present inquiry is unaffected. Even putting the Section 12 credit findings to one side, this Court can comfortably conclude that his Honour would have rejected the Appellant's account of Chinartu and upheld the truth defence, based on the Person 12 lie and the other matters dealt with in Section 6 of the judgment by themselves.

D. Conclusion

93. For all the reasons outlined above, there is no real possibility that the alleged misconduct would have changed the result of the trial if (a) it did not happen at all; or (b) it happened but was known to the Appellant before the end of the trial. Even assuming the most favourable outcome to the Appellant – that Person 17 and Ms Roberts were disbelieved in their entirety, and the Appellant had no adverse credit findings made against him in either

Section 11 or Section 12 of the trial judgment, the war crimes findings would *still* have been made, and the justification defence would have been upheld.

IX. GROUND 17 DOES NOT WARRANT A RETRIAL

94. For the reasons given, there is no evidence of any misconduct of any kind, let alone the very particular kind alleged. There is no evidence of any miscarriage of justice. If the Appellant had obtained the Audio Recording during the trial, it would have made no difference to the outcome. Any forensic choices made by either side in relation to Ms Roberts, Ms Scott or Person 17 could not have made any difference to the outcome. Even if the Court took a different view of one or more of these points, it would be exceedingly reluctant to make an order for a new trial. Taking into account the Appellant's misconduct (including attempting to suborn perjury by his wife, colluding with Person 35 to give false evidence concerning Person 12, intimidation of witnesses, deliberate discovery failures, concealment of evidence and giving false evidence on multiple issues), the fact that no misconduct is alleged on the part of any Respondent but Mr McKenzie, the interest in the finality of proceedings, and the scale of a new trial, such an order would not be in the interests of justice, in relation to the parties or generally in relation to the administration of justice.

X. CONCLUSION

95. For all of the reasons given, this application is utterly without merit. It should be dismissed with costs.

John Sheahan Robert Yezerski Christopher Mitchell Hannah Ryan

Counsel for the Respondents

29 April 2025

Annexure A: particulars to PANoA [35]

	Content of communication	**Evidence #**
1	An email from the Appellant's Senior Counsel dated 19 April 2021 that was "flagged" in his RS Group email account.	MHA-1 at 16;AS [3.16]
2	A document Ms Roberts produced in response to a subpoena and over which the Appellant claimed privilege (the IGADF file note).	MHA-1 at 179;AS [3.16]
3	"MEETING WITH PERSON 29 AND MONICA ALLEN. ERS has knowledge that BRS met with Person 29 and Monica on December 4 2019 to pass to him documents to help prepare for his IGADF interview. Must discuss with ERS."	NM-1 at 209
4	"-D is adamant (150 % sure) that RS sought USBs from his SASR mates prior to his first visit to IGADF in around Early Dec 2018. D says that RS was sweating on the arrival of these USBs. Once he got them, he selected certain images to pass to the IGADF. - RS provided only 17 images to IGADF. The IGADF process involves persons most likely stating on oath that the documents/images they have provided subject to order represents the total in their possession."	NM-1 at 215
5	"[O]n 31 July MOB sent RS an email about the Mick Keelty issue and that authorities wish to speak to him about misconduct involving a senior AFP officer."	NM-1 at 215
6	"- Monica writes to ERS seeking proof of the separation. "i don't know what they will subpoena from you, but if I was them, I would ask you for all documents evidencing or referring to: the separation- when it started and when it ended; - living arrangements during the separation; who you told you were separated; your knowledge of person 17 and when you found out about her. If or when you get subpoenaed, we will have an "independent barrister" act on your behalf in relation to the subpoena to make any objections you may have the right to make as a subpoenaed party and we will represent Ben re any objections he may to wish to make as a party to the proceedings. Anyway, don't worry about that for now. Counsel would just like to see a couple of examples. Unflattering is fine. It lends weight to the fact you guys were estranged. - Monica writes to ERS: "Hi Em, we met with Matthew Richardson this morning about the various categories for discovery and interrogatories to be answered by Ben. I mentioned that while Ben deletes everything, I understand that you had a couple of messages that evidence that: - you were separated; and - that at some point you became aware of [picture of bunny, i.e. bunny boiler], so while we don't have evidence to produce from Ben, we will have when they issue a subpoena to you. Matthew said he would like an example of what you have just so we know what we have to use in the future. So just a couple of examples of any messages would be great. It is not urgent."	NM-1 at 218-219

	Content of communication	**Evidence #**
7	Extract of a telephone call between Mr McKenzie and Danielle Scott: DS: They for some reason, they thought that the DV thing wasn't important. There was some tactic that either Bruce McWilliam or Arthur Moses, one of them, came up with that nuh, it's really not important here. NM: Because the main, because the main game's war crimes or? DS: I don't know, I don't think so. NM: Oh. DS: I think that they could, I think that the thinking behind it was that if the IGADF didn't come back, my understanding is it can't come back. All it can do is make recommendations, right? NM Yep. DS: And therefore, you know, and pass things on to the AFP and so forth. So their thinking was well, unless you actually get charged by the AFP, the case is nothing. That's, that was their thinking.	NM-3, AS [3.21]
8	Extract of an audio recording between Mr McKenzie and Person 17 in which Mr McKenzie states, "Danielle and Emma… [are] actively briefing us on [the Appellant's] legal strategy in respect of you."	NM [9]