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No. NSD 1485, 1486 and 1487 of 2018

Federal Court of Australia

District Registry: New South Wales

Division: General

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD ACN 003 357 720 and Ors

Respondents

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SECTION I: INTRODUCTION**A. Overview**

1. On 8-10 June 2018, the Respondents published a series of articles that alleged an unnamed former member of the Special Air Service Regiment (**SASR**) had murdered and assaulted Afghan detainees while deployed as a member of the Australian Defence Force (**ADF**) to Afghanistan. The soldier was given the pseudonym “Leonidas”. The Respondents do not dispute that “Leonidas” is, and would have been reasonably understood by at least some people to refer to, Ben Roberts-Smith.
2. In August 2018, Mr Roberts-Smith brought three proceedings concerning the publication of these and other articles. Each claim relates to the publication of effectively three articles across different mastheads within the Fairfax group. Those articles may be considered in the three groups set out in the Schedule to these submissions (**Group 1, Group 2 and Group 3**). The element of publication is admitted in relation to each article.
3. The Respondents contend that each alleged imputation is substantially true and the statutory defence of justification¹ provides a complete defence to the publications. They say the truth is that Mr Roberts-Smith knowingly and repeatedly contravened inviolable laws of war which protect civilians and detainees against violence to life and person. He murdered and assaulted Afghan detainees.² He ordered and encouraged other soldiers to murder Afghan detainees. He bullied and assaulted junior Australian soldiers. He also assaulted a woman with whom he was having a clandestine affair.
4. For these reasons, Mr Roberts-Smith’s claim should be dismissed. The Respondents foreshadow that they will seek special orders in relation to costs, both as to the measure of such costs, and the persons liable to pay them.

B. The imputations

5. Mr Roberts-Smith contends that the Group 1 articles conveyed the following imputations to the ordinary reasonable reader:

Imputation 1: The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him.

Imputation 2: The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.

Imputation 3: The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan.

6. Mr Roberts-Smith contends that the Group 2 articles conveyed the following imputations to

¹ Section 25 of the *Defamation Act* 2005 (NSW). The version of the Defamation Act applicable to these proceedings in the version in force at the time of publication, that is, the version prior to the amendments which came into force on 1 July 2021.

² The Respondents accept that the result of Person 66 not being compelled to give evidence in relation to the mission to Syachow is that they are not able to discharge their onus in relation to the Particulars of Truth at [122A]-[122H].

the ordinary reasonable reader:

Imputation 1: The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him.

Imputation 4: The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed Afghan in order to "blood the rookie".

Imputation 5: The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg.

Imputation 6: The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel.

7. Mr Roberts-Smith contends that the Group 3 articles conveyed the following imputations to the ordinary reasonable reader:

Imputation 7: The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra.

Imputation 8: The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman.

Imputation 9: The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol.

Imputation 10: The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off.

Imputation 11: The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat.

Imputation 12: The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence.

Imputation 13: The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's.

Imputation 14: The Applicant assaulted an unarmed Afghan in 2012.

8. Mr Roberts-Smith bears the onus in relation to meaning, and accordingly, the issue of meaning will be addressed by the Respondents in their submissions in reply. That said, the Respondents confirm that: (a) they admit that the Group 1 articles would have been understood by the ordinary reasonable reader to convey each of Imputations 1 to 3; and (b) they admit that the Group 2 articles would have been understood by the ordinary reasonable reader to convey Imputation 1. The Respondents admit that each imputation is defamatory

of Mr Roberts-Smith.

9. In addition to the defence of justification, the Respondents also rely upon the defence of contextual truth. They contend that each of the Group 2 and Group 3 articles conveyed, in addition to the imputations relied upon by Mr Roberts-Smith, Imputations 2 and 3.

C. Summary of the Respondents' truth defence

10. Mr Roberts-Smith grew up in Perth and joined the Army in 1996³. After serving with the 3rd Battalion of the Royal Australian Regiment for some time, and obtaining the rank of Corporal, Mr Roberts-Smith completed selection for the SASR in 2003⁴.
11. During his time with the SASR Mr Roberts-Smith was deployed to Afghanistan six times: five times as part of a Special Operation Task Group rotation - 2006 (rotation III), 2007, 2009 (rotation IX), 2010 (rotation XII) and 2012 (rotation XVIII) - and once as a personal security detachment in 2006/2007⁵. In 2009 and 2010 Mr Roberts-Smith was the second in command (**2IC**) of his patrol. In 2012 Mr Roberts-Smith was a patrol commander⁶. Mr Roberts-Smith discharged from the Army in 2013 at the rank of Corporal⁷.

Breaches of the laws of war - murders

12 April 2009: the double-murder at W108

12. In 2009, Mr Roberts-Smith deployed to Afghanistan as the 2IC of Person 5's patrol. The patrol "rookie" was Person 4. Person 5 spoke repeatedly of the need to "blood the rookie", meaning to give Person 4 his first kill. That happened on 12 April 2009 when the troop assaulted and cleared a compound called Whiskey 108 (**W108**). After the compound was declared secure, two Afghan males were found hiding in a concealed tunnel: an old man and a man with a prosthetic leg. They were both detained by the Australian soldiers (that is, they became 'persons under control' or **PUCs**). Mr Roberts-Smith and Person 5 directed Person 4 to shoot the old man, which he did, inside the compound walls. Mr Roberts-Smith then dragged the man with the prosthetic leg outside and machine-gunned him.⁸
13. The killings at W108 were indiscrete. Multiple people saw the two Afghan males PUC'd. The killings occurred in front of witnesses. Mr Roberts-Smith and Person 4 borrowed Person 41's suppressor to kill the old man. Mr Roberts-Smith did not check whether an intelligence, surveillance, and reconnaissance platform (**ISR**) was filming overhead. Photographs were taken of the bodies with no throwdowns. Eventually, the Troop Commander, Person 81, was told a lie that the insurgents were "squirters" engaged attempting to flee the compound after it was breached.⁹
14. In this case, Mr Roberts-Smith gave an account that departed from the initial falsehood told to Person 81. On his account, the insurgents somehow managed to evade detection by the SASR cordon and were engaged coming *towards* or *around* - not squirting *from* - the

³ T.120/6-13 (BRS).

⁴ T.120/15-39 (BRS).

⁵ T.122/7-14 (BRS).

⁶ T.135/37; 166/19-26 (BRS).

⁷ T.122/24-38 (BRS).

⁸ See Section IV.

⁹ Ex R-192, tab 1, [26].

compound.¹⁰ That account is also untrue, and is belied not just by the contrary testimony of numerous eye-witnesses, but by details in contemporaneous photographs and documents.

2012: pre-deployment training

15. In 2012, Mr Roberts-Smith deployed to Afghanistan as a patrol commander for the first and only time. Two incidents in pre-deployment training prefigured subsequent events in Afghanistan. Junior troopers received instruction on using throwdowns and pushing aerial assets off station during clearance. He told his patrol that PUCs would be taken into a room and shot if deemed to be “bad cunts”. One junior soldier was made to practice a mock execution of a PUC. More senior soldiers told Mr Roberts-Smith to pull his head in, but to no avail.¹¹

11 September 2012: the murder of Ali Jan

16. On 29 August 2012, an Afghan National Army soldier named Hekmatullah killed three Australian soldiers in a “green on blue” attack.¹² Hekmatullah was given the code name “Jungle Effect”¹³ and became Australia’s highest priority target.¹⁴ For weeks, Australian forces targeted Hekmatullah and tried to locate him without success.¹⁵
17. At dawn on 11 September 2012, the SASR landed in Darwan looking for Hekmatullah. Mr Roberts-Smith and his team first cleared along the banks of the Helmand River. After a squighter was spotted on the opposite side, Mr Roberts-Smith took off his body armour, swam across the river, and engaged the insurgent at close range. The possibility that the insurgent might be Hekmatullah, or could provide relevant information about him, was enough to justify Mr Roberts-Smith incurring a significant personal risk.¹⁶ But the man over the river was not Hekmatullah. Mr Roberts-Smith and his patrol then made their way into the village and joined the rest of the troop in clearing compounds. Despite tens of Afghan males being detained throughout the village, Hekmatullah was not found.¹⁷
18. By mid-morning, Mr Roberts-Smith, Person 4, Person 11, Person 56, Person 47, a military working dog and an interpreter approached the last compound in the village. There, they found three Afghan fighting aged males including one named Ali Jan who was not from Darwan. Mr Roberts-Smith interrogated and assaulted the Afghan males for an hour. But no information concerning Hekmatullah was forthcoming.¹⁸
19. Towards the end of the mission, Mr Roberts-Smith and Person 11 placed Ali Jan on the edge of a 10-metre cliff with his back to the precipice and his hands cuffed to the rear. Mr Roberts-Smith said something to Ali Jan; Ali Jan smiled, then Mr Roberts-Smith kicked Ali Jan in the chest, catapulting him off the cliff. Person 4 and Person 11 then dragged the badly injured Ali Jan into a cornfield where Person 11 shot him multiple times in the chest.

¹⁰ See Section IV.

¹¹ See Section V.

¹² T.4790/4-10 (P56).

¹³ Ex R-11, page 2.

¹⁴ T.4790/9-13 (P56).

¹⁵ See, for example, T.2631/8-9 (P4); T.5660 8-21 (P11).

¹⁶ T.384/29-36 (BRS).

¹⁷ See Section VI.

¹⁸ See Section VI.

The handcuffs were then removed, an ICOM planted on his body, and SSE photos taken. A lie was told over the radio, and in the troop debrief, that the man shot in the cornfield was a spotter. Mr Roberts-Smith and Person 11 maintain that lie to this day.¹⁹

20. Person 4 was deeply traumatised by what he saw that day. In late 2012, he began to disclose the circumstances of Ali Jan's death. First to Person 18. Then to Person 7. Person 7 took the allegation seriously and reported it to other sergeants. The allegation was eventually brought to the Regimental Sergeant Major (**RSM**) in both 2013 and 2014. Nothing was done. But Person 7 – a courageous and honourable senior NCO – pressed for the allegation to be formally investigated. Eventually, frustrated with Mr Roberts-Smith's efforts to undermine the investigation by the Inspector-General of the Australian Defence Force (**IGADF**), Person 7 went to the media to air the cliff kick allegation publicly.²⁰

12 October 2012: the murder of an Afghan male at Chinartu

21. On 12 October 2012, Mr Roberts-Smith's patrol was again on mission. On this trip, the patrol was supplemented by Person 14 and Person 27. The target of the mission was Objective Stolen Idea. Late in the mission, shortly before extraction, Mr Roberts-Smith was questioning a PUC when a cache was found nearby. Mr Roberts-Smith ordered the Afghan partner force commander, Person 12, to shoot the PUC. After some discussion, an Afghan partner force soldier stepped forward and shot the PUC. Back at base, a false report of the engagement was made. The engagement was falsely brought forward by an hour and a half, from 1539DE to 1405DE, so the timing would appear consistent with an engagement that occurred during the initial compound clearances.²¹
22. In these proceedings, Mr Roberts-Smith and four witnesses colluded to tell a deliberate lie about Chinartu. They each said Person 12 could not have been on this mission because he was stood down months earlier after shooting a dog and injuring an Australian soldier. The falsity of this claim was exposed by material produced by the Department of Defence, but not before all five witnesses committed the falsehood to writing in five separate outlines of evidence. Mr Roberts-Smith repeated it in sworn interrogatories. In cross-examination, Persons 35 and 32 emerged as the likely instigators of the lie, abetted by Person 27, Person 39, and Mr Roberts-Smith himself. None of the witnesses had a plausible innocent explanation for his involvement in perpetuating the lie.²²

5 November 2012: the murder of a young Afghan male at Fasil

23. On 5 November 2012, Mr Roberts-Smith conducted his last ever mission with the SASR. Shortly after landing, a Hilux containing IED componentry was interdicted by Person 16's patrol. One occupant was a young male who was shaking in terror. The frightened male was handed over to Mr Roberts-Smith's patrol. Mr Roberts-Smith took the young man into a room inside a compound and shot him in the head. Mr Roberts-Smith later admitted to Person 16 that an officer had told him not to kill anyone on the last job, so "[I] pulled out my nine-mill, shot the cunt in the side of the head, blew his – blew his brains out, and it was the most

¹⁹ See Section VI.

²⁰ See Section VI.

²¹ See Section VII.

²² See paragraphs 51 to 89 of Section VII.

beautiful thing I've ever seen."²³

24. Tens of PUCs were detained that day, and all were photographed bar one. There is a haunting gap in the records where the teenager should be. Three of the four Afghan males in the Hilux were photographed wearing labels that said "Veh Rd GB-1", "Veh Rd GB-3" and "Veh Rd GB-4". No photograph exists of a PUC labelled "Veh Rd GB-2". That was the teenager: the second PUC detained by Gothic Bravo in the vehicle on the road.²⁴
25. There are, however, photographs of two Afghan males supposedly killed in combat that day. One shows a young Afghan male with a gunshot wound to the side of the head. An SSE bag labelled with Mr Roberts-Smith's call-sign sits on the body, alongside an AK-47.²⁵ Person 16 said that EKIA looked "very much like" the terrified young man he PUC'd from the Hilux and he had a "high degree of confidence" that it was the same person.²⁶ The location of the gunshot wound – in the side of the head – matches exactly the description of the killing Mr Roberts-Smith gave to Person 16 after the mission.

None of the crimes were heat of battle or fog of war

26. None of murders alleged by the Respondents involved a decision made in the heat of battle or a mistake made due to the fog of war. None involved split-second decisions while in contact or clearing a compound. None involved judgment calls about hostile intent. None involved the potentially fraught moment in which a person is brought under control. In each case, the victim unambiguously was a PUC.
27. There is no dispute that most of the murdered PUCs were insurgents or people reasonably suspected of being insurgents. The two Afghan males murdered at W108 were found in a tunnel containing weapons, in a compound from which Australian forces had been engaged throughout the day. The Afghan male murdered at Chinartu appears to have been the owner of a compound in which a significant cache was found. The Afghan teenager murdered at Fasil was found travelling in a vehicle with IED components. The exception was Ali Jan, a civilian seen trying to leave Darwan with his donkeys on the morning of the raid. The Respondents embrace those facts as a significant part of the explanation for why those people were killed. They were murdered because they were thought to be Taliban.
28. However, being an insurgent, a supporter, or merely suspicious, did not justify these killings. Their lives were protected by Australian and international law the moment they were PUC'd. Mr Roberts-Smith acknowledged that voluntarily and intentionally killing a PUC was murder.²⁷ It was prohibited by the rules of engagement under which Australian soldiers operated (**ROE**) and the Geneva Conventions.²⁸ That was so irrespective of what role the person had played prior to being PUC'd, or what role the person might play if returned to the battlefield.²⁹
29. Mr Roberts Smith acknowledged that ordering, directing or encouraging another person to

²³ See Section VII; T.1824/11-13 (P16).

²⁴ Section VII; Ex R-104.

²⁵ Section VII; Ex R-105.

²⁶ Section VII; T.1819/12-14; 1874/35-1875/43 (P16).

²⁷ T.355/3-4, T.358/32-34 (BRS).

²⁸ T.355/13-15, T.358/36-38 (BRS).

²⁹ T.355/6-11 (BRS).

kill a PUC, if carried out, was murder.³⁰ He knew his obligation was to take reasonable measures to prevent or report subordinates who committed murder.³¹ He knew breaching those obligations constituted murder.³² By directing, encouraging, facilitating and then standing by as Person 4 shot a PUC at W108, Mr Roberts-Smith became responsible for that murder. Similarly, when Mr Roberts-Smith ordered an Afghan partner force soldier to shoot a PUC at Chinartu, he was responsible for that murder.

Breaches of the laws of war - assaults

15 March 2010: assault of an Afghan male

30. On 15 March 2010, Persons 7 and 8 were attempting to detain a fighting aged male who posed no threat. The man was in the foetal position and was extremely scared. Mr Roberts-Smith unnecessarily imposed himself into the situation by giving the man three to four quick fire punches to the side of his head and driving his knee into the man's chest/stomach area twice. He then left, and the task of detaining the man was resumed by Persons 7 and 8.³³

August 2012: assault of an Afghan male

31. On one of the Hekmatullah missions, Mr Roberts-Smith assaulted a PUC when the frightened man could not immediately answer a question Mr Roberts-Smith asked.³⁴

Bullying

2 June 2006: Chora Pass and the bullying of Person 1

32. On 2 June 2006, Mr Roberts-Smith had his first enemy engagement on a mountain ridge above the Chora Valley when he and another soldier left a clandestine observation post and killed an unarmed Afghan teenager who was seen nearby.³⁵ There is no suggestion that the engagement was unlawful, but it compromised the observation post just two days into a multi-day mission, resulting in a significant firefight later that same day, and the forced abandonment of the observation post and the mission. To make the initial engagement appear necessary, a SITREP was sent immediately to troop headquarters falsely describing the unarmed teenager as an "armed ACM" who was "patrolling aggressively" with both hands on his weapon.³⁶ That falsehood was picked up and repeated in the post-mission reporting, and was never corrected.
33. Because he was awarded a Medal of Gallantry for his actions on that day, on various occasions over the next decade, Mr Roberts-Smith was asked to recount the events on Khoran Ghar. In so doing, Mr Roberts-Smith committed publicly to the false account of armed insurgents having discovered the observation post in the morning. At times he described one armed ACM; other times it was two.³⁷
34. The fact that a significant aspect of the reported circumstances of that first engagement was

³⁰ T.356/1-3, T.1-18 (BRS).

³¹ T.356/5-28 (BRS).

³² T.358/17-30 (BRS).

³³ See Section IX, part B.

³⁴ See Section IX, part C.

³⁵ See Section X.

³⁶ Ex R-47.

³⁷ See Section X.

untrue explains in significant measure the reason why Mr Roberts-Smith developed an enduring obsession with destroying the reputation and career of Person 1. He was the junior member of the patrol on Khoran Ghar, had seen the unarmed teenager, and knew the story of one or two armed ACM was untrue. Mr Roberts-Smith had never liked Person 1, but after the Chora Valley mission, his conduct escalated into a relentless campaign of bullying, including death threats and the persistent undermining of Person 1's reputation and career. The fact that Person 1 had, on his own free admission, made significant mistakes in the early days of his first deployment cannot provide a rational explanation for the years of bullying to which Person 1 was subjected by Mr Roberts-Smith. A concern to ensure that Person 1 did not contradict the false contemporaneous report of the engagement appears the likely explanation.³⁸

15 July 2012: blue-on-blue and the assault of Person 10

35. Shortly after arriving in Afghanistan in July 2012, a mission planned by Mr Roberts-Smith resulted in a blue-on-blue incident between his patrol and another SASR patrol. This was a serious embarrassment to Mr Roberts-Smith just two weeks into his first tour as a patrol leader. Person 10, a junior trooper on his first selection, was made a scapegoat. He was assaulted, blamed for the blue-on-blue, then removed from the patrol. He was threatened with being reported to the International Criminal Court unless he gave an account of the incident that accorded with a version that suited Mr Roberts-Smith's purposes. Person 56 was chosen to join Mr Roberts-Smith's patrol as Person 10's replacement.³⁹

Domestic violence

36. Unbeknownst to his wife, Mr Roberts-Smith was engaged in an extra marital affair with Person 17 from October 2017 to April 2018. The relationship was intense and included talk of leaving their respective spouses and starting a life together.⁴⁰
37. In about February 2018, Person 17 told Mr Roberts-Smith that she was pregnant to him. Mr Roberts-Smith encouraged Person 17 to terminate the pregnancy and had her surveilled when she prevaricated. The following weeks were punctuated with instances of threatening and intimidatory behaviour from Mr Roberts-Smith.⁴¹
38. On 28 March 2018, Person 17 accompanied Mr Roberts-Smith to the Prime Minister's Veterans' Employment Awards in the Great Hall at Parliament House. She drank too much, and on leaving the venue, fell down some stairs and hit her head. Mr Roberts-Smith was extremely angry. He was concerned her behaviour had exposed the affair. Back in their hotel room, when Person 17 said her head hurt, Mr Roberts-Smith punched her in the left temple/eye area.⁴²
39. The fact that Person 17 fell at Parliament House is, of itself, irrelevant. The fall and the bruising have no bearing on Person 17's credit because she has always acknowledged that she fell and hurt herself earlier in the evening. The fall, and the bruising, cannot otherwise

³⁸ See Section X.

³⁹ See Section XI.

⁴⁰ See Section XII.

⁴¹ See Section XII.

⁴² See Section XII.

rationality affect the assessment of Person 17's evidence that Mr Roberts-Smith punched her that night. Let it be assumed that the bruise was caused exclusively by the earlier fall. That does not preclude or reduce the likelihood of a later punch in the same location. All it means is that the bruise itself will not be probative of whether the punch occurred.

40. Later that night, Mr Roberts-Smith took steps to ensure Person 17 did not disclose the assault, or that she would be discredited if she did. As she lay unconscious on the bed, he rifled through her bag and photographed some of its contents including her deeply personal private diary notes. He then took photos of Person 17 lying naked in the bed, without her consent. The next day he showed her these photos in an evident threat to keep her quiet. He then coached her on the lie to tell to explain the injury to her face.⁴³

Interference with evidence

2012-2017: allegations persist

41. In the years following Mr Roberts-Smith's departure from the SASR, allegations of serious wrongdoing continued to circulate within the Regiment. In 2012 and 2013, Person 4 disclosed the murder of Ali Jan to Person 18 and Person 7.⁴⁴ In 2013 and 2014, allegations of murder were raised with several SASR sergeants and two RSMs.⁴⁵ In 2014, Person 7 also raised the cliff kick with SASR officer Andrew Hastie: he had already heard it from others.⁴⁶ Numerous witnesses, including those for Mr Roberts-Smith, acknowledged hearing about alleged murders at W108 and Darwan in this period.⁴⁷
42. In May 2016, the IGADF appointed Major-General Paul Brereton to investigate whether there was any substance to persistent rumours of criminal or unlawful conduct involving SOTG deployments in Afghanistan between 2007 and 2016. The Inquiry ultimately covered the period from 2006 to 2016.
43. By mid-2017, Mr Roberts-Smith was becoming increasingly frustrated and concerned that the IGADF investigation and the media were focusing on him. He identified Persons 1, 2, 6, 7, 18, 42 and 44 as potential sources for the IGADF and the media⁴⁸ and he threatened to sue Person 1 and Person 2 for defamation.⁴⁹ Conversely, he identified Persons 5, 29 and 35 as key allies on W108, and Person 11 as a key ally on Darwan.

2017: witness intimidation and collusion

44. From about mid-2017 onwards, Mr Roberts-Smith embarked on a multi-faceted course of conduct to intimidate witnesses and undermine evidence adverse to his interests, and to enhance the probative value of evidence favourable to his interests through collusion.
45. In late 2017, Mr Roberts-Smith tried to derail the fledgling IGADF inquiry through an anonymous public campaign intended to intimidate Person 6 and scare other witnesses. In

⁴³ See Section XII.

⁴⁴ T.3021/1-11 (P18); T.3615/25-3616/25 (P7).

⁴⁵ T.3617/3-11 (P7); T.3617/24-48 (P7); T.4672/23-44 (P31).

⁴⁶ T.4245/41-47 (AH).

⁴⁷ T.3083/30-33 (P18); T.3320/35-46 (P40); CCT 31.05.22, p.6 (P27); CCT 12.05.22, p.9 (P11); T.4245/41-47; 4294/22-30; 4316/34-35 (AH). A reference in these submissions to a Closed Court Transcript (CCT), is a reference to the public (redacted) version of the CCT.

⁴⁸ T.588/35ff (BRS).

⁴⁹ Ex A-30.

early October 2017, less than two weeks after Person 11's first major interview with the IGADF, Mr Roberts-Smith used an intermediary to make an anonymous complaint about Person 6 to the Australian Federal Police (AFP), a member of Federal Parliament and *The Australian* newspaper. The complaint was dismissed, but not before it was publicised in two articles in *The Australian* newspaper and Person 6 was investigated and his home raided by the police. Mr Roberts-Smith later told his wife, in writing, that what happened to Person 6 would "scare the others". The others, at this time, he assessed to be at least Persons 1, 2, 6, 7, 18, 42 and 44.⁵⁰

June 2018: intimidation, collusion, and destruction increases

46. On 8-10 June 2018, the Respondents published the first articles on Darwan and W108. It was now clear to Mr Roberts-Smith that both the IGADF and the media were investigating him. Unbeknownst to him, the AFP were too. In the following days and weeks, Mr Roberts-Smith's campaign of intimidation, collusion and concealment escalated. Mr Roberts-Smith threatened Person 18 in two letters sent anonymously to the SASR headquarters. He also attempted to threaten Person 1, stopping only when he learned Person 1 was deployed overseas.⁵¹
47. Mr Roberts-Smith also took steps to consolidate his own support. He arranged legal representation for his key allies Persons 5, 11 and 35. He concealed this arrangement from the Respondents for as long as possible, going so far as to swear a false affidavit to keep it a secret. His contact with Persons 5, 11, 29 and 35 also increased. Person 11 received particular attention. The day after the first article on Darwan was published, he flew to Perth to see Person 11 in person. Three days later, he flew to Sydney to shadow Person 11 to an interview with the IGADF. He met Person 11 in his hotel room the night before the interview. He met Person 11 again, with Person 29, immediately after the interview.⁵²
48. On 15 June 2018, Mr Roberts-Smith gained important intelligence on the investigations into him. Person 5 provided Mr Roberts-Smith with a 3-page letter summarising his IGADF interview. On 15 and 20 June 2018, former AFP Commissioner Mick Keelty told Mr Roberts-Smith that referrals to the AFP had been made. In response, Mr Roberts-Smith took further precautions. He began using encrypted Apps on burner phones in the name of third parties. He also burned his laptop.⁵³

August 2018 onwards: intimidation, collusion, destruction and lies

49. Mr Roberts-Smith commenced these proceedings in August 2018. Just two days later, he sent relevant documents to his wife's email account and deleted them from his own devices. He has continued colluding with "friendly" witnesses. He attempted to suborn two new adverse witnesses (Persons 14 and 40). He erased a hard drive containing relevant material. He knowingly or recklessly withheld hundreds of discoverable documents. Those failures were concealed for many months by the service of affidavits of verification that must

⁵⁰ See Section XIII.

⁵¹ See Section XIII.

⁵² See Section XIII.

⁵³ See Section XIII.

have been sworn with knowing or reckless disregard for the truth.⁵⁴

50. Perhaps most seriously, both Mr Roberts-Smith and several of his witnesses knowingly gave false evidence to this Court. This has several implications for the analysis of the evidence in this case. We turn to these immediately below.

D. The credibility of Mr Roberts-Smith, his witnesses, and his case

51. Throughout this case, the Court heard two irreconcilable accounts of each incident. The Respondents' witnesses described the murder of PUCs. Mr Roberts-Smith and his witnesses described legitimate battlefield engagements. There is no middle ground. None of the killings involved nuanced questions of hostile intent/act or a justification based on the fog of war. None of the crucial evidentiary inconsistencies can reasonably be attributed to memory, perspective, innocent error, or mental illness. The only reasonable explanation for the divergent evidence on key points is deliberate dishonesty. The dishonest accounts, in every instance, were given by Mr Roberts-Smith and his key witnesses.
52. The Respondents make three overarching submissions in relation to the credibility of Mr Roberts-Smith, his witnesses, and his overall case.
53. **First**, the Court should reject the evidence of Mr Roberts-Smith and his key witnesses (Persons 5, 11, 29, 32, 35, 38 and 39) on each material issue in contest. Their evidence, on those issues, was not honest or accurate and cannot be accepted as reliable. Each account was inconsistent with objective evidence and other, more credible, witness testimony. Many had internal inconsistencies or material departures from prior accounts. There were also irreconcilable differences between these witnesses on key issues.
54. Far-reaching witness collusion and contamination are further reasons to reject the evidence of Mr Roberts-Smith and his key witnesses. Mr Roberts-Smith candidly acknowledged communicating extensively with Persons 5, 11, 29 and 35 about allegations in this case.⁵⁵ The key features of the denial of what happened at W108 were heavily workshopped between Mr Roberts-Smith and Persons 5, 29 and 35.⁵⁶ The key features of the denial of what happened at Darwan were workshopped with Person 11.⁵⁷ Persons 35 and Mr Roberts-Smith, abetted by Persons 27, 32 and 39, concocted a deliberate lie on Chinartu (**Person 12 lie**). These were not the routine interactions of colleagues reminiscing about their service together. The very purpose of these interactions was to discuss, find answers to, and respond to allegations of wrongdoing. The nature and extent of the discussions between Mr Roberts-Smith and his key witnesses have destroyed their reliability.
55. The evidence of these witnesses should be approached with extreme caution for other reasons. All are Mr Roberts-Smith's close friends. All of them disagree with the media publishing stories on their service in Afghanistan. Some are themselves accused of murder either in relation to the incidents in question, or in other circumstances that give them a common interest in remaining aligned with Mr Roberts-Smith. Persons 5, 11 and 35 also have a financial interest in retaining free legal advice arranged by Mr Roberts-Smith. Each

⁵⁴ See Section XIII.

⁵⁵ See Section XIII.

⁵⁶ See Section IV; Section XIII.

⁵⁷ See Section VI; Section XIII.

of them, in short, has a powerful set of motives to lie.

56. **Secondly**, Mr Roberts-Smith's lies can be used for more than just credit. He told deliberate lies on material issues. The Person 12 lie is one example. No Afghan males in the tunnel at W108 and the spotter in the cornfield at Darwan are others. These lies are evidence of consciousness of guilt which should be used as positive evidence against Mr Roberts-Smith (in the form of admissions against interest) and from which the Court may also infer that his case is unfounded. Each deliberate lie on a material matter is identified in these submissions.⁵⁸
57. **Thirdly**, aspects of Mr Roberts-Smith's conduct outside of the Courtroom constitute further evidence of consciousness of guilt and should be used as positive evidence against Mr Roberts-Smith. In 2017 and 2018, he took steps to intimidate Person 6, Person 18, Person 1 and "scare the others". It is immaterial that those attempts pre-date this proceeding. After the proceedings commenced, he took steps to dissuade Persons 14 and 40 from giving evidence for the Respondents. Throughout, he destroyed and repeatedly concealed evidence. He swore false affidavits of verification to disguise his disclosure failures. When caught, the explanation was inevitably "inadvertence". That is untrue. All disclosure failures were one way. All of them assisted Mr Roberts-Smith by concealing adverse evidence from the Respondents. A finding of deliberateness is the more probable inference available.
58. The Court must consider all this conduct together. When the collusion, lies, intimidation, and concealment are considered as part of "an assembly of facts each of which raises its own incriminating inference",⁵⁹ an irresistible inference arises as to Mr Roberts-Smith's consciousness of guilt of the conduct alleged by the Respondents. The Court should rely on this conduct as admissions against interest to find in the Respondents' favour on the ultimate issue: the Respondents' allegations are true, and Mr Roberts-Smith's case is unfounded.
59. In these submissions, the analysis of credibility appears in three different places. *First*, we have sought to deal with factual credit issues during the factual analysis of the relevant allegation. *Secondly*, issues of witness contamination, collusion, intimidation, and concealment of evidence are dealt with in a standalone section (see Section XIII). *Thirdly*, for each material witness, we have summarised the relevant factual and other credit issues at the end of the allegation to which the witness is most closely associated (for example, the Person 11 analysis is in the Darwan section; Persons 5, 29 and 35 appear in W108).

E. Credibility of the Respondents' military witnesses

60. In contrast to the close group of friends and personally interested individuals who Mr Roberts-Smith called as his key witnesses, the Respondents' military witnesses were a disparate group of serving or former SASR soldiers who served with Mr Roberts-Smith at different points in time. Collectively they were honest, accurate and reliable.
61. All appeared under subpoena. Some still admired Mr Roberts-Smith. Many hated the media and disagreed with publication of stories about their service in Afghanistan. Most were

⁵⁸ See Section IV; Section V; Section VII; Section XIII.

⁵⁹ *R v Boscanio* [2020] QCA 275 per Sofronoff P (Morrison JA and Brown J agreeing) at [33].

reluctant to attend Court. Some tried, or thought about trying, to be excused from their subpoenas. Many made admissions against interest. Three witnesses - Persons 4, 56 and 66 – declined to give evidence concerning their own alleged involvement in murder and were not compelled after establishing reasonable grounds for an objection under s 128(4) of the *Evidence Act* 1995 (Cth). The suggestion that these mostly reluctant men, who served in different patrols across different years, conspired to give false evidence for the media should be swiftly rejected.

62. A conspiracy against Mr Roberts-Smith is particularly implausible once account is taken of the Afghan witnesses. On Mr Roberts-Smith's case, Person 4 and Person 56 gave honest but inaccurate evidence about Ali Jan's murder in Darwan. Meanwhile, according to Mr Roberts-Smith, three illiterate villagers on the other side of the world dishonestly fabricated the exact same story. There is no evidence of collusion, contamination or even a connection between these two groups of witnesses from opposite sides of the world whose lives intersected on one fleeting occasion. The answer for the consistent accounts is a much simpler one. Each of them is telling the truth.
63. Equally implausible is the suggestion that witnesses gave dishonest or inaccurate evidence because they are jealous of Mr Roberts-Smith. Several witnesses expressed their opinion that he was not entitled to the Victoria Cross, or that there was doubt about it, and explained why they held that opinion.⁶⁰ However, those opinions do not reflect adversely on the honesty or accuracy of the witness' evidence to this court. It stands to their credit that they acknowledged in open court holding such a contentious view.
64. Each witness challenged on this basis rejected the proposition that he was jealous of the award;⁶¹ bitter or upset about the award or not getting an award himself;⁶² or that he resented Mr Roberts-Smith because of the award.⁶³ Persons 7, 18 and 43 all confirmed that they did not themselves consider their actions on the day as being worthy of an award or that they did not want an award.⁶⁴ There is no rational basis to infer that despite these denials, these witnesses were so jealous or bitter or resentful of an award conferred on Mr Roberts-Smith that they fabricated allegations of murder (or evidence supporting such allegations). Person 43 put it succinctly: "The awarding of the VC and his behaviour is two separate things. And no one would ever put them together."⁶⁵

⁶⁰ T.3412/18; 3416/14; 3417/43-47; 3418/7-16 (P43); T.2815/37-47; 2816/40-46 (P4); T.3953/22-23; 3773/12-18; 3951/33-39 (P7); T.3202/39-3203/6 (P18).

⁶¹ T.3202/31-32 (P18); T.1799/21-22 (P14); T.3408/7-10; 3409/20; 3418/20-27 (P43).

⁶² T.3074/10-19; 3075/22-23; 38-42; 3076/12-14; 3195/17; 3195/40-3196/12; 3198/33-34; 3221/37-39 (P18); T.3418/20-27 (P43); T.3879/46-3880/6 (P7).

⁶³ T.1574/45; 1576/43-47 (P14); T.2817/22-25 (P4); T.3639/1-3 (P7).

⁶⁴ T.3193/35; 3194/3; 3195/22-30 (P18); 3418/20-25 (P43); T.3638/29-34; 3767/43 (P7).

⁶⁵ T.3416/20-23 (P43).

SECTION II: EVIDENTIARY PRINCIPLES**A. Standard of proof**

1. The standard of proof in this case is the balance of probabilities: *Evidence Act*, s 140(1). Under s 140(2), in assessing whether it is satisfied that the case has been proved on the balance of probabilities, the Court is to take into account (at least) the nature of the cause of action or defence; the nature of the subject-matter of the proceeding; and the gravity of the matters alleged.
2. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 170-171, Mason CJ, Brennan, Deane and Gaudron JJ summarised various earlier authoritative statements to the effect that where the matter concerned something as serious as fraud, clear or cogent or strict proof is necessary. Their Honours held that these statements should not be understood as changing the standard of proof, rather, they reflect a judicial approach that a court should “not lightly” make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.
3. Branson J in this Court has similarly observed that the correct approach to the standard of proof under s 140 is, “adopting the language of the High Court in *Neat Holdings*”, one that recognises that the “strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved”: *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at [139]. Branson J said that references to the “Briginshaw standard” tend to lead the trier of fact into error and directed attention back to s 140.
4. The standard of proof in a civil case, no matter how serious, must not be conflated with the criminal standard of proof. In *Rejtek v McElroy* (1965) 112 CLR 517 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ) said this at 521-2:

The ‘clarity’ of the proof required, where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved: see *Briginshaw v Briginshaw*, per Dixon J; *Helton v Allen* per Starke J; *Smith Bros v Madden*, per Dixon J.

But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: see *Helton v Allen* per Dixon, Evatt and McTiernan JJ.

5. The “gravity of the matters alleged” and the “nature of the cause of action or defence” both direct attention to the gravity of the consequences of the proceeding: *Morley v ASIC* (2010) 247 FLR 140 (Spigelman CJ, Beazley JA, Giles JA) at [741]-[745]. The graver the consequences at the time of trial (for example, whether a result of the proceeding will include penalties, declarations, or an order for disqualification), the stronger should be the evidence required to conclude that the allegation was established on the balance of probabilities:

Morley at [741]-[745]. The Full Court of the Federal Court has adopted a similar analysis: see, for example, *Vergara v Ewin* (2014) 223 FCR 151 (North, Pagone and White JJ) at [25].

6. The consequences of this case are not equivalent to those addressed in *Morley*. No party will be subject to a penalty, a declaration, or any disqualification or banning orders. The consequences are pecuniary and reputational only.

B. Drawing inferences in a civil case

7. When a civil case falls to be decided on inferences, the circumstances need not do more than raise “a more probable inference in favour of what is alleged”.¹ It is not necessary to exclude all reasonable hypotheses consistent with innocence.² Instead, the existence of other reasonable hypotheses is simply a matter the Court may consider in determining whether the fact in issue should be inferred from the facts proved.³
8. When considering inferences which may be drawn from the evidence, and any innocent explanations advanced, the Court should consider the weight of the united force of all the circumstances put together.⁴ It is wrong for a tribunal of fact to consider each piece of circumstantial evidence in isolation from the rest of the circumstantial evidence.⁵

C. The rule in *Browne v Dunn*

9. The “rule” in *Browne v Dunn* (1893) 6 R 67 is an important and long-standing rule of practice. Many of the relevant authorities governing its scope, operation, and consequences for breach were summarised in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 36)* [2022] FCA 578.
10. Of particular significance in these proceedings is that the rule is based upon a general principle of fairness which applies not only to party-witnesses but to other witnesses – particularly since witnesses who are not parties have no capacity to object to attacks on them by a party: *Bale v Mills* (2011) 81 NSWLR 498 at [66].
11. More fundamentally, it is designed to achieve a fair trial between the parties by serving the practical needs of the adversarial system, namely that a judge is entitled to have presented to him or her issues of fact that are well and truly joined on the evidence to ensure that the Court is not left with “two important bodies of evidence which are inherently opposed in substance but which, because *Browne v. Dunn* has not been observed, have not been brought into direct opposition, and serenely pass one another by like two trains in the night”: *Reid v Kerr* (1974) 9 SASR 367 at 373-4.

¹ *Chamberlain v The Queen [No 2]* (1984) 152 CLR 521 at 536; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [462].

² *Luxton v Vines* (1952) 85 CLR 352 at 358 (Dixon, Fullagar and Kitto JJ).

³ *Doney v They Queen* (1990) 171 CLR 207 at 211, approved in *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [462].

⁴ *R v Steven Wayne Hillier* (2007) 228 CLR 618 per Gummow, Hayne and Crennan JJ at [48]; *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 per Mahoney JA at 233-234.

⁵ *R v Steven Wayne Hillier* (2007) 228 CLR 618 per Gummow, Hayne and Crennan JJ at [48]; *Leung v Western Australia* [2020] WASCA 81 at [44]; *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 per Mahoney JA at 233-234.

Operation

12. The practical steps which should be taken by counsel to adhere to the rule were described by Wells J in *Reid* at 373:

This much counsel is bound to do, when cross-examining: he must put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which that witness had any share. Thus, if the plaintiff has deposed to a conversation with the defendant, it is the duty of the counsel for the defendant to indicate by his cross-examination how much of the plaintiff's version of the conversation he accepts, and how much he disputes, and to suggest what the defendant's version will be. If he asks no question as to it, he will be taken to accept the plaintiff's account in its entirety.

(An even more detailed outline of how the rule practically operates was prepared by Hunt J in *Allied Pastoral Holdings* [1983] 1 NSWLR 1 at 23-24.) It will be observed that a proper challenge to a witness' evidence will thus have two dimensions: first, a challenge to the *witness'* version, and secondly, the proffering of the *challenger's* version relevant to that witness.

13. Ordinarily, where detail in support of an allegation is known to the cross-examiner and is to be the subject of evidence, there must be sufficient puttage of that detail so that it can be said that the witness was given an adequate opportunity to respond, not only to the allegation but to its essential features, which may include the time, place and circumstances of the occurrence: *Parsons v The Queen* [2016] VSCA 17 at [42] (and authorities therein cited).
14. Relevantly, the rule in *Browne v Dunn* will generally require more extensive cross-examination in cases where all the evidence is given orally as opposed to where the substance of the evidence to be given by each party is contained in affidavits or statements prior to hearing: *Parsons* at [42]; *West v Mead* [2003] NSWSC 161; 2003 BPR 24431 at [98]. It is also relevant to bear in mind that non-party witnesses are far less likely than party witnesses to have had knowledge of the actual or anticipated evidence of other witnesses in the case, no matter how it is to be given.
15. Whilst the authorities expressly state that the rule in no way derogates from the right of cross-examining counsel to use all the fair arts and devices of cross examination, "in the final analysis, it is manifestly unfair to leave unchallenged part of a witness' evidence and then, through another witness, called by the side represented by the cross-examining counsel, to suggest something that is contrary to the first-mentioned witness' testimony, or which has never been covered by him": *Reid* at 375.

Exceptions

16. Of course, there will be no breach of the rule if the witness is sufficiently put on notice that his version is in contest. Meagher JA of the NSW Court of Appeal observed in *Oneflare Pty Ltd v Chernih* [2017] NSWCA 195 at [42] (Gleeson JA and Leeming JA agreeing):

There are many ways in which a party or other witness might sufficiently be put on notice that their evidence on a particular subject or to a particular effect is challenged as untruthful, and as to the basis of that challenge. Depending on the circumstances, those ways include by pleadings, affidavits or statements of evidence exchanged before the hearing, and opening statements made or exchanged at the commencement of the hearing, as well as by cross-examination.

17. In general, however, an exception to the rule should only operate where the issue is a fairly clear and obvious one. Even where there has been an exchange of affidavits or statements, a cross-examiner must put to the witness any non-obvious inferences which the cross-examiner proposes to submit can be drawn from the evidence: *Cross on Evidence* (11th edition) at [17445] and citations therein. In this case, where all of the Respondents' witnesses were non-party witnesses, where evidence was only adduced orally, and the outlines of evidence served were at the most general level, there could be no suggestion that any meaningful exception to the operation of the rule applies.

Consequences of non-compliance

18. In the body of these submissions, we have noted many occasions upon which the rule in *Browne v Dunn* was not complied with. The consequences of a failure to comply with the rule in *Browne v Dunn* will vary with the circumstances of the particular case. As the rule is directed to the fairness of a trial there may be a multitude of remedial steps which might ameliorate the non-compliance: *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 280 FCR 479 per Markovic, Derrington and Anastassiou JJ at [147].
19. Without suggesting any limitation on the Court's discretion as to appropriate remedies, a breach of the rule will generally attract one of the following sanctions:
- (a) First, if the witness is not cross-examined on a point, cross-examining counsel may be taken to accept it and may not be entitled to address in a fashion which asks the Court not to accept it: *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 at 236; *Bale* at [45]; *Copmanhurst Shire Council v Watt* (2005) 140 LGERA 333 at [46];
 - (b) Secondly, if the witness has not been cross-examined on a particular matter, that may be a very good reason for accepting the witness' evidence, particularly if it is uncontradicted by other evidence: *Reid* at 375; *Allied Pastoral Holdings* at 18; *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 371. It can affect the weight of the evidence called against the witness: *R v Morrow* (2009) 26 VR 526 at [61]. In particular, when determining whether to accept a serious allegation, the Court may take into account the lack of cross-examination on the point and any explanation the witness might have been able to proffer if there had been cross-examination: *Bale* at [85]. Although non-compliance with the rule in *Browne v Dunn* does not mean that the Court is obliged to accept the evidence of the witness in question, for example where the evidence is inherently illogical or unreliable, or where the opposing party calls evidence of a substantial nature directly contradicting the evidence on which there was no cross-examination, in many cases it would be wrong, unreasonable or even perverse to reject evidence upon which there has been no relevant cross-examination: *Bradley v Matloob* [2015] NSWCA 239; 72 MVR 194 per McColl JA; *Bulstrode v Trimble* [1970] VR 840 at 848; *Allied Pastoral Holdings* at 26;
 - (c) Thirdly, the Court may accede to an application by counsel for the party who called the witness in respect of whom the rule was broken to call evidence in rebuttal so that matters not put to the witness may be so put albeit belatedly: *Johnston v Western Australia* [2012] WASCA 148 at [108]-[111]. Alternatively, the Court may require the

relevant witness to be recalled for further cross-examination or grant an application for the recall of the witness (pursuant to section 46 of the *Evidence Act*): *MJW v The Queen* (2005) 80 ALJR 329 at [40]; *Payless Superbarn (NSW) Pty Ltd v O’Gara* (1990) 19 NSWLR 551 at 556; *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* [1998] FCA 806; 156 ALR 169. None of those options are appropriate in the circumstances of this case;

- (d) Fourthly, while in general a Court has no, or very limited, discretionary power to reject the tender of relevant and admissible evidence in civil proceedings, if a party fails to cross-examine a witness called by the other side on a point, evidence later called by it in support may be rejected: *R v Schneidas* (1981) 4 A Crim R 101 at 110-11. The Court has already ruled that this is not an appropriate remedy in this case: see *Roberts-Smith v Fairfax Media Publications Pty Limited (No 36)*.
20. At the time of service of these submissions, it is not known whether and if so to what extent Mr Roberts-Smith will make submissions that a witness’ evidence, in respect of which there was a failure to comply with the rule in *Browne v Dunn*, should not be accepted. It follows that it is not possible, at this point, to make submissions as to whether the first or second remedial responses outlined above is appropriate (or is appropriate in relation to particular evidence). These submissions have, however, been drafted on the basis (without conceding) that Mr Roberts-Smith will be permitted to make submissions that the Respondents’ witnesses should not be believed on any matter. There is, however, no basis for disbelieving any of the Respondents’ witnesses in relation to any matter where there has been a failure to comply with the rule. That is to say, in no instance was the relevant evidence inherently unreliable or illogical, or was there substantial evidence to the contrary adduced by Mr Roberts-Smith. In all cases, the failure to challenge the witness can be attributed to nothing other than fear of what the witness would say in response.

D. The assessment of witness reliability

21. The Court’s function, in assessing a witness’ evidence, is to determine whether it is sufficiently reliable to be accepted. Reliability depends on two distinct but overlapping factors. One is the witness’ honesty. The other is the witness’ accuracy. In assessing honesty and accuracy of witnesses in this case, the Court should pay particular regard to the nature and extent of any *Browne v Dunn* challenge made of the witness.
22. Many factors can have a bearing upon a witness’ honesty, for example: a personal relationship with a party; a personal interest in the proceedings; the receipt of a financial benefit; belief in adherence to a code of silence; or animus towards a party or witness. If the Court concludes that a witness has been doing his or her best to be honest, the analysis then turns to accuracy. A witness can be perfectly honest and accurate. Or perfectly honest, yet completely or partly inaccurate. Several factors may bear upon this analysis. Mental health and memory are two that have featured prominently in this case.
23. The mere existence of a mental health condition, or that a witness is taking medication, does not undermine the reliability or accuracy of the witness’ evidence without more. For one or both of those matters to adversely affect the honesty or accuracy of a witness’ evidence, a causal link must be established between the condition or the medication and a factor going

to honesty or accuracy. For example, in *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784, Collier J held that expert evidence about the general effect of PTSD was not sufficient to establish that inconsistencies in a witness' account were explained by amnesia. In that case, the Court heard evidence that persons suffering PTSD can forget certain aspects of the trauma or may have variable recall of events (at [364]). However, "neither expert gave a considered opinion as to whether [the witness] suffered from such partial amnesia that would explain inconsistencies in his evidence" (emphasis in original) (at [365]). Absent specific expert evidence, the Court was not able to find that inconsistencies between his evidence and the evidence of other witnesses was caused by his PTSD (at [365], [1023]).

24. The situation in this case is both different, in terms of the suggested impact of mental health conditions on a witness' reliability, and more acute, in terms of the lack of an evidentiary basis for the submission, than in *Ford v Inghams*. In that case, there was expert evidence on at least the general effect of PTSD. However, Mr Roberts-Smith adduced no expert evidence establishing any causal link between any witness' condition or medication on the one hand, and their ability to give honest and accurate evidence on the other. There is no expert evidence that any witness' condition, or treatment, has any adverse effect on his memory either by creating new false memories or the anomalous deletion of real ones. In the absence of expert evidence demonstrating any such causal link, this challenge fails at the first hurdle.
25. Another theme of cross-examination was to test a witness' memory in relation to details of rotations (for example, how many missions did you go on) or mundane or benign aspects of missions, and to suggest that the witness had a poor memory when they were unable to recall those details. It is unsurprising that witnesses would not recall inconsequential events that occurred more than 10 years ago. Nor is it surprising that when a witness did recall a significant event, some aspects of the detail (or parts that were not of real consequence to the core memory) had sometimes faded. The discovery of the tunnel at W108 is an exemplar. While every witness recalled the tunnel and professed to recall whether people came out of it, it was generally the case that some aspects of the detail (such as who they were standing next to) had faded. Indeed, it would be curious if a witness were able to recall every detail from an event 10 years ago without a reason for the recollection. The Court would likely approach any witness who professed to have perfect recall with caution and scepticism.

SECTION III: DEFAMATION PRINCIPLES AND APPLICATION**A. Justification**

1. Section 25 of the *Defamation Act* provides a defence to the publication of defamatory matter if the respondent establishes that the imputations carried by the matter are substantially true.
2. “Substantial truth” means that the respondent must prove that every material part of each imputation is true: *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232; [2010] NSWCA 335 at [138] per McColl JA (Spigelman CJ, Beazley JA, McClellan CJ at CL, and Bergin CJ in Eq agreeing). A “material part” is any detail which alters or aggravates the character of the imputations: *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4 at 22 per Street ACJ. To succeed on a defence of justification it is not necessary to establish that every part of an imputation is literally true; it is sufficient if the “sting” or gravamen of an imputation is true.
3. In considering whether an allegation has been established to be substantially true, the allegation is considered in a non-technical, non-legal sense, in the way it would be understood by the ordinary reasonable reader.¹ The ordinary reasonable reader is not a lawyer, and is not taken to have detailed knowledge of the law.² Accordingly, recourse to the elements of a criminal offence or statutory definitions of misconduct is unlikely to be a useful guide to the meaning of an imputation to the ordinary reasonable reader. See for example *Haddon v Forsyth* [2011] NSWSC 123 at [34], [132] and [234]-[250] where Simpson J considered the meaning of “sexual harassment” as it would be understood by the ordinary reasonable reader rather than reverting to statutory definitions.

The “ordinary reasonable reader” and allegations of war crimes

4. There should not be any dispute that the ordinary reasonable reader’s understanding of the meaning of “murder” would encompass the intentional killing by a soldier of a battlefield prisoner. Similarly, as the framing of the imputations themselves recognises, the ordinary reasonable reader would understand that a soldier who procured or pressured another soldier to kill a battlefield prisoner is himself responsible for murder. The ordinary reasonable reader would also understand that where two or more soldiers reached agreement between them to kill a battlefield prisoner, each soldier who is party to the agreement is responsible for murder. Each of the allegations of murder alleged by the Respondents in the Particulars of Truth would comfortably fall within the ordinary reasonable reader’s understanding of the term.
5. In relation to the ordinary reasonable reader’s understanding of the meaning of “assault”, once again it would plainly encompass the intentional application of unnecessary or disproportionate physical force by a soldier to a civilian in the course of detaining them, or during their detention.

¹ See, e.g., *Farquhar v Bottom* [1980] 2 NSWLR 380 at 385-386 (21) and the authorities there collected.

² See, e.g., *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386 (22) and the authorities there collected; *Krahe & Ors v TCN Channel Nine Pty Ltd & Ors* (1986) 4 NSWLR 536 at 546; *Trkulja v Google LLC* (2018) 263 CLR 149 at 160–161 at [32]; *Herron v HarperCollins Publishers Australia Pty Ltd* [2022] FCAFC 68 at [30] and [73]. See also *Foord v John Fairfax & Sons Ltd* (Supreme Court of NSW, unreported, 27 February 1987, per Hunt J; BC8701559 at 40 and 50.

SECTION III: DEFAMATION PRINCIPLES AND APPLICATION

6. In the circumstances of this case, the notion of the ordinary reasonable reader's understanding of "the moral and legal rules of military engagement" does not require any additional analysis. That is to say, the ordinary reasonable reader would understand that at the core of the moral and legal rules of military engagement is a prohibition on the murder of battlefield prisoners and the assault of civilian detainees.
7. There is, in other words, no necessity to have regard to the precise terms of either Common Article 3 of the Geneva Conventions, the RoE, or the provisions of Division 268 of the *Commonwealth Criminal Code* including, relevantly:
 - (a) Section 268.70: the war crime of murder in the context of an armed conflict that is not an international armed conflict;
 - (b) Section 268.72: the war crime of cruel treatment in the context of an armed conflict that is not an international armed conflict; or
 - (c) Section 11.2 in relation to extension of criminal liability through aiding, abetting, counselling or procuring the commission of an offence by another person.

B. Contextual truth

8. Section 26 of the *Defamation Act* provides a defence to the publication of defamatory matter if the respondent establishes that:
 - (a) the matter carried, in addition to the defamatory imputations of which the applicant complains, one or more other imputations (contextual imputations) that are substantially true; and
 - (b) the defamatory imputations do not further harm the reputation of the applicant because of the substantial truth of the contextual imputations.
9. An imputation will be an "other imputation" carried "in addition" to the applicant's imputations if it is different in substance from the applicant's imputations: *Fairfax Media Publications v Zeccola* [2015] NSWCA 329 at [42]-[46]; [72] and [114].
10. The balancing exercise set out in sub-section 26(2) requires the Court to weigh the facts matters and circumstances relied upon in support of the substantial truth of the contextual imputation against the applicant's imputations: *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541.
11. In considering the balancing exercise the Court is required to take into account that any applicant's imputation found to be substantially true has already harmed the applicant's reputation: *Fairfax Digital Australia and New Zealand Pty Ltd v Kazal* (2018) 97 NSWLR 547 at [21].

SECTION IV: WHISKEY 108 - 12 APRIL 2009**A. Introduction**

1. The central allegation in relation to W108 is that two men were found in a tunnel, placed under the control of Australian soldiers, and then executed. One man was shot by Person 4, in circumstances making Mr Roberts-Smith complicit in his murder (**EKIA 56**), and one man was shot by Mr Roberts-Smith himself (**EKIA 57**).
2. The Respondents' case in relation to the two murders at W108 is set out in the Particulars of Truth at [40]-[55]. They are relied upon in relation to the substantial truth of Imputations 2, 3, 4, 5, 6 and 9.
3. EKIA 56 is shown in Ex R-6 (an NPO Document). The critical particular in relation to that murder states:¹

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

4. Before the commencement of the trial, the Respondents wrote to Mr Roberts-Smith in relation to that allegation, stating that, for the avoidance of doubt, they relied on the evidence that the parties could anticipate would be given by Person 41.² That is to say, the Respondents made clear that the matters they relied upon to establish that Mr Roberts-Smith was complicit in and approved of the murder of EKIA 56 included the conduct observed by Person 41. The trial then proceeded on the basis that the Respondents' case encompassed the matters about which Person 41 gave evidence (discussed in detail below).
5. EKIA 57 is shown in Ex R-7 (an NPO Document). The critical particular in that regard states:³

...[T]he Applicant carried an Afghan male with a prosthetic leg outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW ... light machine gun.

6. The ultimate issue for determination is whether, on the one hand, Mr Roberts-Smith was complicit in Person 4's execution of EKIA 56 and himself responsible for executing EKIA 57, or, on the other hand, whether each killing was a legitimate battlefield engagement. Resolution of that ultimate issue involves determining (at least) the following subsidiary questions:
 - (a) Where was Person 6's patrol located?

¹ Particulars of Truth, [46].

² Letter from MinterEllison to Mark O'Brien Legal dated 6 June 2021.

³ Particulars of Truth, [49].

- (b) Where did the two men (EKIA 56 and 57) come from?
- (c) Were they under the control of Australian forces in the period prior to their death?
- (d) Where was the body of EKIA 56 located?
- (e) What were the circumstances of the death of EKIA 56?
- (f) What were the circumstances of the death of EKIA 57?

B. Proposed factual findings

Person 4 was known as “the rookie”

7. It is uncontroversial that Person 4 was the newest member of Person 5’s patrol in 2009. It was his first deployment as an SASR trooper on an SOTG deployment.⁴ Person 14 gave evidence that the term “rookie” was used in the SASR and meant a “junior trooper that is very new to the squadron/troop, if not on their first deployment”.⁵ He understood the term in 2009 to refer to Person 4.⁶ He was not challenged on that evidence.
8. Person 18 – a member of Person 4’s patrol in 2009 and 2010 – gave evidence that Person 4 was regularly called the “rookie fuck” as a joke from the movie “Super Troopers”.⁷ There was no challenge to that evidence.⁸ Person 18 also gave unchallenged evidence that in a meeting in 2013, Person 102 asked directly about the bleeding of rookies at W108.⁹
9. Person 24 gave evidence that he understood the term “rookie” to refer to Person 4 in 2009.¹⁰ He went on to say that he had formed the view that Person 4 was the “pet project” of Person 5 and Mr Roberts-Smith, or “the new guy who they could influence”.¹¹ In relation to that latter aspect of his evidence it was put to Person 24 that “what you’ve told the court is based on things that you’ve read ... rather than what you’ve seen”.¹² But the former aspect, that he understood the term “rookie” to refer in 2009 to Person 4 was not challenged.
10. Ex R-210 shows that the term was in use in 2010.¹³ This exhibit clearly shows that Person 8, as the most junior member of Person 5’s patrol in 2010, was known as the “rookie fuck”. Person 8 had replaced Person 4 as the rookie in that year.
11. The term was still in use in 2012. Person 19 said that when he joined the SASR in 2012, the term “rookie” was both used and understood.¹⁴
12. Despite there being no challenge to the Respondents’ witnesses on this point, various witnesses called in Mr Roberts-Smith’s case did not accept that Person 4 was known as the “rookie”. Those witnesses denied not just using the term “rookie” to describe Person 4

⁴ T.2605/22-35; 2761/3-18 (P4).

⁵ T.1389/1-17 (P14).

⁶ T.1395/30, T.1517/24-44 (P14).

⁷ T.3020/36-42 (P18).

⁸ T.3102/34-35 (P18).

⁹ T.3085/9-33 (P18).

¹⁰ T.3443/46-3444/1, T.3483/6-21 (P24).

¹¹ T.3483/13-34 (P24).

¹² T.3483/36-38 (P24).

¹³ CCT 22.4.22 T.2/9-3/24 (P5); T.5241/21-31; 5244/13-27 (P35); T.5405/29-31 (P27); T.5553/17-32 (P29); T.6009/14-43 (P38); See also Ex R-200 (a closed court exhibit).

¹⁴ See, e.g., T.2321/17-20, T.2360/18-24 (P19).

themselves or hearing him referred to as such by others; they denied hearing *any* member of the SAS ever referred to in those terms.¹⁵ The Court would not accept those denials in circumstances where numerous witnesses called by the Respondents gave evidence that Person 4 was known as the rookie in 2009, and none of those witnesses was challenged.

13. The denial of the term “rookie” as a reference to Person 4 can only be seen as a refusal to admit a fact considered to be prejudicial to Mr Roberts-Smith’s case.¹⁶ That is to say, it was plainly thought that to admit that Person 4 was known as the “rookie” would add credence to the allegation that Person 5 had spoken of “bleeding the rookie”.

Talk of “bleeding the rookie”

14. In the weeks leading up to the W108 mission, Person 5 was heard to say to different people that he was going to “blood the rookie”, including by Person 14 and Person 24.
15. Person 14 said that before 12 April 2009 he heard Person 5 say “I’m going to blood the rookie” in the troop briefing room in Tarin Kowt.¹⁷ Although he recalled the “majority of the SAS troop was in a room all together”,¹⁸ he said that Person 5 “wasn’t addressing the room”.¹⁹ The cross examination did not challenge Person 14’s evidence that Person 5 said he was going to blood the rookie. Rather, it was apparent that the cross-examination had two broad objectives.
16. *First*, accepting that Person 5 had said he was going to “blood the rookie”, the cross-examiner sought (and obtained) Person 14’s agreement that Person 5’s comment did not imply that “a rookie would be asked to conduct an unlawful killing”.²⁰ That is to say, Person 14 agreed that one meaning of the term “blood” was “for a new member of the troop to get a kill in action ... not unlawfully”.²¹ That was consistent with the evidence of Person 5, who also acknowledged that the term “bleeding” had been “used for centuries” in the military to refer to the “first kill in action or in battle” of a soldier.²² The cross-examiner thus expressly refrained from challenging Person 14’s evidence as to what he had heard Person 5 say, and instead sought to demonstrate that the words may have had a benign meaning.
17. *Secondly*, the cross-examination sought to demonstrate that that Mr Roberts-Smith was not in earshot when Person 5 said he was going to “blood the rookie”. Person 14 agreed that while Mr Roberts-Smith was in the room, he would not have been within earshot.²³
18. Person 24’s evidence was that around a week before the mission to W108 he was in his patrol room with members of his patrol including Person 6 when Person 5 came to the doorway of the patrol room and said “We’re going to blood the rookie”.²⁴ Person 24 said

¹⁵ See, e.g., Person 5: T.4954/16-26, T.5000/11-19, T.5001/7-23 (P5). Person 27: T.5386/28, 5394/33-5395/8 (P27). Person 29: 5464/33-5465/6, 5553/7-15 (P29). Person 35: T.5168/8, T.5241/14 (P35). Person 38: T.6008/40-6009/5 (P38).

¹⁶ T.4954/16-26 (P5); T.5241/9-19 (P35); T.5553/4-12 (P29).

¹⁷ T.1394/41-1395/23, T.1516/9-1517/24, T.1580/9-1584/20 (P14).

¹⁸ T.1395/3-4 (P14).

¹⁹ T.1517/17 (P14).

²⁰ T.1580/19-20 (P14).

²¹ T.1519/40-43 (P14).

²² T.4847/27-30 (P5).

²³ T.1582/20-1584/18 (P14).

²⁴ T.3443/28-3444/7; 3480/43-46 (P24).

that, at that point in time, he understood that bleeding meant “to facilitate or put Person 4 in a position where he could get a kill under his name”.²⁵ In cross-examination, it was put to Person 24:

- (a) When he said he understood that “bleeding” meant “they were going to put Person 4 in a position to kill someone”, that was “because [he had] read stories about that”.²⁶ In other words, at that point, the cross-examination did not appear to challenge the fact that the words had been said, but rather how Person 24 had come to understand the meaning he now ascribed to them.
- (b) Confirming that understanding of the cross-examination is the fact that, later, it was clearly put to him that at the time he heard the words he understood the term “bleeding” to refer to “killing someone lawfully”.²⁷ It was then put to him that his hindsight understanding that there was illegality involved was because he had been “influenced about what [he had] been reading in newspaper articles”.²⁸ It was thus unarguable that, at least to this point, the cross-examination was conducted on the basis that Person 5 had said the words “blood the rookie”, but that they had an innocent meaning.
- (c) Shortly thereafter, in the context of questioning Person 24 about his evidence that Person 5 had been “jovial and doing a jig”, which Person 24 had found “unusual” in circumstances where he later understood that Person 5 was declaring that he was “going to have one of [his] junior soldiers kill”, the cross-examiner asked Person 24 if he was “sure you have not imagined this statement by Person 5”.²⁹ To the extent that that is a challenge to Person 24’s evidence about Person 5 saying the words that had hitherto been accepted, it certainly was not suggested that he was being deliberately untruthful. There is no basis in the evidence for finding that Person 24 had simply “imagined” the interaction with Person 5 in his patrol room. That interaction was not written about in any newspaper article, and there was no suggestion that it was implanted in Person 24’s memory by something someone else had said. The “imagining” of the conversation as a result of reading newspaper articles about bleeding is, in any event, inconsistent with Person 24 having a memory of ascribing an *innocent* interpretation to what was said back in 2009.
- (d) Finally, it may be accepted that there was a clear and direct challenge to Person 24’s evidence about Person 5 saying he was going to “blood the rookie” in Closed Court on 11 April 2022. That challenge was put on a very specific basis, which in the Respondents’ submission is without substance. The Respondents’ submissions in relation to that matter are set out in paragraphs A11 to A14 of the Respondents’ Closed Court submissions.

19. The likelihood that Person 5 did in fact refer to “bleeding” is supported by the evidence of Person 19 who said that he had heard Person 5 use that term (and he was not challenged

²⁵ T.3444/5-7 (P24).

²⁶ T.3482/23-33 (P24).

²⁷ T.3573/22-31 (P24).

²⁸ T.3573/38-39 (P24).

²⁹ T.3575/1-17 (P24).

on that evidence).³⁰ Person 19's evidence also supports a finding that the term "blooded", as a reference to making a junior soldier unlawfully kill an enemy prisoner, was used and known in the SASR.³¹

20. Further support for a finding that Person 5 made these comments before the mission is found in the evidence of similar statements made by him in the immediate aftermath of the mission (discussed below).
21. Overall, it is submitted that the Court would find that Person 5 said on two occasions prior to the W108 mission that he was going to "blood the rookie". The denials of Person 5 can only be seen as motivated by a recognition that admitting to having made those statements would add credence to the Respondents' case that Person 4 had, in fact, been blooded at W108.³²

The killing of Objective Depth Charger

22. It is anticipated that Mr Roberts-Smith will contend that references to Person 4 being "blooded" at W108 are implausible because he had already had a kill in action (namely "Objective Depth Charger") and accordingly did not need to be "blooded". Any such submission would suffer from the fundamental difficulty that the clear weight of the evidence is that Person 4 shot at Objective Depth Charger after numerous other SAS operators had already engaged and killed him, or, at the very least, that Person 4 engaged the objective simultaneously with other operators such that responsibility for the kill could not be securely attributed to him (or him alone). In those circumstances, the perceived need to "blood" Person 4 remained extant at the time of the W108 mission.
23. Of particular significance is that Person 4's own evidence concerning Objective Depth Charger was not challenged. Person 4 said he was third in the order of march behind Person 6 and Person 5, and all three of them engaged the target.³³ In circumstances where that evidence was not challenged, the Court should prefer it over the contrary evidence of Person 5 (discussed below).
24. Person 18's evidence provided a different perspective on the engagement, in that he was not located on the ground with Persons 4, 5, 6 and others, but was with Person 14 up on a wall. He said that in addition to operators on the ground (who he believed to be Person 6 and Person 73), the objective was engaged by himself and Person 14 from the wall. He said that if anyone else engaged "they would have been engaging dead bodies".³⁴ He said that whilst he did not see Person 6 engage, he heard an M14 shoot which was the weapon he believed Person 6 was carrying, including based upon post-operation discussions.³⁵ He was not challenged in respect of his evidence that Person 6 was carrying an M14. Indeed, the premise of the cross-examination was that *both* Person 6 and Person 4 were carrying M14s (which Person 18 denied).³⁶ There was no evidence adduced in support of the proposition that Person 4 was in fact carrying an M14 on that day, or even on that rotation. Even if

³⁰ T.2321/22-26 (P19).

³¹ T.2321/28-33, T.2361/40-43 (P19).

³² T.5030/1-5031/14; 5115/14-46 (P5).

³³ T.2766/11-2768/2 (P4). As to the meaning of the word "engagement", see T.2999/18-21 (P18).

³⁴ T.3029/15-3030/14 (P18).

³⁵ T.3093/10-18; 31-35; 3094/19-30; 3096/15-17 (P18).

³⁶ T.3093/40-43 (P18).

Person 4 was carrying an M14, however, all that would demonstrate is that Person 4 may have engaged the objective in addition to Person 6. Furthermore, Person 18 was not challenged on his evidence that both he and Person 14 engaged the objective. It follows that there was unchallenged evidence from Person 18 that, at best, Person 4 engaged Objective Depth Charger along with several other operators.

25. Person 5's evidence concerning Objective Depth Charger was unsatisfactory. He stated that he ran out of the gate with Person 4, Mr Roberts-Smith, Person 18, Person 6 and the rest of Person 6's patrol. Initially, in his evidence in chief he said that "the first rounds that went in him [the Objective] were from myself and Person 4".³⁷ On that evidence, Person 4 could not take sole credit for the kill. Person 5 evidently realised this difficulty and changed his evidence in cross-examination. At that point, Person 5 said that he was *not* shooting at Objective Depth Charger at all, rather he was shooting at the person on the back of the motorbike.³⁸ When pressed on the topic, he then changed his evidence again, and said that he "fired at both of them" and was "aiming at the men on the bike".³⁹
26. Person 5's evidence was thus not only internally inconsistent, but was also inconsistent with the unchallenged evidence of Person 4 that Person 6 was out first, and Person 18's unchallenged evidence that he was on a wall and engaged from there.⁴⁰ It is submitted that Person 5's evidence in cross-examination was a transparent attempt to attribute sole responsibility for the death of Objective Depth Charger to Person 4,⁴¹ and would not be accepted (especially in preference to Person 4's and Person 18's unchallenged evidence).
27. Overall, the evidence in relation to Objective Depth Charger supports, rather than contradicts, the proposition that at the time of the mission to W108, Person 4 had not had a kill at all, or at the very least, had not been unambiguously responsible for a kill. In those circumstances, Person 5's perceived need to "blood" Person 4 remained unfulfilled.

The morning of 12 April 2009

28. On the morning of 12 April 2009, G-Troop established an overwatch position just outside the green belt on the western side of the Deh Rafshan river.⁴² On the eastern side of the river, an element of the Mentoring and Reconstruction Taskforce (**MRTF**), the 7th Battalion of the Royal Australian Regiment, was being engaged by insurgents.⁴³ Those insurgents appeared to be operating out of a number of different compounds, including two on the western side of the river designated W108 and W109.
29. During the morning, from the overwatch position, G-Troop observed numerous insurgents manoeuvring against the MRTF and engaged some with sniper fire.⁴⁴ Those insurgent movements included three individuals entering W108.⁴⁵ G-Troop was also provided with

³⁷ T.4450/40-45.

³⁸ T.5029/1-3 (P5).

³⁹ T.5125/20-31 (P5).

⁴⁰ See T.5029/21-22 where Person 5 appears to accept that Person 18 was on the wall.

⁴¹ T.5126/26-27 (P5).

⁴² Ex R-192 (Tab 1), at [5(b)]; T.5465/28-38 (P29); T.32923/14-15 (P40).

⁴³ T.6154/8-18 (P81); T.1396/30-46 (P14); T.2115/18-28 (P42); T.5170/29-36 (P35).

⁴⁴ T.5466/7-20 (P29); T.5171/1-5 (P35).

⁴⁵ Ex R-192 (Tab 1), at [5(d)]. See also T6155/46-6156/1 (P81).

intelligence from the Scan Eagle drone, which identified insurgents in W108.⁴⁶ See paragraph A1 of the Respondents' Closed Court Submissions.

30. As a result of the observed insurgent activity at W108, a 500-pound bomb was dropped on the compound at 1221DE, which caused extensive damage to the northern⁴⁷ half of the compound.⁴⁸
31. A decision was then made that G-Troop would clear W108 and W109, and the Troop Commander gave orders to that effect to the patrol commanders.⁴⁹ The entire Troop participated in the mission, comprised of five patrols, plus a headquarters element.
32. The patrols were constituted as follows:
 - (a) Gothic 1: Person 44 (PC), Person 45 (2IC), Person 27, Person 46, Person 47 and Person 48;⁵⁰
 - (b) Gothic 2: Person 29 (PC), Person 40 (2IC), Person 35, Person 38, Person 41 and Person 42;⁵¹
 - (c) Gothic 3: Person 43 (PC), Person 72 (2IC), Person 3, Person 98, Person 108 and Person 109;⁵²
 - (d) Gothic 4: Person 6 (PC), Person 73 (2IC), Person 14, Person 24, Person 68 and Person 80;⁵³ and
 - (e) Gothic 5: Person 5 (PC), Mr Roberts-Smith (2IC), Person 4, Person 18 and Person 52.⁵⁴
33. The headquarters element included (inter alia) Person 81 (Troop Commander), Person 82 (Troop Sergeant), and an interpreter.⁵⁵

⁴⁶ T.6155/41-44 (P81).

⁴⁷ W108 is not aligned neatly with the four cardinal directions, a fact which, when coupled with the fact that different documents identify the direction of north differently, has led to some inconsistencies in the description of different parts of the compound.

Insofar as the orientation of the compound was understood by operators on the day, it appears that the side of the compound closest to the direction from which the Troop approached was regarded as "south" (with the opposite wall, closest to W109, thus being "north"), and the side of the compound closest to the river was regarded as "east" (with the opposite wall being "west") (see, for example, T.5034/17-5035/32). Consistently with that understanding, the corner of the compound where the tunnel courtyard was located was thought on the day of the mission to be the "north-west corner" (see, e.g., the markings on SSE bags in Ex R-5, Ex R-6, and Ex R-7).

Later documents (including, critically, the aerial photograph of W108 shown to many witnesses: e.g., Ex R-4 (BRS), R-92 (P41), R-98 and R-275 (P14), R-115 (P42), R-132 and A-117 (P18), R-141 and A-130 (P24), R-137 (P40), A-194 and R-207 (P5); A-205 (P35); A-219 (P29) and A-240 (P38). have identified north as being closer to what was understood as "west" on the day of the mission. Evidence given in the context of such documents, and sometimes at other times, thus involved a corresponding adjustment of the cardinal directions used (e.g., with the area where the tunnel courtyard was located being described as the "north-east corner"). The intended meaning of the evidence is usually clear from the context, but care does need to be taken.

In these submissions we will use the cardinal directions as understood on the day.

⁴⁸ T.169/21-30 (BRS); T.2116/1-4 (P42); Ex R-208; Ex R-192, tab 1, [5(d)].

⁴⁹ T6154/33-6155/11 (P81).

⁵⁰ T5368/25-28; T.5378/1-8 (P27).

⁵¹ T.1220/35-42 (P41); T.2092/17-2093/2 (P42); T.3258/4-14 (P40).

⁵² T.3346/33-3347/23 (P43).

⁵³ T.1387/47-1388/45 (P14).

⁵⁴ T.166/19-26 (BRS); T.2996/26-34 (P18).

⁵⁵ T.6176/10-17 (P81); T.1398/46-47 (P14); T.2107/21-25 (P42); T.1335/23-34 (P41); T.3263/18-27; 3263/45-46 (P40); T.3348/34-36; 3376/29 (P43).

34. The mission orders assigned different roles to each of the patrols. Two (namely, the patrols of Person 5 and Person 29) were designated as primary assault patrols, with responsibility for conducting the clearance of the compounds.⁵⁶ Person 6's patrol was tasked with leading the approach to W108, and then providing cordon and external security during the clearance.⁵⁷ Person 43 and Person 44's patrols were also responsible for providing cordon and external security during the clearance.⁵⁸

1500DE: step-off from the VDOP

35. At about 1500DE, G-Troop stepped off from the vehicle drop-off point (**VDOP**). Key timing for the mission based upon contemporaneous reporting is set out in paragraph A2 in the Respondents' Closed Court Submissions.
36. On the approach to W108, Person 6's patrol, as the lead patrol, engaged three insurgents, resulting in three EKIA's.⁵⁹ The last of those EKIA's was shot by Person 14 very close to the compound.⁶⁰ The circumstances of that engagement are critical to resolving the first significant issue of controversy in relation to the W108 mission: the location of Person 6's patrol in a cordon outside W108.

The location of Person 6's patrol in the cordon

37. There is broad agreement that the patrols approached the compound from a generally southerly direction. There was no such agreement, however, in relation to the place at which the assault patrols made entry to the compound. The point of entry has little relevance in and of itself. However, there is a connection between the point of entry and the location of members of Person 6's patrol in the cordon. That latter issue may (subject to one important qualification, to be mentioned shortly) be a matter of both controversy and importance.
38. The location of Person 14 and Person 24 (both members of Person 6's patrol, and thus stationed in the cordon at W108) during the mission is on any view an important issue because both men gave evidence that they witnessed an Australian soldier shoot a man outside the north-western corner of the compound. At the risk of stating the obvious, if they were not in fact in a position to observe what happened outside the north-western corner of the compound, then their evidence would be wholly inaccurate and therefore unreliable.
39. Person 14 and Person 24 both gave evidence that they were stationed close to the north-

⁵⁶ T.169/12-13; 170/1-9; 421/3-5 (BRS); T.1399/33-45 (P14); T.2094/1-9 (P42); T.2998/16-18 (P18); T.3258/26-30 (P40).

⁵⁷ T.168/40-43 (BRS); T.1399/15-19 (P14); T.2094/12-15 (P42).

⁵⁸ T.2998/20-33, 3005/28-29 (P18); T.3348/11-20, T.3398/8-9 (P43); T.5378/40-43, 5380/21-28, 5392/42-46 (P27).

⁵⁹ The first EKIA was engaged by Person 6, and does not appear to have been photographed during the SSE process (T.1402/6-9 (P14); T.3445/7-10 (P24)). The second EKIA was engaged by Person 24 approximately 500m south of W108. And SSE photograph of this individual, taken by Person 40, appears on page 16 of the document at Tab 11 of Ex A-10 (which is a closed court exhibit) (T.1402/33-46 (P14); T.3334/32-36 (P40); CCT 10.03.2022, T.5/44-6/24; 8/23-25 (P40); T.3444/23; 3445/12-20 (P24)). The third EKIA was engaged by Person 14, in circumstances discussed below.

⁶⁰ T1404/5-47; 1418/18-20 (P14); T.3446/1-6 (P24). See also page 9 of Ex A-10, tab 11 and CCT 4/2/2022 T.3/18-37 (P14). See also Person 40's evidence at T.3258/45-3259/4 in relation to a radio call about Person 14's engagement.

western corner of W108.⁶¹ To a similar effect, Person 18 said that just prior to the assault teams making entry to the compound, Person 6's patrol moved to take up a position on the north-west corner of the compound.⁶² Person 18 also said that he saw "persons from Person 6's patrol ... off to the northwest" when he moved outside during the SSE process to examine two bodies outside the northern end of the compound.⁶³ Person 41 also recalled that the mission orders that "Person 6's patrol would be a cordon and overwatch to the left", with another patrol "in the rear and the other one ... out to the right-hand side" to provide a cordon around W108.⁶⁴ So too Person 42 who said that Person 6's patrol provided cover "to the north."⁶⁵

40. On the other hand, Mr Roberts-Smith's evidence was that Person 6's patrol formed a cordon on the southern side of the compound,⁶⁶ and he expressly denied that they were where they said they were.⁶⁷ Person 5's evidence initially was to a generally similar effect,⁶⁸ but he acknowledged that Person 6's patrol "split" and at least some members moved further to the north (although not as far as Persons 14, 18 and 24 indicated).⁶⁹ Ultimately, while Person 5 denied seeing Person 14 and Person 24 near the edge of the field on the north-west corner of W108,⁷⁰ he admitted that he was unaware of their location on the day.⁷¹ Similarly, Person 29 conceded that he was "not aware of where they were positioned on the ground".⁷²
41. The apparent contest in the evidence outlined above must be assessed in light of the fact that there was no relevant challenge to any of Persons 14, 18 or 24 in relation to their evidence about the location of Person 6's patrol:
- (a) To the extent that Person 14 was challenged on his evidence about his location, it was put to him that he was very slightly back towards the heavier tree line from the point he had marked on Ex R-98.⁷³ That challenge appeared to be based on a misunderstanding of Person 14's evidence (with the wrong understanding that he had placed himself in an open field, whereas he made clear the location he had marked was at a tree).⁷⁴ Nor was any relevant challenge to his evidence concerning his location made indirectly, by way of a suggestion that could not have seen what he claimed to have seen.

⁶¹ As to the location of Person 14, see Ex R-98, page 2 (marked "A"), T.1405/46-47 (P14). Similarly, Person 24 gave evidence that Person 14 was about two to three metres away from him (T.3446/46-47 (P24)), and within the circle marked "A" on Ex A-130 (T.3527/39-40).

As to the location of Person 24: see Ex R-141 (marked with a circle), T.3447/21-24 (P24). See also Ex A-130 (marked "A"), T.3527/17-23, T.3554/38-40 (P24). Similarly, Person 14 gave evidence that Person 24 was located at the point marked "D" on Ex R-98 (T.1406/18-23 (P14)).

⁶² T.3004/6-10. See Ex R-132 (marked "C"), T.3007/21-22 (P18). See also T2998/22-29, T.3005/26-28 (P18).

⁶³ T.3014/40-41 (P18).

⁶⁴ T.1257/17-21 (P41).

⁶⁵ T.2094/39; T.2101/23-24 (P42).

⁶⁶ See Ex R-4 (marked "C"); T.423/35-36 (BRS). See also T.169/8-13, T.169/40-45, CCT 11.06.2021, T.14/17-29 (BRS).

⁶⁷ T.534/16-36 (BRS).

⁶⁸ See Ex A-194 (marked "D"), T.4854/32-33 (P5).

⁶⁹ See Ex R-207 (marked "A"), T.5038/1-20 (P5).

⁷⁰ T.5041/1-4 (P5).

⁷¹ T.5042/45-5043/16 (P5).

⁷² T.5528/18-21, T.5547/37 (P29).

⁷³ T.1614/18-32 (P14).

⁷⁴ T.1403/23, T.1405/45-47, T.1406/37, T.1420/18 (P14).

- (b) Insofar as Person 24 was challenged on his location, it was put to him that he was “at the north-western corner” of the cleared field to the north of W108 (in other words that he was where Person 14 had indicated on Ex R-98).⁷⁵ In other words, the case put to Person 24 appeared to be that Person 14’s evidence was correct. That location was not markedly different from the location where Person 24 said he was located, and it is submitted that the Court would not regard the discrepancy between the precise locations identified by Person 14 and Person 24 as undermining the essential consistency of their evidence. It was apparent that Person 24 had some difficulty correlating the observations he made on the day, to the different perspective of the aerial photograph.⁷⁶ But he was firm in his recollection (and was not challenged) that he was located towards the northern end of W108, including because his role in the cordon was to cover the approach from W109.⁷⁷ He was also firm in his recollection that he was located very close to Person 14.⁷⁸ The only challenge that was made to his evidence about his location relative to Person 14 was that part of his evidence that Person 14 was to his left.⁷⁹ Presumably that is because Person 14 said that Person 24 was to *his* left,⁸⁰ and the general nature of the case being put to Person 24 was that Person 14’s evidence as to location was accurate. Ultimately, it is submitted that a difference in recollection, after more than 12 years, as to who was on the left is unimportant.
- (c) While it was put to Person 18 that he could not see members of Person 6’s patrol while he was clearing W108 (a proposition that he agreed with, and which was in any event obvious),⁸¹ he was not challenged on his evidence that he saw them as he moved outside during the SSE process to photograph two bodies outside the northern end of the compound. Nor was he challenged about their role in the scheme of manoeuvre, or seeing them move to the north-west corner before he made entry to the compound, despite the cross-examination covering that topic.⁸²

42. In circumstances where it was not put to any of those witnesses that their evidence as to location was false or mistaken, and no positive alternative case consistent with the evidence of Mr Roberts-Smith was put to them, the Court would not disbelieve Persons 14, 18 and 24 (and would not accept the evidence of Mr Roberts-Smith).
43. In any event, the evidence of Persons 14, 18 and 24 is supported by the following objective considerations.
44. *First*, it is not in dispute that Person 14 killed EKIA 50,⁸³ the body of whom was uncontroversially placed by multiple witnesses next to the break in a field wall 15-20 metres

⁷⁵ T.3556/4-5 (P24).

⁷⁶ T.3556/10-11 (P24).

⁷⁷ T.3526/21-39, T.3555/10-46 (P24).

⁷⁸ T.3527/36-44, T.3556/17-20 (P24).

⁷⁹ T.3557/11-14 (P24).

⁸⁰ See Ex R-98 (marked “D”), T.1407/23 (P14).

⁸¹ T.3111/1-5 (P18).

⁸² See T.3109/16-27 (P18).

⁸³ See Ex R-5 (T.1418/18-20 (P14)).

off the north-west corner of W108.⁸⁴ It is not disputed that Person 14 shot that person just before the assault teams made entry to W108.⁸⁵ It follows that from the time of the commencement of the assault, Person 14 must have been in a position to take the shot that killed that man.⁸⁶ Person 14 would not have been able to take that shot if he was located at the southern end of the compound.⁸⁷ The contrast between Person 29's outline of evidence and his oral evidence on this topic was particularly telling.⁸⁸

45. *Secondly*, Person 14 linked his position to his role in the Troop, namely, as the patrol scout of the lead patrol. He was thus on the axis of advance and his primary role was observation towards the uncleared area to the north, including, critically, W109.⁸⁹ If the leading edge of the Troop had not been placed where Person 14 said it was, then a significant area from which threats could emerge would have been left unguarded. Equally, there would have been a significant portion of the compound from which squirts could escape. Many witnesses accepted that proper practice would have involved the placement of the cordon in the area identified by Persons 14, 18 and 24.⁹⁰ Indeed, it was put to one of the Respondents' witnesses in cross-examination that "while on the cordon, the job was to monitor activity at Whiskey 109 to keep an eye out for spotters ... that may have approached from the direction of Whiskey 109".⁹¹
46. *Thirdly*, it is submitted that further confidence as to the location of Person 6's patrol in the cordon can be obtained from the fact that, it is submitted, Mr Roberts-Smith and various of his witnesses colluded to give false evidence as to the point at which entry was made to the compound (or at the very least contaminated each other's evidence to the point where it cannot be relied upon). By placing the entry point on the southern edge of the compound, it was plainly intended also to tie Person 6's patrol to that edge of the compound. In this way, the collusion as to the point of entry may be seen as an attempt to undermine the testimony of a known key eye-witness to the murder of the man with the prosthetic leg.⁹²
47. Despite his initial denial, Person 29 conceded that he was aware at the time of preparing his outline that Person 14 had alleged he had seen Mr Roberts-Smith shoot a man outside W108.⁹³ That was clearly why he colluded with Mr Roberts-Smith about the key aspects of the W108 compound,⁹⁴ and included what he did in his outline, despite not being aware of

⁸⁴ Ex R-5 (an NPO Document), page 5; T.1404/5-40, Ex R-98 (page 2, solid line and marked "B") T.1406/4-5 (P14); T.5041/20-45, Ex A-194 (marked "B"); CCT 26.04.22, p.3/23-27 (P5); T.5480/40 – T5481/10-25, Ex A-219 (marked "E") (P29); T.446/8-22 (BRS), Ex R-4 (marked "K" on page 1).

⁸⁵ T.1406/43-46 (P14).

⁸⁶ T.5528/11-12 (P29); T.534/1-36 (BRS); T.5041/20-T.5042/12 (P5); T.5995/13-24 (P38).

⁸⁷ While Person 5 refused to accept that it would have been impossible to take the shot from the other side of the compound, he was not able to say that there was a clear line of sight, merely that there "could be": T.5042/7-8 (P5). See also T.534/1-36 (BRS); T.5528/8-12 (P29).

⁸⁸ T.5520/1-5522/18 (P29); Ex R-271, [25].

⁸⁹ T.1408/6-12 (P14).

⁹⁰ T.1257/1-5 (P41) (Person 41 said that the cordon's job would have been to monitor for activity from W109); T.5544/23-27 (P29); T.5036/45-5037/18 (P5) (Person 5 conceded that that point was the tactically sensible location); T.5298/39-5299/42 (P35).

⁹¹ T.1257/1-5 (P41).

⁹² See Section XVIII

⁹³ T.5527/16-31 (P29).

⁹⁴ Section XIII, paragraphs, 40-45, 98-100, 103-107 and 157-160.

where Person 6's patrol was.⁹⁵

48. Person 14's evidence as to the location of the entry point is strengthened by his unique perspective as the scout for the lead patrol. He gave detailed and clear evidence concerning his approach to the compound, and his observations of potential entry points. He said that as he was walking up, he could see on the right, there was an opening kind of halfway along W108 which looked like an alcove area. He said it looked like an entry point into the compound system or compound of interest.⁹⁶ He looked down into that alleyway as he got perpendicular to it and trained his weapon down it as he walked past it. He said that he lassoed it or looped it with his barrel to indicate it as an entry point to his patrol commander, Person 6 who was behind him. He then kept advancing up towards W109 and took a knee at a tree.⁹⁷ At this point the assault element were in trail. Person 6 came up to him and said he was going to go and clear the alcove area.⁹⁸ Person 14 marked the entry point as the point marked A on the first page of Ex R-98.⁹⁹ Person 14 saw the assault teams come to the force separation point, which he marked B on the first page of Ex R-98, and head to the entry point marked A. He accepted that he did not see them enter the compound but last saw them roughly half way between A and B, slightly closer to A.¹⁰⁰ He said that post assault that area became a thoroughfare.¹⁰¹ That fact is supported by, *inter alia*, the evidence of Person 5, who said he repeatedly entered and exited the compound through that central alleyway throughout the mission.¹⁰² In that regard, it is relevant to note the admission of Person 29 that "if there was an easy access point to the [west] side of that compound, we would have gone through it".¹⁰³
49. In addition to Person 14, Persons 18 and 42 both said that they recalled entry being made on the western side of the compound.¹⁰⁴ It must be acknowledged, of course, that Person 41 did recall that his patrol made entry to the compound on the southern side,¹⁰⁵ although he did say that he thought it was only his patrol (i.e., that of Person 29) who made entry at that location.¹⁰⁶ It is therefore possible that Person 29's patrol made entry at a different point to Person 5's patrol. Indeed, Person 29 said that he did not see Person 5's patrol enter the compound, despite them entering first.¹⁰⁷
50. Overall, wherever the troop made entry to the compound, it is submitted that there can be no reasonable doubt that Person 14 and Person 24 were located in the cordon to the west of the compound, at roughly its northern-most extent.

⁹⁵ T.5527/8-47 (P29).

⁹⁶ T.1403/8-12 (P14).

⁹⁷ T.1403/17-24; 1609/5-11 (P14).

⁹⁸ T.1403/26-44 (P14).

⁹⁹ T.1420/3-25 (P14).

¹⁰⁰ T.1407/10-21; 1408/1-4; 1611/4-11 (P14).

¹⁰¹ T.1611/15-15 (P14).

¹⁰² See, e.g., the markings on Ex A-194.

¹⁰³ T.5527/1-2 (P29).

¹⁰⁴ Ex R-132 (marked "A"), T.3007/17-18 (P18); Ex R-115 (circle marked "A"), T.2095/4-15, T.2096/25 (P42).

¹⁰⁵ See Ex R-92 (marked "A"), T.1221/36-37 (P41).

¹⁰⁶ T.1220/38-1221/7; 1318/10-14 (P41).

¹⁰⁷ T.5525/24-31 (P29); T.1221/5-37 (P41); T.2095/18-19 (P42). Person 5 said that he did see Person 29's patrol: T.4857/31-35, and Person 38 said that he could see Person 5's patrol during entry: T.5942/13.

Clearance of the W108 compound

51. There was general agreement (with the exception of Mr Roberts-Smith) that Person 5's patrol entered the compound first.¹⁰⁸ Similarly, it appears to be uncontroversial that the southern half of the compound was cleared first. Many (but not all¹⁰⁹) witnesses recalled local nationals being located in that part of the compound, who were rounded up and passed down the line to the Troop Sergeant.¹¹⁰ Those people were ultimately taken to W109.¹¹¹ See also paragraph A3 Respondents' Closed Court Submissions.
52. Both patrols then proceeded to the northern half of the compound. As with the southern half, many (but not all) witnesses recalled there being local nationals in the northern half of the compound.¹¹²
53. It is around the point that the assault teams entered the far northern courtyard of the compound, where the tunnel would ultimately be discovered, that the evidence of the witnesses called by the Respondents and those called by Mr Roberts-Smith begins to diverge. The key controversy at this stage of the analysis may perhaps be reduced to the following question: "who was present in the tunnel courtyard when the tunnel was discovered, and shortly thereafter?" The principal significance of that issue is, self-evidently, concerned with the identification of those witnesses who were able to observe whether or not any men were found in the tunnel.

Discovery of the tunnel after compound secure

54. The evidence of each relevant witness called by the Respondents was that the tunnel was discovered *after* the compound had been declared secure and the SSE process had commenced while the witness was present, or shortly before the witness was present. The issue appeared to be uncontroversial. With only limited exceptions, those witnesses were not challenged on these aspects of their evidence. In only peripheral respects was any positive contrary case as to what the witness in fact did, saw, or heard put to them.
55. No obvious controversy appeared on the face of the outlines of evidence served for Mr Roberts-Smith's witnesses either. Indeed, Person 29 and 35's outlines said the tunnel was discovered during the SSE process.¹¹³ However, that changed once they appeared in the witness box. Despite the manner in which the Respondents' witnesses had been cross-examined, the case now advanced by Mr Roberts-Smith (through his witnesses) was that *none* of the Respondents' witnesses were present in the tunnel courtyard at the time of the tunnel's discovery.
56. The Respondents submit that the obvious inference is that the position changed for this reason. At the time Mr Roberts-Smith served outlines of evidence in reply for his witnesses, none of Persons 40, 41, 42 or 43 were on the Respondents' witness list. After leave to

¹⁰⁸ T.170/11-17 (BRS); T.3004/17-19 (P18); T. 5174/24-29, T.5300/21-23 (P35); T.5469/40-41 (P29); T.5942/15-16 (P38). Cf. T.424/2-3 (BRS).

¹⁰⁹ T.5470/33-34, T.5470/46-47 (P29); T.5176/9-10 (P35).

¹¹⁰ T.1220/38-44 (P41); T.1221/43 (P41), Ex R-92 (Women near letter "A"); T.4857/9-14 (P5); T.5942/36-43 (P38), Ex A-240 (saw women at "C"). See also T.424/12-16 (BRS).

¹¹¹ T.5380/21-25; 5380/39-5381/3 (P27).

¹¹² T.5470/34-35, T.5471/1-2 (P29); T.3301/44 (P40), Ex R-137 (marked "G"); T.2096/40-42 (P42).

¹¹³ Ex R-270, [14]; Ex R-271, [22]; T.5301/16-31 (P35).

subpoena those witnesses was granted, Mr Roberts-Smith's case had to contend with four witnesses who were not only going to say they were present when the tunnel was discovered, but that they observed two Afghan males emerge from it. One way to remove these witnesses *en masse* from the tunnel courtyard at the critical moment was to shift the timing of the tunnel's discovery to before the compound was declared secure. That way, Persons 40, 41 and 42 could be said to have not yet reached the tunnel courtyard at the critical moment, while Person 43 could be placed outside the compound altogether in the cordon.

57. The Court should prefer the Respondents' witnesses on this issue. Their evidence was honest, accurate, materially consistent, and largely unchallenged. In contrast, the evidence of Mr Roberts-Smith's witnesses had material inconsistencies including prior inconsistent statements for Person 29 and Person 35, and material inconsistencies *between* each other. Perhaps most strikingly, the effect of the change of position meant that (on Mr Roberts-Smith's case), only he and his closest friends (Persons 5, 29, 35 and 38) were in the tunnel courtyard when the tunnel was discovered. It is wholly implausible that with two assault patrols inside the compound and three more outside, it just happened to be the peculiar combination of Mr Roberts-Smith and his best friends, by themselves, who found the tunnel.

The Respondents' witnesses

58. Person 18's evidence was that the assault patrols "assaulted up into an open area which would have been more on the northern sector of the compound" and "met up with the other teams", following which there was a "fight back".¹¹⁴ The "re-org" and "exploitation" phase then commenced.¹¹⁵ It was as part of the exploitation phase that Person 18 "went back to the main entry point which was along the western wall and ... commenced searching through the rubble".¹¹⁶ At the beginning of his exploitation he observed a gathering of commanders, which he suspected was for the rendezvous.¹¹⁷ He observed them move location, however, because they were "all standing in the vicinity of rockets".¹¹⁸ It was while he was searching that area that Person 18 learned of the discovery of the tunnel by means of a radio call.¹¹⁹
59. Person 18 was not challenged on his evidence that the assault and fight-back had been completed prior to discovery of the tunnel. Nor was he challenged on his evidence that he was not present when the tunnel was discovered (indeed, it was put to him that he was not).¹²⁰ The only challenge made to this part of Person 18's evidence related to the content of the radio call,¹²¹ and the location of the commanders' rendezvous.¹²² In relation to the content of the radio call, the challenge presumably relates to that part of the call stating that people had been pulled out of the tunnel, given that most of Mr Roberts-Smith's own witnesses agree that a radio call announcing the discovery of the tunnel was, or could have

¹¹⁴ T.3004/37-45 (P18).

¹¹⁵ T.3005/4-6, T.3005/30-41 (P18).

¹¹⁶ T.3006/29-31 (P18).

¹¹⁷ At the location marked "E" on Ex A-117 (T.3111/19-20 (P18)).

¹¹⁸ T.3111/29-35 (P18).

¹¹⁹ T.3008/12-16 (P18).

¹²⁰ T.3113/1 (P18).

¹²¹ T.3115/46-3116/2 (P18).

¹²² T.3111/29-32 (P18).

been, made.¹²³ In relation to the location of the commanders' rendezvous, the suggestion that it was held outside the compound was not supported by any other witness. Putting to one side the contentious aspect of Person 18's evidence about the content of the radio message (to which we will return), it is submitted that there is no reason not to accept his evidence as summarised above.

60. Person 40 gave evidence that *after* the compound had been declared secure (which he said occurred after completion of the assault and fight-back¹²⁴), and during the SSE phase, he was searching hidden walls and found a cache.¹²⁵ He was "running back and forth"¹²⁶ or "bouncing back and forth"¹²⁷ in a general area that he marked with a circle on Ex R-137,¹²⁸ and noticed that there was a "commotion".¹²⁹ In that general area was a gathering of "key personnel",¹³⁰ including Persons 81 and 82, patrol commanders, and the Troop interpreter.¹³¹ Also present in the area was Mr Roberts-Smith, Person 35, and some Afghan women.¹³² He said that the women were "obviously concerned".¹³³ After asking what was going on, he was told "we believe there's a tunnel there".¹³⁴ He was about five to seven metres away from the tunnel.¹³⁵
61. Person 40 was not challenged on his evidence that the tunnel was found during exploitation, nor his evidence that he was present in the vicinity of the tunnel in the immediate aftermath of its discovery. The sole challenge to that part of his evidence summarised above related to the location of the commanders' rendezvous.¹³⁶ The alternative location put to Person 40 (the "southwest") is entirely unclear, and in any event was not supported by the evidence of any other witness. Indeed, Person 40's evidence is directly supported by that of Person 43. The Court would thus accept Person 40's evidence as summarised above.
62. Person 41's evidence (both in chief and in cross-examination) did not explicitly address whether the tunnel was found before or after the SSE process had commenced. The plain implication of his evidence, however, is that the discovery of the tunnel occurred during SSE. That is because Person 41's evidence was that when he was in the tunnel courtyard other SAS operators were already present,¹³⁷ and he described himself as "just [having] a bit of a look around", which is not consistent with the assault and fight-back continuing.¹³⁸ It was at that point that the tunnel was found, and, after he ascertained that he could not usefully assist in the clearance of the tunnel, Person 41 "went to look at ... two rooms" near the

¹²³ T.4859/6-9 (P5); T.5473/23-25 (P29); T.5176/26-28 (P35).

¹²⁴ T.3260/10-28 (P40).

¹²⁵ T.3260/40-45 (P40).

¹²⁶ T.3261/7 (P40).

¹²⁷ T.3261/32 (P40).

¹²⁸ T.3261/13-25 (P40).

¹²⁹ T.3261/7 (P40). See also 3286/21-24 (P40).

¹³⁰ T.3261/31 (P40). See also 3282/1-26 (P40).

¹³¹ T.3263/16-46 (P40).

¹³² T.3264/1-12 (P40).

¹³³ T.3264/10, T.3264/14-16 (P40).

¹³⁴ T.3261/33-34 (P40).

¹³⁵ T.3264/4-5 (P40).

¹³⁶ T.3328/9-33, T.3342/21-33 (P40).

¹³⁷ He recalled Mr Roberts-Smith, Person 4 and Person 5 already present in the courtyard when he, along with Person 29 and Person 35, entered (but he accepted that there may have been other people that he couldn't remember): T.1223/1-8, T.1313/18-31 (P41).

¹³⁸ T.1223/17 (P41).

courtyard area.¹³⁹ He then performed a search of those rooms that is only consistent with the SSE process.¹⁴⁰

63. Person 41 was not challenged in relation to his evidence concerning the discovery of the tunnel. Indeed, Person 41's evidence about being present at the discovery of the tunnel, and walking off to search nearby rooms, was adopted in cross-examination as providing an explanation for the (alleged) falsity of his evidence about witnessing two executions.¹⁴¹ The Court would thus accept Person 41's evidence as summarised above.
64. Person 42 gave evidence that his patrol entered the courtyard where the tunnel was found, but they "didn't find [the tunnel] on the initial assault".¹⁴² He said that there were women in the courtyard who were "making a noise or indicating to us that there was something else within that ... courtyard".¹⁴³ The tunnel was then found during a "more detailed search".¹⁴⁴ He specifically recalled Person 35 and Person 38 being present when the tunnel was found, but couldn't otherwise recall which members of his patrol were still present at that point.¹⁴⁵
65. Person 42 was challenged on being present when the tunnel was found.¹⁴⁶ It was never put to him, however, that he was in fact in some other place. In particular, it was never put to Person 42 that he was, as Person 5 said, at the point marked "L" on Ex A-194.¹⁴⁷ Given that it is on any view clear that all members of Person 29's patrol were in the vicinity of the tunnel when it was discovered, and no motive for lying whatsoever could be attributed to Person 42, there is no reason not to accept Person 42's evidence as summarised above.
66. Person 43 gave evidence that his patrol set up a cordon while the assault patrols cleared the compound, until he was "called in".¹⁴⁸ He was called in "for the commanders' brief", which he described as "while everyone else was doing their SSE ... the commanders would get called in and discuss what we were going to do next whilst the SSE was in process".¹⁴⁹ He recalled that "there was a lot of bomb damage to the compound" so the commanders' rendezvous was held "in a clear area away from the ... bomb damage", but noted that "there was a wall around us".¹⁵⁰ Person 43 could not recall which of the commanders were actually present when the tunnel was discovered.¹⁵¹ He had a clear recollection, however, of seeing Person 35 "kick over the hay exposing the entrance to the tunnel".¹⁵² He then ran over the tunnel entrance.¹⁵³
67. Person 43 was not directly challenged in relation to those aspects of his evidence

¹³⁹ T.1223/27-28 (P41).

¹⁴⁰ T.1224/1-9 (P41).

¹⁴¹ T.1348/1-39, T.1349/7-37 (P41).

¹⁴² T.2096/41 (P42).

¹⁴³ T.2096/42-43 (P42).

¹⁴⁴ T.2096/46-47 (P42).

¹⁴⁵ T.2121/27-2122/5 (P42). See also T.2122/36-2123/30, T.2125/5-29 (P42).

¹⁴⁶ T.2124/14-15, T.2125/14-15, T.2126/38 (P42).

¹⁴⁷ T.4860/1-37 (P5).

¹⁴⁸ T.3348/18-20, T.3348/44-45, T.3349/1-6 (P43).

¹⁴⁹ T.3349/8-11 (P43).

¹⁵⁰ T.3349/36-41 (P43).

¹⁵¹ T.3365/26-32, T.3376/20-29 (P43). Cf. T.3349/13-34 (P43) for the people who "would have" been called in for the rendezvous.

¹⁵² T.3365/41-42 (P43). See also T.3350/18-23 (P43).

¹⁵³ T.3350/22-23, T.3365/43-44 (P43).

summarised above. The closest that the cross-examination of Person 43 came to challenging his evidence about being present when the tunnel was discovered was a challenge to his evidence that he was present when people emerged from the tunnel.¹⁵⁴ The force of that question as a challenge to his evidence as to being present around the time of the tunnel's discovery generally is diminished by the failure to put any positive alternative case to him. For instance, is it said that the compound had not been declared secure, and thus that Person 43 remained outside the compound at the relevant time? Is it said that the commanders' rendezvous had been called, but was being held in a different part of the compound? Is it accepted that Person 43 was present when the tunnel was discovered, but is said to be lying about seeing people come out of the tunnel? Especially in circumstances where Person 40's evidence squarely supports that of Person 43 (and vice versa), and noting the failure to challenge Person 40's evidence as to being in the vicinity of the tunnel when it was discovered, and the failure to challenge any witnesses' evidence about the tunnel being discovered during SSE, it is submitted that the Court would accept Person 43's evidence as summarised above.

68. In the circumstances of the limited challenges made to the evidence of the Respondents' witnesses outlined above, any submission that contrary evidence of Mr Roberts-Smith's witnesses should be preferred ought not be accepted. In any event, even considered on its own terms, the contrary evidence of those witnesses is unpersuasive. We turn to this now.

Mr Roberts-Smith's witnesses

69. Mr Roberts-Smith's own evidence was silent as to whether the discovery of the tunnel occurred before or after the compound had been declared secure. He did recall that "Person 29's patrol had joined" his patrol in the tunnel courtyard, but didn't recall if "all of them were there". He did not have a clear recollection of the circumstances in which the tunnel was discovered, other than he saw "a couple of the guys, and I don't remember who, move the grass and find the grate".¹⁵⁵
70. Person 5's evidence was that the tunnel was discovered by an Afghan partner force member during the initial assault.¹⁵⁶ No other witness said that partner force soldiers were present during the clearance, and it follows that the Court would reject that evidence.¹⁵⁷ Person 5 also said that, at that point in time, Person 18 was present with him.¹⁵⁸ That proposition was not put to Person 18, is contradicted by Person 18's unchallenged evidence that he was not, and the Court would not accept it. Person 5's evidence was then that, once the tunnel had been discovered, Persons 29, 35 and Mr Roberts-Smith ran over.¹⁵⁹ It may be accepted that those witnesses were present, but the Court would not accept that Persons 40, 41, 42 and 43 were not.
71. Person 29's evidence that the tunnel was found before the compound had been declared secure was significantly undermined by the fact that he had approved an outline of evidence

¹⁵⁴ T.3427/7-9 (P43).

¹⁵⁵ T.427/1-15 (BR5).

¹⁵⁶ T4858/22-43 (P5).

¹⁵⁷ See e.g.,: T.6176/22-23 (P81); T.5469/37-41; T5470/15-19 (P29); T.5942-5943 (P38); T.1222/1-2 (P41).

¹⁵⁸ T.4858/5-20 (P5).

¹⁵⁹ T4859/3-4 (P5). See also T.5053/27-39 (P5).

which specifically described the discovery of the tunnel during SSE.¹⁶⁰ The only explanation he could offer for that discrepancy was that he “probably should have proofread and communicated with Mr Roberts-Smith’s counsel a bit better”.¹⁶¹ With respect, that was an unpersuasive attempt to explain an inconsistency between his oral evidence and his outline. Before that, Person 29 had been cross-examined in relation to other aspects of his outline, had agreed that he approved the document,¹⁶² and had at no point suggested that he had not carefully reviewed or proofread that document.¹⁶³ His oral evidence should be seen as a transparent attempt to undermine the evidence of eye-witnesses giving evidence unfavourable to Mr Roberts-Smith.

72. Person 35 also approved an outline of evidence that stated the tunnel was found during SSE.¹⁶⁴ He attempted to explain the inconsistency by suggesting that the whole clearance of W108 was, in effect, an SSE because the Troop was “essentially doing a battle damage assessment” after the bomb that had been dropped on the compound,¹⁶⁵ and sought to minimize the existence of the threat on the mission so as to suggest that the “clearance” and the “SSE” processes were essentially the same.¹⁶⁶ That evidence is contradicted by the evidence of numerous other witnesses, who all spoke of the heightened perception of threat on the mission,¹⁶⁷ and the contemporaneous intelligence reporting.¹⁶⁸ Person 35 admitted that at the time he approved his outline of evidence, he was unaware that Persons 40, 41, 42 and 43 would be giving evidence, and while he denied changing his oral evidence to undermine those witnesses’ accounts, it is submitted that that is the most plausible explanation for the change in his account between his outline and his oral evidence.
73. Person 38’s evidence was also unsupported by any other witness. He said that the compound was not declared secure until after he had cleared an orchard on the northern side of the tunnel courtyard with Person 41 (after being turned down by Person 40).¹⁶⁹ That evidence should be rejected for a variety of reasons:
- (a) It was not put to any of the Respondents’ witnesses.¹⁷⁰ That was no mere technical breach of *Browne v Dunn*. Person 38’s evidence, coming close the very end of the trial, introduced a wholly new account, which impacted on the evidence of nearly every other witness. Most obviously, that account, if Mr Roberts-Smith were to submit that it should be accepted, needed to be put to Person 40 and Person 41. But it also needed to be put to Person 14 and Person 24 (who were in the cordon and should

¹⁶⁰ Person 29’s outline of evidence is Ex R-271 at [22].

¹⁶¹ T.5529/20-21 (P29).

¹⁶² T.5515/19-20 (P29).

¹⁶³ See, e.g., T.5517-5522 (P29).

¹⁶⁴ Person 35’s outline of evidence is Ex R-270, at [14].

¹⁶⁵ T.5301/37 (P35).

¹⁶⁶ T.5301/43-5302/40 (P35).

¹⁶⁷ T.1400/33-43 (P14); T.4852/13-20 (P5); CCT 06.05.22, p.10/27-29 (P29); T.5940/42-44 (P38); T.5974/13-41 (P38); T.3258/35-40 (P40).

¹⁶⁸ See paragraph A1 of the Respondents’ Closed Court Submissions.

¹⁶⁹ T.5925/1-8 (P38).

¹⁷⁰ The witnesses to whom that account should have been put extended beyond Persons 40 and 41. The account of Person 38 should have been put to Persons 14 and 24 (as witnesses who would have been in a position to observe his movements outside the compound: T.5996/26-31 (P38)), and to Persons 42 and 43, and potentially Person 18 (as witnesses who would have been in a position to observe his movements inside the compound: T.5996/21-24 (P38)).

have been able to confirm or deny the alleged movements of Person 38 and Person 41), as well as Person 42 and Person 43 (who would have been in a position to confirm or deny whether Person 38 and Person 41 did in fact leave the tunnel courtyard to clear the orchard). Had the account been put to the Respondents' witnesses in cross-examination, the Respondents would have cross-examined each of Person 5, Person 29, and Person 35 about Person 38's account, and may have sought to lead additional evidence in chief to deal with it. In the circumstances, the failure to comply with *Browne v Dunn* is sufficient reason in and of itself to reject the evidence of Person 38.

- (b) In any event, the evidence of Person 38 was inherently implausible, in that there was no obvious means by which Person 38 could have seen the orchard to identify the need for it to be cleared, or any means of access to enable him to move to it in any event.¹⁷¹ It would have involved significant and unjustified risk to his own safety.¹⁷² It would never have been a task undertaken in the manner described.¹⁷³
- (c) His evidence was also undermined by the evidence of his own patrol commander. Person 38 said that the call of compound secure could not have been made until the orchard was cleared.¹⁷⁴ But Person 29 said that the tunnel courtyard was the "limit of exploitation for our clearance".¹⁷⁵ He said that a limit of exploitation was a "designate[d] ... stop point for where we ... finish our actual clearance or actual assault so we just don't continue ... overextending".¹⁷⁶ The suggestion that the orchard was a "part of the compound" to be cleared is simply false.
- (d) Finally, the failure of Mr Roberts-Smith to comply with the rule in *Browne v Dunn* leads to the inescapable inference that Person 38's evidence was a recent invention, designed to attempt to salvage Mr Roberts-Smith's case.¹⁷⁷ That is especially so in circumstances where the substance of Person 41's evidence was known to Mr Roberts-Smith's legal representatives, those legal representatives were aware that Person 38's evidence was relevant to Person 41's evidence,¹⁷⁸ and Person 38 was available at all relevant times to meet with Mr Roberts-Smith's lawyers and did in fact meet with them.¹⁷⁹

74. The evidence of Person 81 does not shed any significant light on the circumstances in which the tunnel was found but it is entirely consistent with the Respondents' witnesses. Person 81 said, as is obviously the case, that he would not have "approached the compound until it was secure".¹⁸⁰ But he was unable to recall whether the tunnel was found before or after

¹⁷¹ See T.5994/8-5995/11 (P38).

¹⁷² See T.5996/33-5997/26 (P38).

¹⁷³ See T.5997/28-5998/2 (P38).

¹⁷⁴ T.5963/39-44 (P38).

¹⁷⁵ T.5472/34-35 (P29). See also T.5528/43-44 (P29). See further the evidence of Person 5 at T.4858/12-4860/21 (P5).

¹⁷⁶ T.5472/38-40 (P29).

¹⁷⁷ T.5998/23-32; T.5964/35-38; T.5965/31-32 (P38).

¹⁷⁸ Ex R-286, [26(d)].

¹⁷⁹ T.5961/33-39 (P38).

¹⁸⁰ T.6160/23-24 (P81).

the compound was cleared.¹⁸¹ When asked if the tunnel was discovered while he was standing nearby, he said he “wouldn’t like to speculate”.¹⁸² He acknowledged that he was very busy performing a range of tasks, and generally did not carefully observe what SAS operators were doing around him.¹⁸³ He did think it likely that the commanders’ rendezvous would have occurred in close proximity to the tunnel.¹⁸⁴ Overall, Person 81’s evidence is consistent with the tunnel being found after the compound had been declared secure, while he was nearby waiting for the commanders’ rendezvous to commence.

75. For all the reasons just given, it is submitted that the Court would find that the tunnel was discovered after the compound had been cleared and declared secure, the commanders had been called in for their rendezvous, and the SSE process had commenced.

The uncovering and clearance of the tunnel

76. On any view, the question of whether two men came out of the tunnel at W108 is a pivotal issue. In this section we deal with the direct witness testimony relevant to the period from the uncovering of the tunnel to the emergence, or not, of two men from it. But it is important to note that the evidence of other witnesses (specifically, Persons 14 and 24) is also relevant in this context. That is to say, if the evidence of Person 14 and Person 24 is accepted, that in turn makes it more likely that men were found in the tunnel (equally, of course, if the Court accepts that men were found in the tunnel, then the evidence of Person 14 and Person 24 is also rendered more likely).
77. Three of the Respondents’ witnesses gave evidence that they saw men come out of the tunnel (Persons 40, 42 and 43). Two more (Person 18 and Person 41) saw fighting aged males under guard in the courtyard when they arrived soon after the tunnel’s discovery. The evidence of Mr Roberts-Smith’s witnesses is that no men were found in the tunnel.

The Respondents’ witnesses

78. The nature and extent of the challenge to the Respondents’ witnesses’ evidence differed from witness to witness. Some witnesses were challenged on a particular matter (e.g., whether men came out of the tunnel), while others were not. To the extent that a witness’ evidence was challenged, the basis upon which it was suggested that the witness’ evidence should not be believed differed between witnesses (if such a basis was put to the witness at all). To evaluate the conflicting evidence, a careful and precise understanding of the challenge to each witness is required.

Person 40

79. Person 40 described seeing two women in proximity of the tunnel, in the spot he marked G on Ex R-137, “obviously concerned”.¹⁸⁵ He said the interpreter and the women were doing callouts for the insurgents to come out of the tunnel.¹⁸⁶ He said the interpreter was speaking

¹⁸¹ T.6160/13-14 (P81).

¹⁸² T.6178/23-25 (P81). See also T.6177/37-43 (P81).

¹⁸³ T.6177/45-6178/21 (P81).

¹⁸⁴ T.6177/14-17 (P81).

¹⁸⁵ T.3264/7-16 (P40).

¹⁸⁶ T.3264/10-12; 27-29; 3275/25-40 (P40).

Farsi/an Afghan dialect.¹⁸⁷ Person 40 said Person 35 was also calling out and was instrumental in getting the men to come out. He said “There was a lot of talk. There was a lot of yelling, shouting, assurance. ‘Come out. You will not be harmed’”.¹⁸⁸ He heard words spoken to the interpreter to the effect “Come out, you will be safe. You’re not going to be harmed. We want to talk to you.”¹⁸⁹

80. Person 40 recalls two insurgents coming out of the tunnel, and said they were “obviously very frightened”.¹⁹⁰ He does not recall the order in which they came out of the tunnel or how they came out but said that they came out on an oblique angle relative to him and the first man who came out was grabbed by Person 35.¹⁹¹
81. He described one of the men as an older sort of man with a beard, balding and no shoes.¹⁹² He said that he had a “distinctive limp” and that as he came out he was lifting his trouser, pointing to a prosthetic leg (his right leg), “expecting some sort of sympathy, you know, from – from the troops.”¹⁹³
82. Person 40 does not recall anything significant about the second man other than he had a beard and was baldish, although that description was based upon an assumption that most Afghans have a beard.¹⁹⁴ Person 40 said that he believed that the man with the prosthetic leg was older than the other man,¹⁹⁵ although that evidence needs to be considered in the context that he does not have a recollection of the appearance of the other man.
83. Person 40 recalls that after the two men came out of the tunnel they were searched and marched off to another area by Mr Roberts-Smith and Person 35.¹⁹⁶ The man’s prosthetic leg was not taken off and searched at that point.¹⁹⁷ He said he watched them get taken away and saw them “manhandled” by Person 35 and Mr Roberts-Smith. He said that Mr Roberts-Smith and Person 35 were behind the insurgents with their hands on the shoulder or the scruff of the neck of the insurgents, controlling them. Initially they were in an extended line but then one took the lead.¹⁹⁸ He did not see where they were taken to but marked where he last saw them with an X on Ex R-137.¹⁹⁹ Person 40 does not recall whether the men were handcuffed during the initial search but indicated that it would be standard practice for them to be.²⁰⁰
84. While Person 40 was challenged on his evidence that the two men come out of the tunnel, he was not, as discussed above, challenged on his evidence that he was “bouncing back

¹⁸⁷ T.3264/24-29; 3275/27-40; 3302/5-3303/24 (P40). It was readily apparent from the cross-examination that Person 40 did not understand the language that was being spoken by the interpreter but assumed it was Farsi on the basis that he understood that to be an Afghan dialect/part of the Afghan language. He accepted it was possible the interpreter was speaking Pashto.

¹⁸⁸ T.3279/25-46 (P40).

¹⁸⁹ T.3302/19-21 (P40).

¹⁹⁰ T.3264/31-33 (P40).

¹⁹¹ T.3305/39-3306/18 (P40).

¹⁹² T.3264/38-44; 3313/11-19 (P40).

¹⁹³ T.3264/33-36; T.3307/26-31 (P40).

¹⁹⁴ T.3265/3-5; 3313/42-3314/2 (P40).

¹⁹⁵ T.3313/7-9 (P40).

¹⁹⁶ T.3265/7-21 (P40).

¹⁹⁷ T.3318/21-25 (P40).

¹⁹⁸ T.3340/43-3342/5 (P40).

¹⁹⁹ T.3315/8-43 (P40).

²⁰⁰ T.3265/29-3266/8 (P40).

and forth” around the area where the tunnel was found. There is thus no dispute that he was able to observe whatever happened immediately after the tunnel was discovered. The nature of the challenge to Person 40’s evidence about two men coming out of the tunnel was that he had no actual recollection,²⁰¹ and had “come to think that [he] saw something on that day because somebody told [him] that RS had pulled the trigger that killed the insurgent with the prosthetic leg”.²⁰² His evidence that he saw two men come out of the tunnel was thus suggested to be “a story that [he had] come to convince [himself he] saw something on that day that’s relevant to that rumour”.²⁰³

85. That theory cannot, it is submitted, support the rejection of Person 40’s evidence. For one thing, there is nothing in his evidence that would suggest that his memory of W108 is unreliable. He appropriately conceded which details he could recall, and which he couldn’t, and (plausibly) stated that while he could remember the “really important bits and pieces” accurately, more mundane matters may have been forgotten.²⁰⁴ Some aspects of his recollection that were put to him as false (such as the presence of an interpreter²⁰⁵), were supported by other witnesses (including witnesses called by Mr Roberts-Smith).²⁰⁶
86. More fundamentally, however, the suggestion that Person 40 had somehow innocently come to have an entirely false recollection by reason of having heard a rumour is simply implausible. There is certainly no evidence whatsoever to suggest that such a process of false-memory-creation is possible, let alone likely to have occurred in this instance. In any event, it is decisively undermined by the fact that there was unchallenged evidence of three conversations that Person 40 had on or shortly after the day of the mission concerning PUCs taken at W108. Each of those conversations proves that Person 40 has not in the years after the mission “come to convince himself” that he saw two men come out of the tunnel; he was talking about it on the day:
- (a) *First*, Person 41 gave evidence of a conversation with Person 40 when he was about to enter the second room in the area Person 41 marked F on Ex R-92. He said that Person 40 said to him, “Hey, [Person 41], do you know what happened to those two blokes they pulled out of the tunnel?”.²⁰⁷ It was not put to either Person 40 or Person 41 that that conversation did not happen.
- (b) *Secondly*, Person 43 gave evidence that on or around the departure from W108, Person 40 asked him “Where were the PUCs?”, to which Person 43 said “You know where they are”. Person 40 then replied “That’s fucked”.²⁰⁸ It was not put to either Person 40 or Person 43 that that conversation did not happen.

²⁰¹ See, e.g., T.3275/3-4 (P40). See also T.3341/45-3342/19 (P40).

²⁰² T.3342/37-39 (P40). What he was told was not, of course, simply that Mr Roberts-Smith shot the man with the prosthetic leg (which was of course true on any version of events). The rumour that he heard, back at Tarin Kowt post-mission, was that a PUC “was killed on [site] execution style”: T.3320/27-46 (P40).

²⁰³ T.3342/43-44 (P40).

²⁰⁴ T.3275/6-23 (P40).

²⁰⁵ T.3285/1-5 (P40).

²⁰⁶ T.5473/41-5474/5 (P29); Ex A-219 (P29 marked 'D' where either the interpreter or ANA partner force soldier was whilst shouting something in Pashto in the vicinity of the courtyard); T.5478/37-42; 5533/38-42 (P29); T.6176/17-20 (P81).

²⁰⁷ T.1242/7-22 (P41).

²⁰⁸ T.3354/6-24 (P43).

- (c) *Thirdly*, Person 40 gave evidence of a conversation he had with Person 42 in their accommodation once they had returned to Tarin Kowt. He remembered saying words to the effect of “that was wrong what occurred”.²⁰⁹

87. There is no suggestion whatsoever that Person 40 was dishonest, motivated by or affected by jealousy or ill-will, suffering from any mental health issues that would affect his recollection, confusing W108 with another mission, or innocently mistaken in his observations. The only theory propounded to undermine Person 40’s evidence was that described above: he had come innocently to have a false memory by reason of hearing rumours. For the reasons set out above, that theory cannot be accepted, and is inconsistent with other unchallenged evidence.

Person 41

88. Person 41 was standing around with Person 29 and Person 35²¹⁰, and Person 29 started yelling down the tunnel to see if there was anybody in there that would come out. That carried on for a short time. Person 41 then left the tunnel area to look at the two rooms he marked D in Ex R-92.²¹¹

89. While he was searching that room, Person 41 heard some louder voices and talking, and a bit of commotion outside in the courtyard. He stepped out of the room and to his immediate left he saw Mr Roberts-Smith and Person 4. And just behind them squatting down against the wall, sort of the north eastern wall, was an Afghan male.²¹² He described the man as “An older male dressed in traditional Afghan loose top and clothing, either white or a very light colour. Short, cropped hair.”²¹³

90. No coherent theory as to any reason to doubt Person 41’s evidence that, shortly after the tunnel was discovered, he saw an Afghan male “squatting down against the ... north-eastern wall, just near the tunnel entrance”,²¹⁴ was put to him in cross-examination. The cross-examination explored a variety of topics which might be regarded as potentially relevant to the assessment of Person 41’s evidence, but ultimately only one theory was put to him. Avenues of inquiry that went nowhere included:

- (a) He was asked whether he had been told by other people what they saw at W108 (presumably to test whether his account may have been infected by the accounts of others), to which he replied that he had not.²¹⁵
- (b) He was asked if it was possible that news articles he had read had influenced his recollection, something that he also denied.²¹⁶
- (c) He was asked about his involvement with members of the SAS who had a dislike of Mr Roberts-Smith, but while he candidly acknowledged that there were such people

²⁰⁹ T.3325/20-3326/5 (P40).

²¹⁰ He said it was possible that there may have been others there that he did not see: T.1313/30-31 (P41).

²¹¹ T.1223.17-41; 1320/29-34; 1321/23-1322/22 (P41).

²¹² T.1236/3-8 (P41).

²¹³ T.1236/12-14 (P41).

²¹⁴ T.1236/7-8 (P41). He described him as an “older male dressed in traditional Afghan loose top and clothing, either white or a very light colour ... [with] short cropped hair”: T.1236/12-14 (P41).

²¹⁵ See T.1272/17-34, T.1297/23-35 (P41).

²¹⁶ See T.1272/36-1273/40, T.1297/13-15, T.1299/18-1300/47 (P41).

(and identified them),²¹⁷ there was no suggestion he was himself a person with any grievance against Mr Roberts-Smith or influenced by any such person.

- (d) He was asked about his mental health, but he has no mental health issues other than anxiety related to having to give evidence.²¹⁸
- (e) It was put to him that he had a “feeling that [he is] a coward because [he says that he] saw something that shouldn’t have happened and didn’t stop it”.²¹⁹ It is unclear what the suggested relevance of that matter could be said to an assessment of Person 41’s credibility (indeed, it would appear to assume the truthfulness of his evidence).

91. The ultimate theory put to Person 41 was that he was a coward for leaving the clearance of the tunnel to other SAS operators and had made up a story to “assuage [his] feelings of guilt about the fact [he was] unable to cut it that day”.²²⁰ That theory, with respect, is inherently implausible and incapable of providing an explanation for Person 41’s impressive evidence.

Person 42

92. Person 42 recalls that members of Person 29’s patrol trained their weapons on the tunnel and were trying to get a look down into the tunnel.²²¹ Either he or another member of the patrol started using broken Pashtun to call the individuals out.²²² At least two, but potentially three, individuals then freely came out of the tunnel.²²³ He said they were compliant, “they came out unarmed. They came out freely. They came out relatively quickly once given the commands to – to come out, or hands up, or whatever the commands we gave them.”²²⁴
93. Person 42 recalls that the individuals were called out all the way to ground level and after they came out there was an initial pat down search. Person 42 searched one of the individuals but does not recall who searched the other. Whilst he does not specifically recall handcuffing the individual, he stated that it would be normal practice to handcuff the individual at that stage, but they may not have been because they knew there were additional people in the troop ready to receive the individuals whilst they focused on the clearance of the tunnel or the compound itself.²²⁵
94. No proposition was put to Person 42 that would explain why he had either misremembered or manufactured seeing men come out of the tunnel. Indeed, the final portion of his cross-examination positively reaffirmed that evidence without any challenge being made to it.²²⁶ The only express challenges made to Person 42’s evidence was to his evidence about being present at the moment the tunnel was discovered, the presence of women and Person 29

²¹⁷ See T.1275/26-1276/38, T.1290/19-1292/4 (P41).

²¹⁸ See T.1243/31-1244/6, T.1296/7-41 (P41).

²¹⁹ T.1295/15-17 (P41).

²²⁰ T.1320/1-27, T.1348/1-39, T.1349/7-37 (P41).

²²¹ T.2097/42-2098/6; 2134/3-11 (P42).

²²² He is fairly confident that it may have been Person 29 who started giving commands to the people within the tunnel, but was not 100% sure that it was Person 29 and accepts that it is possible that his recollection in that regard might be wrong: T.2136/27-442139/42-2140/20 (P42).

²²³ T.2098/12-16; 36-43; 2144/45-2145/5 (P42).

²²⁴ T.2098/45-2099/4 (P42).

²²⁵ T.2099/6-37; 2100/4-11 (P42).

²²⁶ T.2145/1-7 (P42).

conducting a call out.²²⁷ Because no proposition was put to him that he had fabricated any part of his evidence, or that there was any particular reason why it would be unreliable, the Court would not hesitate to accept it.

Person 43

95. Person 43 said that when he reached the tunnel he was standing next to Person 35 on the left hand side covering down into the tunnel²²⁸. Person 43, along with other people, verbally called for an interpreter.²²⁹ He was also calling out in English “Come out, come out”.²³⁰ His recollection is that before the interpreter had reached them, after about 10 or 15 seconds, someone came crawling out of the tunnel.²³¹
96. Person 43 described that the person crawled out to the bottom and then started to stand up.²³² He said that the man’s hands and head were coming up out of the hole and that his hands were “out in front of him in the universal ‘I give up’ position”.²³³ When he was close enough for him to grab, Person 43 knelt down and grabbed the man by his upper body and pulled him out of the tunnel.²³⁴ He said there were other people around and “there were other hands grabbing at the same time”.²³⁵
97. Person 43 recalls that when the man was pulled out of the hole he was placed on the ground.²³⁶ Person 43 said he helped him to the ground, and by that stage there was enough people to contain him and search him, so he went back to his job of planning and commanding.²³⁷ He was searched lying down and simultaneously handcuffed.²³⁸ He was then handed over to the TQ team, which was Person 5’s team.²³⁹ He was then walked away by people holding his upper body and assisting him to walk.²⁴⁰
98. Person 43 described the person as an “elderly Afghani male with a beard and dressed in what we would refer to as local clothing”. It was light coloured.²⁴¹
99. Person 43 was ultimately accused of “making up” his evidence, and “deliberately refraining” from mentioning specific people in his evidence so that his evidence could not be disputed.²⁴² The reason that it was suggested he had done that was because, as he accepted, he did not like Mr Roberts-Smith, thought he was a bully, and considered there to be doubt about his entitlement to his Victoria Cross. Person 43 denied, however, that any

²²⁷ T T.2124/14-15, 2125/14-15, 2126/38-40, 2127/27-30; 2129/31; 2130/11-14; T.2136/46-2137/3; 2139/32-2140/20; 2140/32-33 (P42).

²²⁸ He recalls that there were other people behind them, but he does not recall who was standing where and says that the other people were in his rear periphery and he was focused on the hole: T.3352/18-29; 3366/6-7; 16-19; 3367/9-23 (P43).

²²⁹ T.3352/32; 41-42 (P43).

²³⁰ T.3368/21-31 (P43).

²³¹ T.3352/38-3353/2; 3368/10-14 (P43).

²³² T.3369/26-28; 3369/44-3370/26 (P43).

²³³ T.3370.30-35; 3371/5-14; 3380/5-14 (P43).

²³⁴ T.3353/7-9; 3369/32-42; 3370.28-31; 3371/16-17 (P43).

²³⁵ T.3372/36-3373/5; 3380/24-27 (P43).

²³⁶ T.3373/12-13 (P43).

²³⁷ T.3353/13-14; 3373/26-37 (P43).

²³⁸ T.3353/16-18; 3373/17-19; 3374/3-7; 3375/22-32; 3378/39-43; 3393/30-44 (P43).

²³⁹ T.3353/20-23 (P43).

²⁴⁰ T.3374/11-28 (P43).

²⁴¹ T.3353/4-5; 11; 3368/43-46; 3374/32-37 (P43).

²⁴² See, e.g., T.3427/7-25, T.3428/12-25 (P43).

of that meant he had come to give evidence to assist the Respondents.²⁴³

100. The Court would accept Person 43's denials of making up his evidence. He was a witness that only became known to the Respondents in the circumstances described in *Roberts-Smith v Fairfax (No 12)* [2021] FCA 465. His evidence is corroborated by other witnesses whose honesty was not challenged. He was plainly making an honest attempt to give evidence only as to those matters about which he could recall, and his plausible recollection of more unusual or significant events, and non-recollection of more mundane occurrences, is entirely consistent with genuine memory.²⁴⁴ There is no sense in which the matters of detail that Person 43 said he could not recall meant that his evidence could not be challenged by other witnesses.
101. Indeed, it is telling that at many points during the cross-examination, the focus was more on the quality of Person 43's memory. He was questioned about his mental health, and the effects of medication that he was on (he denied any impact of either upon his memory).²⁴⁵ Those lines of cross-examination go nowhere in the absence of any expert evidence proving a causal link between mental health or medication and the ability to give honest and accurate evidence.²⁴⁶ It was also put to him that it was possible to "confuse things" where missions were similar (a proposition he accepted, though denied his memory of men in the tunnel fell into that category).²⁴⁷ It was ultimately only when it became clear that innocent memory problems could not explain his evidence that the unconvincing attack on his honesty was made.

Person 18

102. Whilst he was conducting an exploitation in the area that he marked B on Ex R-132, Person 18 heard a call on the radio that a tunnel or a tunnel entrance had been found and that a person had been pulled out of the tunnel.²⁴⁸ Like Person 41, Person 18 did not see men come out of the tunnel himself, but when he arrived in the courtyard shortly afterwards he saw "a person in white" under the control of Australian soldiers.²⁴⁹ He then assisted Person 35 to clear the tunnel. Person 18 lay on his stomach with the top half of his body and his weapon in the tunnel to provide cover for Person 35 as he cleared the tunnel.²⁵⁰
103. Person 18 was never directly challenged on his evidence that he saw a person in white under the control of Australian soldiers. He was challenged about "going to the tunnel",²⁵¹ which was presumably intended to encapsulate a challenge to his evidence about what he saw when he entered the tunnel courtyard. As noted in the previous section, Mr Roberts-Smith appears to accept Person 18's evidence to the extent that it was put to him that he was not present in the courtyard when the tunnel was found. That is contrary to the evidence of Person 5, which is thus presumably disavowed by Mr Roberts-Smith to that extent.

²⁴³ See, e.g., T.3417/1-11 (P43).

²⁴⁴ See, e.g., T.3428/20-22 (P43)

²⁴⁵ See, e.g., T.3390/28-46, T.3418/29-3419/18 (P43).

²⁴⁶ Section II, paragraph 23.

²⁴⁷ See, e.g., T.3382/12-40, T.3427/1-5 (P43).

²⁴⁸ T.3008/12-16; 3113/21-3114/11; 3117/38-3118/5 (P18).

²⁴⁹ T.3012/21-24; 3120/44-3121/10; 3011/28-3012/24 (P18).

²⁵⁰ T.3012/26-3013/3; 3122/1-26; 3128/30-3129/26 (P18). See also T.171/26-28 (BRS).

²⁵¹ T.3146/11-12 (P18).

Further, Mr Roberts-Smith appears to accept that Person 18 was covering Person 35 when he cleared the tunnel.²⁵² But having accepted that Person 18 was giving honest evidence as to his location when the tunnel was discovered, and as to his involvement in assisting to clear the tunnel, it is not clear why his evidence should be regarded as other than honest in other respects.

104. It was put to him that he had “decided to add to the rumour by throwing in the false story in respect of the tunnel”.²⁵³ No plausible reason for him having decided to give false testimony in aid of a rumour was identified. Person 18 agreed that he did not consider that Mr Roberts-Smith deserved his Victoria Cross but denied that he was upset that he was not himself awarded a medal.²⁵⁴ Those matters provide no rational basis for concluding that Person 18 gave false evidence (and were not put to him as the reason he did so).

Conclusion on the Respondents’ witnesses

105. The preceding analysis of the nature of the challenge to the five witnesses called by the Respondents who saw Afghan men either come out of the tunnel, or in the courtyard shortly thereafter, demonstrates that Mr Roberts-Smith is unable to offer any plausible reason why those witnesses should not be believed. A particular difficulty for Mr Roberts-Smith is the fact that he appears to concede that two of those witnesses (Persons 40 and 42) were honest witnesses. There is no rational explanation for how those witnesses could honestly have given the evidence they did (aligning with each other, and other witnesses called by the Respondents) if it was untrue. That in turn undermines the theory that the evidence of the other three witnesses (Persons 41, 43, and 18) was invented for some reason. There was no explanation for how the evidence of each of those men could have been so consistent if it was fabricated (both with the honest evidence of Persons 40 and 42, and with the evidence of the other allegedly dishonest witnesses). In any event, the motivation given for each of those men to invent a lie was utterly implausible as a motive to invent such serious untruths.
106. It is submitted that the evidence of the Respondents’ witnesses comprises a coherent and plausible account of the discovery of two Afghan men hiding in the tunnel.
107. *First*, all the Respondents’ witnesses who were present say that after the tunnel was discovered, many SAS operators trained their weapons on the entrance. Each of Persons 41, 42, and 43 recall pointing their weapon down into the tunnel, and between them they recall other people including Persons 29, 35, and 38 doing the same.²⁵⁵ It is submitted that the fact that different witnesses recall different people does not mean that there are inconsistent accounts, it simply means that of all the people present, individual witnesses recall different individuals. In any event, to the extent that a witness may have misremembered the identity of an individual, it is submitted that that is unexceptional in circumstances where the tunnel was a newly discovered threat. Person 42 put it succinctly:

²⁵² T.171/25-30 (BRS).

²⁵³ T.3146/1-2 (P18).

²⁵⁴ See, e.g., T.3198/22-34, T.3199/5-3203/25 (P18).

²⁵⁵ Person 41 recalled Persons 29 and 35 being present (T1223/22-28 (P41)).

Person 42 recalled the “complete patrol” of Person 29 being present, but only had a specific recollection of Person 35 and 38 being next to him (T.2098/1-6, T.2134/13-36 (P42)).

Person 43 recalled Person 35 being on his right but otherwise could not recall specifically who else was present because he was “focussed on the hole” (T.3366/6-3367/11 (P43)).

“the people around me and exactly who they were is not the focus. The focus is the threat in the tunnel. So whilst I know ... there is people with me, I'm not 100 per cent always sure exactly who it is”.²⁵⁶ The presence of so many people makes also Person 41's recollection that he left to search another area, having perceived he was not required, particularly plausible.

108. *Secondly*, all the Respondents' witnesses who were present recall a callout being performed.²⁵⁷ While only some of those witnesses recall an interpreter being involved in the callout,²⁵⁸ none positively denied it.²⁵⁹ Similarly, the fact that different witnesses recall different people calling out is unremarkable. The scene was evidently a chaotic one. Various of Mr Roberts-Smith's witnesses suggested that calling out into the tunnel would not have been performed, because it would have alerted any occupants of the tunnel to the presence of Australian soldiers. That suggestion should be rejected: as was readily accepted, anyone in the tunnel would have been well aware that it had been discovered as soon as the cover was removed.²⁶⁰
109. *Thirdly*, the evidence of Persons 40, 42 and 43 was consistent as to Afghan men coming out of the tunnel. Person 43 remembered that the first person to emerge from the tunnel was an elderly, bearded, man dressed in light-coloured clothes.²⁶¹ He helped to pull that man out of the tunnel and then assisted in PUCing him.²⁶² Presumably because his attention was focussed on that man, he did not recall seeing anyone else come out of the tunnel. But both Person 40 and Person 42 each recalled seeing two men emerge from the tunnel (Person 42 said it could have been two or three²⁶³). Person 42 could not recall anything specific about the appearance of the men in the tunnel.²⁶⁴ Person 40 could remember that one of the men emerged with a limp, lifting his trouser leg, and pointing to a prosthetic leg,²⁶⁵ while about the other he could remember nothing significant other than he had a beard and was “baldish”.²⁶⁶
110. *Fourthly*, the Respondents' relevant witnesses recalled the men coming out of the tunnel being PUCd. Person 43 recalled assisting to PUC the older man in light clothing.²⁶⁷ Person 42 also recalled helping to PUC one of the men.²⁶⁸ Person 40 saw the men searched, and then taken to another area.²⁶⁹ That is consistent with the evidence of both Person 42 and 43 who each recalled passing the PUC that they assisted with to other SAS

²⁵⁶ T.2134/16-19 (P42).

²⁵⁷ T.3264/7-12 (P40); T.2098/12-16; T.2136/22-28; T.2139/42-2140/9 (P42) T.3368/21-31; T.3398/41-42 (P43).

²⁵⁸ T.3264/7-12; 18-29; T.3275/25-3276/8; T.3279/46-3280/1; 3284/40-3285/12 (P40); T.3352/31-45; T.3368/10-29; (P43) (Person 43 gave evidence that he called the interpreter over, but said the people came out of the tunnel before the interpreter arrived)

²⁵⁹ See, e.g., T.2098/25-34, T.2116/43-2117/1 (P42).

²⁶⁰ T.6003/11-20 (P38).

²⁶¹ T.3353/1-11, T.3368/38-46 (P43).

²⁶² T.3353/7-18, T.3369/1-3374/9 (P43).

²⁶³ T.2098/41-43 (P42).

²⁶⁴ T.2100/16-18 (P42).

²⁶⁵ T.3264/31-36 (P40).

²⁶⁶ T.3265/3-5 (P40).

²⁶⁷ T.3353/7-18, T.3369/1-3374/9 (P43).

²⁶⁸ T.2099/9-23 (P42).

²⁶⁹ T.3265/7-9 (P40).

members who took them away.²⁷⁰ Person 40 recalled that it was Mr Roberts-Smith and Person 35 who took the PUCs away,²⁷¹ and Person 43 recalled passing his PUC to Person 5's patrol (a member of which was obviously Mr Roberts-Smith).²⁷² Person 42 was unable to recall to whom he passed his PUC.²⁷³

111. Consistently with the previous paragraph, when they later entered the courtyard, Person 41 recalled seeing an "older male dressed in traditional Afghan loose top and clothing, either white or a very light colour" in the courtyard.²⁷⁴ Similarly, Person 18 recalled seeing a "person in white"²⁷⁵ who had "flexicuffs on his wrists".²⁷⁶

Person 81

112. The evidence of Person 81 is consistent with fighting aged males having been found in the tunnel. While he did not himself see anyone come out of the tunnel,²⁷⁷ and was not informed that anyone was found in the tunnel,²⁷⁸ he did recall that he observed local nationals in the compound. He said that while he couldn't give "firm details" on the "exact position" of the local nationals that he saw, he said that "wherever that troop RV was is likely to [be] where I have seen ... those persons".²⁷⁹ He did have a positive recollection of seeing fighting aged males in the compound.²⁸⁰ That is obviously significant in circumstances where Mr Roberts-Smith's witnesses deny the presence of *any* fighting aged males in the compound, and, apart from the men in the tunnel, there was only one male found in W108, and he was in the southern portion of the compound. Person 81's recollection of seeing fighting aged males (plural) in the area near the commanders' RV is thus highly corroborative of the fact that men were found in the tunnel.

Documentary evidence

113. Support for a finding that the man who became EKIA 57 was found in the tunnel is also derived from identity documents located in the tunnel.²⁸¹ Those documents relate to a man named "Ahmadullah" who was a "R leg amputee" and had a right below-knee prosthesis. The connection between EKIA 57 and those documents was expressly made, in Ex R-17 (the TSE Report prepared shortly after the mission), which recorded that "documents likely related to KIA 57 recovered from tunnel complex, in the name of 'Ahmadullah'".²⁸²
114. It is acknowledged, of course, that the fact that EKIA 57's identity documents were found in the tunnel does not prove that he was himself present in the tunnel at any particular point in time. But they do establish a connection between that man and the tunnel, and strongly suggest that he used the tunnel and had been present in it.

²⁷⁰ T.2099/23 (P42), T.3353/20-23 (P43).

²⁷¹ T.3265/20-21 (P40).

²⁷² T.3353/23 (P43).

²⁷³ T.2099/25 (P42).

²⁷⁴ T.1236/12-14 (P41).

²⁷⁵ T.3011/28 (P18).

²⁷⁶ T.3012/23-24 (P18).

²⁷⁷ T.6160/43 (P81)

²⁷⁸ T.6160/31-32 (P81).

²⁷⁹ T.6178/40-45 (P81).

²⁸⁰ T.6176/35-37, T.6179/5-6 (P81).

²⁸¹ Ex R-193.

²⁸² At pages 14 and 34. See further the document behind Tab 11 of Ex A-10 (a closed court exhibit).

Mr Roberts-Smith's witnesses

115. Mr Roberts-Smith's evidence in relation to the clearance of the tunnel was brief. He said that Person 35 was chosen to go in to clear the tunnel and another member, possibly Person 18, was supporting him "in terms of covering him at the top of the tunnel". He said the rest of them were searching the area. He said that he did not know what was found in the tunnel at that point because he "left to go outside".²⁸³ He said that there were no men in the tunnel.²⁸⁴
116. Person 5 said that the tunnel was not cleared straight away. He said that a decision was made to "hold the tunnel", because "you're not going to open up two avenues of approach" and that the tunnel "could be a courier system. It was all the way down to the river."²⁸⁵ He said that Person 35 held security on the tunnel by holding his gun at the entrance point.²⁸⁶ No other witness corroborated Person 5's evidence about there being a delay in clearing the tunnel. The purpose of this evidence appeared to be to corroborate Person 5's account that the tunnel was located before the compound had been declared secure. For the reasons set out above, that evidence should not be accepted.
117. Person 5 said that a decision was made by him and Person 29 that Person 35 would clear the tunnel. He said that Person 35 took off his body armour and helmet, took his pistol out, put his long gun down and jumped into the tunnel.²⁸⁷ After no more than a couple of minutes he then came back, stuck his head up and said the tunnel was clear.²⁸⁸ Person 5 said that no one came out of the tunnel.²⁸⁹
118. Person 29 did not corroborate Person 5 as to the tunnel being 'held'. Person 29 said that an interpreter or ANA partner force soldier was shouting something in Pashtun from where the walkway is between the compound and the courtyard.²⁹⁰ He maintained a security posture at the tunnel, and then covered the entrance of the tunnel as Person 35 cleared the tunnel. Person 35 took off his body armour, took off his weapon, unholstered his pistol (which had a light source on it) and then crawled headfirst into the tunnel. Person 29 does not recall him placing on his NVGs. Person 29 held him by the back of his pants until Person 35 wriggled for him to release him.²⁹¹ After about 30 seconds or so Person 35 communicated to him that the tunnel was clear.²⁹² He said he then assisted Person 35 bringing items out of the tunnel, which were laid next to the tunnel entrance.²⁹³ Person 29 said that no fighting-aged males came out of the tunnel.²⁹⁴ Person 29 then moved to the commanders' RV.²⁹⁵

²⁸³ T.171/8-36; 428/25-36 (BRS). In cross-examination Mr Roberts-Smith said he could not recall who covered Person 35: T.429/5-7 (BRS).

²⁸⁴ T.578/26-27; 32-33; 580/23-24; 39-40 (BRS).

²⁸⁵ Person 5 accepted in cross-examination that there was no second exit to the tunnel: T5058/1-8 (P5).

²⁸⁶ T.4859/14-37; 5067/6-12 (P5).

²⁸⁷ T.4860/39-4861/5; 5067/22-25 (P5).

²⁸⁸ T.4861/7-9 (P5).

²⁸⁹ T.5005/6; 5063/8; 5067/44-5077/29 (P5).

²⁹⁰ T.5473/41-4574/5 (P29).

²⁹¹ T.5474/7-30; 5532/42-45; 5536/12-25 (P29).

²⁹² T.5474/32-35 (P29).

²⁹³ T.5475/1-5477/6 (P29).

²⁹⁴ T.5475/12 (P29). See also T.5518/34-36; 5519/15-18; 5533/44-5534/23; 5535/18-46; 5537/9-10; 5537/31-36 (P29).

²⁹⁵ T.5476/35-39 (P29).

119. Person 35 said he learnt of the existence of the tunnel when a call came over the radio that a tunnel had been discovered.²⁹⁶ He said that there were no Afghan nationals in the area and he did not see anyone emerge from the tunnel.²⁹⁷ It was decided that Person 35 would clear the tunnel. He said that there was no callout because “it would essentially tip our hand on our intentions and we would not do it”.²⁹⁸ Person 35 said that he removed his body armour, left his M4 behind and cleared the tunnel with his pistol using night vision goggles. Person 29 provided cover.²⁹⁹ He said that he did not locate or observe any weaponry in the tunnel.³⁰⁰ Person 35 said that after about a minute he stuck his head out to tell Person 29 that the tunnel was clear.³⁰¹ The initial clearance was not complex.³⁰² He then went back into the tunnel and gathered things up and ferried them back up, he believes to Person 29.³⁰³ He said that he also took photos of what he found in the tunnel and the layout of the tunnel.³⁰⁴ Person 35 denied that Person 18 covered him whilst he went into the tunnel, saying “that simply physically could not happen. You could not describe to me that scenario where Person 18 can cover me when I made entry into that tunnel; you cannot”.³⁰⁵ This evidence should not be accepted. Clearly it was physically possible for someone to cover Person 35 as he entered the tunnel because on his evidence Person 29 performed that task.
120. Person 38 said that he did not see any Afghan women or fighting aged males in the tunnel courtyard.³⁰⁶ He said that Person 35 took off his armour, used a handgun, and “possibly night vision goggles”, and entered the tunnel. He said he believed that Person 29 had a hand on the back of Person 35 as he made initial entry to the tunnel. Person 38 saw Person 35 stick his head out of the tunnel and heard him say “clear”. He also said he had found a bunch of equipment in the tunnel.³⁰⁷ Person 38 said he then pushed forward into the orchard area to clear it. That evidence should be rejected for the reasons set out in paragraph 73 above.
121. The evidence of Persons 5, 29, 35 and 38 about how Person 35 cleared the tunnel does not contradict the evidence of the Respondents’ witnesses. That is, it may be that Person 35 entered the tunnel and cleared it in the manner described *after* the two men had already come out of it compliantly as described by the Respondents’ witnesses. It also may be the case that Person 29 covered him for this initial clearance. The evidence however that Person 29 was the one assisting Person 35 when he exploited the tunnel (i.e. as opposed to the initial clearance which was complete in a matter of minutes) and receiving items “ferried out” of the tunnel should not be accepted. Not only was it not put to Person 18 that it was Person 29 performing this task and not him, but it is fundamentally inconsistent with the role of a patrol commander whose role it is to plan and command not to carry out menial

²⁹⁶ T.5176/26-28 (P35).

²⁹⁷ T.5178/114-16; 5306/36-5308/4 (P35).

²⁹⁸ T.5178/30-44; 5306/30-34 (P35).

²⁹⁹ T.5179/9-42 (P35).

³⁰⁰ T.5179/44 (P35).

³⁰¹ T.5180/9-15 (P35).

³⁰² T.5296/30-38 (P35).

³⁰³ T.5180/17-44 (P35).

³⁰⁴ T.5180/46-5181/3 (P35).

³⁰⁵ T.5308/19-26 (P35).

³⁰⁶ T.5944/31-34; 5957/9-10; 5985/40-5986/29; 5991/6-9; 6000/29-31; 6003/37-6004/24 (P38).

³⁰⁷ T.5945/20-47 (P38).

tasks such as receiving items ferried out of a tunnel.³⁰⁸

Conclusion on Mr Roberts-Smith's witnesses

122. Each of Mr Roberts-Smith's witnesses (Mr Roberts-Smith, Persons 5, 29, 35 and 38) are very close friends, have a range of shared interests giving them a powerful motive to lie, and have engaged in a course of sustained communications designed to arrive at a common narrative concealing the commission of crimes. The credit of those witnesses is addressed in detail elsewhere in these submissions.³⁰⁹

Overall conclusion

123. The Respondents apprehend that Mr Roberts-Smith will submit that variation between the evidence of the Respondents' witnesses in relation to the circumstances of the discovery of the tunnel means that they cannot be accepted (or cannot all be accepted). With respect, any such submission should not be accepted. None of the Respondents' witnesses' evidence is *inconsistent*. Rather, their evidence should be understood as limited to the matters the subject of their particular focus. Many witnesses acknowledged that their focus during operations was on whatever the "threat" was at any given point in time.³¹⁰ They did not necessarily pay attention to other Australian soldiers in their vicinity. In those circumstances, the fact that different witnesses had slightly different recollections is explicable by reason of their differing focusses, and natural variation in honest memory.

124. For all the reasons set out above it is submitted that the Court should find:

- (a) Just before the tunnel was discovered, present in or very nearby the courtyard were:
 - (i) A group of commanders who were beginning to assemble for the commanders' RV, including Person 81, Person 80, Person 43, Person 5 and Person 29. The troop interpreter was also present.
 - (ii) Members of Person 5's patrol, who had commenced SSE duties, including Mr Roberts-Smith and Person 4.
 - (iii) Members of Person 29's patrol, who had commenced SSE duties, including Person 35, Person 38, Person 40, Person 41 and Person 42.
 - (iv) A group of Afghan women, who were agitated and indicating the presence of something in the vicinity of the tunnel.
- (b) The tunnel was discovered by a member of Person 29's patrol, most likely Person 35.
- (c) When the tunnel was discovered, a group of operators quickly moved to the tunnel entrance, pointed their weapons down the entrance, began calling out, and called for an interpreter.
- (d) The interpreter soon joined and began calling out.
- (e) Two Afghan men came out of the tunnel, and were placed under control.

³⁰⁸ T.5519/12-13; 5536/5-6; 5537/38-5538/6 (P29). See also T.3373/32-37 (P43).

³⁰⁹ See Section XIII.

³¹⁰ T.1400/42-43 (P14); T.1306/36-44 (P41); T.2134/13-19 (P42).

125. Ultimately, though, the most powerful indication of whether men came out of the tunnel is found in a consideration of the competing accounts of the two EKIA's. It is to that topic that we turn next.

Analysing the competing accounts of the deaths of EKIA 56 and EKIA 57

126. There are a variety of different perspectives from which the conflict between the competing accounts of the circumstances of the deaths of EKIA 56 and EKIA 57 may be sought to be resolved. We propose to analyse the competing cases in relation to these two killings in the following manner:

- (a) *First*, by analysing the Respondents' witnesses' account of the death of EKIA 56. In our submission, the location of the body of EKIA 56 provides the surest guide to the resolution of the conflict between the parties' respective cases. On the Respondents' case, the body of EKIA 56 was located inside the tunnel courtyard. On Mr Roberts-Smith's case, it was outside the compound. It will follow almost inevitably from a finding about the location of the body that the corresponding party's case in relation to the circumstances of EKIA 56's death should be accepted. Similarly, once a party's case concerning the circumstances of EKIA 56's death is accepted, it will follow almost inevitably that that party's case in relation to the death of EKIA 57 should be accepted. Because there is a considerable amount of evidence, both testimonial and documentary, capable of shedding light on the question of the location of the body of EKIA 56, that death provides a useful prism through which to commence the analysis.
- (b) *Secondly*, by an analysis of Mr Roberts-Smith's witnesses' evidence relevant to the death of *both* EKIA 56 and EKIA 57. On Mr Roberts-Smith's account, of course, both those men were killed in close succession outside the north-west corner of the compound in what was effectively a single engagement. It is thus not possible meaningfully to analyse Mr Roberts-Smith's account of the death of one of those men independently of the other.
- (c) *Thirdly*, by analysing the Respondents' witnesses' account of the death of EKIA 57.

Respondents' witnesses' account of EKIA 56

127. After the discovery of the tunnel (and the emergence of two men from it), the Respondents' witnesses each gave evidence that was not challenged about their next movements:

- (a) Person 40 moved outside of the compound to take up a defensive posture at the point he marked A on Ex R-137.³¹¹
- (b) Person 41 left the tunnel area to look at the two rooms he marked D in Ex R-92.³¹² (Cf. Person 38's account, discussed above).
- (c) Person 42 left the courtyard area to clear down the southern side of the compound closer to the river with another soldier.³¹³ The only plausible candidate for other soldier is Person 38 (but cf. Person 38's account, discussed above).

³¹¹ T.3266/35-3267/8 (P40).

³¹² T.1223/17-41 (P41).

³¹³ T.2100/38-2101/2 (P42).

- (d) Person 43 attended the commanders' brief which focussed on the clearance of W109.³¹⁴ His patrol remained in a cordon on the southwest aspect of the compound.³¹⁵
- (e) Person 18 gave evidence that after he had finished clearing the tunnel he returned to the rooms on the western side of the compound.³¹⁶ As discussed above, although Person 18 was challenged about "going to the tunnel" (which was presumably intended to constitute a challenge to his evidence that he assisted Person 35 to clear the tunnel,³¹⁷ and to remove items from it),³¹⁸ the absence of any challenge to his evidence about searching rooms on the western side of the compound, implies acceptance of that evidence.

The murder of EKIA 56

128. Outside the compound, Person 24, who was located in the area he circled on Ex R-141,³¹⁹ heard Person 5 call Person 4's name a couple of times and say "Get in here, get here now". He heard this before he observed Mr Roberts-Smith come out of the compound with an Afghan male as described below and considered that Person 5's voice was coming from very close to the entrance he later saw Mr Roberts-Smith come from.³²⁰ Person 24 was not challenged about that evidence.
129. The next direct evidence of what happened next inside the tunnel courtyard came from Person 41. He said that he had been searching one of the rooms he marked D on Ex R-92 for about a minute or two when he heard some louder voices and talking, and a bit of commotion outside in the courtyard. That is when he stepped out of the room and to his immediate left he saw Mr Roberts-Smith and Person 4, and just behind them was the squatting Afghan male described above.³²¹ Given its importance, it is worth quoting Person 41's evidence in relation to what happened next at length:³²²

And what happened next?---Person 4 and RS then approached me, and using my nickname, they said, "Hey, Person 41, can we borrow your suppressor?" I thought a bit of a strange request at first, but I complied. I removed the suppressor from my M4 assault rifle and handed it to Person 4.

Can I just stop you there. Why did you think it was a strange request?---I would have thought that Person 4 would have had his on him at the time, as it was – fact that it was – well, in my patrol, at least, you either – if it wasn't on your rifle, you carried it when you left, so you had it on you at all times. So I thought initially it was a bit strange Person 4 did not have his suppressor on him. So I removed mine and handed it to Person 4, thinking he must need it because he's going to go into the tunnel and the suppressor would have muffled the loud noise if he had to use his rifle within that

³¹⁴ T.3377/21-27; 3378/7-11; 3353/40-3354/2; 3383/15-19 (P43).

³¹⁵ T.3348/11-20; 38-40 (P43).

³¹⁶ T.3014/10-11 (P18).

³¹⁷ T.3012/26-3013/3 (P18).

³¹⁸ T.3013/32-3014/8 (P18).

³¹⁹ T.3446/43-44; 3447/21-27 (P24).

³²⁰ T.3451/13-32 (P24).

³²¹ T.1236/3-8 (P41).

³²² T.1236/20-45 (P41).

tunnel. So I handed it to Person 4. He then proceeded to turn around and commenced fitting the suppressor to his M4 rifle. They started to walk back towards where this Afghan male was squatting against the wall.

Just to be clear, who's they?---RS and Person 4. I then thought to myself, "I think I know what's about to happen here." So I just stood there for another few seconds and – watching. Person 4 stood facing where the Afghan male was towards the tunnel entrance. RS then walked down and grabbed the Afghan male by the scruff of the shirt, picked him up, marched him a couple of metres forward to – he was in front of Person 4. He then kicked him in the back of the legs behind the knees until he was kneeling down in front of Person 4. He pointed to Person 4 and said – sorry, he pointed to the Afghani and said to Person 4, "Shoot him." And as he said that and he stepped to the side, I didn't wish to witness what was about to happen and I stepped back into that room where I found those IED components.

130. Person 41 clarified in cross-examination that he believes it was Mr Roberts-Smith who asked to borrow his suppressor. This was his recollection because Mr Roberts-Smith called him by his nickname whereas Person 4 generally called him by his first name.³²³
131. Person 41 was about three metres from Mr Roberts-Smith, Person 4 and the Afghan male³²⁴. He does not remember seeing any other people in the courtyard at this point, and said he was fixated on Mr Roberts-Smith, Person 4 and the Afghan male.³²⁵
132. Person 41 stepped back into the room and had been there for only a second or two when he heard a single suppressed shot, which he knew to be from an M4 rifle.³²⁶
133. He waited in the room for about 15 or so seconds, wanting to stay out of what just happened. When he stepped back out, he saw that "Person 4 was the only one there at the time and there was a dead Afghan male at his feet."³²⁷ The dead Afghan was the same one he had previously seen by the wall and handled by Mr Roberts-Smith.³²⁸
134. Person 41 then walked to Person 4. Of the interaction he said³²⁹:
- I don't believe anything was said. He removed the suppressor from his rifle and he gave it back to me. When he handed it to me, it was warm, and so I knew that it had just been used to shoot that Afghan with Person 4's M4.*
135. Person 41 fitted the suppressor back on to his rifle and walked over to see the dead Afghan lying on the ground in front of Person 4. Person 41 said Person 4 was just standing there and he seemed to be in a bit of shock.³³⁰
136. Person 41 noticed that the Afghan man had been shot once in the head and there was quite

³²³ T.1304/22-34 (P41).

³²⁴ T.1237/1-2 (P41).

³²⁵ T.1236/16-19; 1337/4-5 (P41).

³²⁶ T.1237/7-13 (P41).

³²⁷ T.1237/15-21 (P41).

³²⁸ T.1237/23-24 (P41).

³²⁹ T.1237/26-35 (P41).

³³⁰ T.1238/17-19 (P41); T.4997/1-9 (P5).

a bit of blood flowing down around out from his head wound. He was lying on his back.³³¹ The nature of the injury to the Afghan man as described by Person 41 is consistent with the photographs in Ex R-6. See also paragraph A4 of the Respondents' Closed Court Submissions. Person 41 recognised the man shown in the photographs of Ex R-6 as the "person shot by Person 4".³³²

137. As has been set out in the previous section, the only theory put to Person 41 as to *why* he would fabricate his evidence was that he did so to "assuage [his] feelings of guilt about the fact [he was] unable to cut it that day".³³³ As already submitted, that theory is simply unable to be accepted as providing an explanation for Person 41's evidence.
138. It is also anticipated that Mr Roberts-Smith will submit that there is one aspect of Person 41's account that is implausible, which thus lends credence to the notion that the evidence was fabricated. The relevant aspect of Person 41's evidence is that concerning Mr Roberts-Smith's request to borrow his suppressor.
139. Cross-examination of numerous witnesses sought to adduce evidence in support of the proposition that Person 4 should have had his own suppressor, as it is an essential part of the kit that should be carried on all missions³³⁴. So much may be accepted, and indeed was accepted by Person 41, who said that even on the day he thought the request to be "strange". At the very least, it is uncontroversial that Person 4 did not have his suppressor attached to his weapon during the mission.³³⁵ It is unknown if he was carrying it on his body somewhere. Whether he was, though, is beside the point. It may be that he forgot it. It may be that it was located on his body somewhere that made it more convenient, in circumstances where Person 41 was standing nearby with his already attached to his weapon and easily accessible, to borrow rather than dig out his own.³³⁶ Perhaps there is some other reason. Similarly, any suggestion that Person 41 would not have given his suppressor can be rejected. He considered the area to be quite safe at the time, and they were inside the compound, so he was content to hand over his suppressor.³³⁷
140. Overall, it is inherently unlikely that Person 41 would have built such a "strange" detail into his evidence if he was making it up. The presence of that detail thus enhances, rather than undermines, the credibility of Person 41's account.
141. Person 43 identified the man in the photographs in Ex R-6 (EKIA 56) as the person he helped pull out of the tunnel.³³⁸ He said seeing the photographs recently did not particularly refresh his memory, because he recalled the person in the photographs.³³⁹ He also recalled a conversation he had with Person 40 as they were walking off or getting ready to walk off

³³¹ T.1237/37-47 (P41).

³³² T.1238/21-28 (P41).

³³³ T.1320/1-27, T.1348/1-39, T.1349/7-37 (P41).

³³⁴ T.1303/12-13; T.1307/11-20 (P41). See also: T.1303/15-35 (P41); T.1603/31-42 (P14); T.3212/22-25 (P18); T.3336/17-19 (P40); T.3422/27-28 (P43).

³³⁵ T.4997/26-4998/15 (P5); See also Ex R-130 (a closed court exhibit) and the unchallenged evidence given by Person 18 at CCT 7.03.2022 T.6/5-13 and by Person 40 at CCT 9.03.2022 T.6/24-43. See also T.2997/24-29 (P18) in relation to Gothic 5's SOP in relation to the use of suppressors.

³³⁶ See the cross-examination of Person 5 at T.4998/26-4999/31 (P5).

³³⁷ T.1364/27-36 (P41).

³³⁸ T.3354/26-39 (P43).

³³⁹ T.3426/1-31 (P43).

W108, in which Person 40 asked “where were the PUCs?”.³⁴⁰ Person 43 responded along the lines “You know where they are” and Person 40 responded “That’s fucked”. Person 43 was not challenged on this evidence.

142. Person 40 made a similar enquiry of Person 41. He asked him “Hey, [Person 41], do you know what happened to those two blokes that they pulled out of the tunnel?”.³⁴¹ Person 41 responded that he did not know, for the reasons he explained to the Court.³⁴²
143. That account is then further corroborated by the evidence concerning the location of the body of EKIA 56 addressed next.
144. Before moving to that topic, however, it is acknowledged that the Court does not have direct evidence of Person 5’s actions prior to the execution of EKIA 56. That is immaterial: the transmission of an order in these circumstances can be established by circumstantial evidence.³⁴³ That Person 5 ordered or directed the murder is the most probable inference on all the evidence. The inference arises, in particular, from the following evidence:
- (a) The evidence of Person 24 about Person 5 calling Person 4 into the compound.
 - (b) Person 5’s statements before the mission of his intention to “blood the rookie”.
 - (c) The conversation in which Person 5 chastised Mr Roberts-Smith for having “done this” while the ISR was still flying, then confirming with the JTAC where the ISR was located (see below).³⁴⁴ In this conversation, Person 5 was expressing frustration with Mr Roberts-Smith for the indiscrete way the killings were carried out, not the *fact* of their occurrence. By contacting the JTAC on Mr Roberts-Smith’s behalf to determine whether there was a potential problem, Person 5 demonstrated both his approval of the killings and his intention to ensure they remained concealed.
 - (d) Person 5’s statements after the mission that he had “blooded the rookie” (dealt with below). It is of note that Person 5 said “I” have blooded the rookie.
 - (e) The reference to “squirters” in the patrol debrief was information provided by Person 5.³⁴⁵ That was a deliberate lie from which his consciousness of guilt should be inferred.
 - (f) Person 5’s denials of those matters demonstrating a consciousness of guilt, along with his other lies concerning EKIA 56 (dealt with below).
145. Even if such a finding were not made, that does not mean the Respondents have not established the truth of paragraph [46]-[48] of the Particulars of Truth as against Mr Roberts-Smith. Mr Roberts-Smith’s responsibility does not depend on any finding against Person 5.

The location of the body

146. Person 41 said the body of the man he saw shot by Person 4, who he identified as EKIA 56

³⁴⁰ T.3354/6-24 (P43).

³⁴¹ T.1242/7-22 (P41).

³⁴² T.1242/26-30 (P41).

³⁴³ See, for example, *Prosecutor v Blaskic*, ICTY Trial Chamber I, Judgment, 3 March 2000, at [281].

³⁴⁴ T.3014/13-23; 3136/38-3137/16 (P18).

³⁴⁵ CCT 21.4.22, p.5/11-30 (P5).

or the man shown in Ex R-6, was in the spot that he marked E on Ex R-92.³⁴⁶ Mr Roberts-Smith's evidence, of course, was that that man was shot outside the compound.³⁴⁷ It follows that a very important indicator of which version of events is correct is the location of the body of EKIA 56.

147. Person 18 gave unchallenged evidence that the body of EKIA 56 was located in the tunnel courtyard. He had a particular reason to be aware of the location of that body because he took photographs of it for the purposes of SSE. Even Person 5 said that he selected Person 18 to be in his patrol "because he was good at his job"³⁴⁸. There is no reason to doubt the reliability of Person 18's SSE process and the documents derived from it. The failure to challenge that evidence of Person 18 in this regard is particularly significant, and there is no reason why the Court would not accept it (especially when, as discussed below, it is consistent with other, objective, evidence). The evidence of Person 18 was:

- (a) As he emerged from clearing a room on the western side of the compound, he was "directed outside to two bodies ... on the northern side of the compound".³⁴⁹ He commenced exploitation of the "furthest body"³⁵⁰ which had a "gunshot wound to the face".³⁵¹ He then moved to exploit the second body which "was significant due to the prosthetic leg that [he] found during the search".³⁵²
- (b) Person 18 described the exploitation process as including taking a photograph of the bodies with an SSE bag containing certain information. He said that the SSE bags he wrote and photographed with those bodies included the description "north-west corner" which "signifies where this was located in relation to the compound".³⁵³
- (c) He then "went back inside and continued conducting exploitation" inside the compound.³⁵⁴ He said that "inside the compound ... there was another body" of a "person in white, lying on his back ... and there was blood over the ground".³⁵⁵ He took a photo of that body (which he identified as EKIA 56) and said that it was located "roughly near the tunnel entrance".³⁵⁶ He wrote the information on the SSE bag for that body which included the words "NW Corn Tunnel", which he said "signifies that it was the northwest corner in the vicinity of the tunnel".³⁵⁷
- (d) In relation to the location of EKIA's, Person 18 said that he carried a laminated piece of paper upon which he would make a "sketch map".³⁵⁸ In relation to this topic, see further paragraph A5 of the Respondents' Closed Court Submissions.

148. Given the unchallenged evidence of Person 18 that the body of EKIA 56 was photographed

³⁴⁶ T.1238/9-10; 21-28 (P41).

³⁴⁷ T.171/35-7 (BRS).

³⁴⁸ T.4835/19 (P5).

³⁴⁹ T.31014/32-34 (P18).

³⁵⁰ T.3014/43 (P18).

³⁵¹ T.3016/13 (P18).

³⁵² T.3016/13-14 (P18).

³⁵³ T.3017/26 and T.3018/6-10 (P18).

³⁵⁴ T.3018/14 (P18).

³⁵⁵ T.3018/24-29 (P18).

³⁵⁶ T.3018/31-3019/2 (P18).

³⁵⁷ T.3019/9-10 (P18).

³⁵⁸ T.3015/19-20 (P18).

during the SSE process just near the tunnel entrance, the overwhelming inference is that was the location where that man was both shot and photographed.

149. The differing notations on the SSE bags for EKIA 56, on the one hand, and EKIA 50 and 57 on the other, can only rationally be explained by the fact that the bodies were in differing locations.³⁵⁹ Ex R-17, described the location of EKIA 56, based on “info obtained from FE TSE”, as “NE Corner W108. In courtyard containing tunnel complex. Photographed on target”.³⁶⁰ Furthermore, multiple witnesses gave evidence supporting the area in which EKIA 56 was photographed as the tunnel courtyard:

- (a) Person 42 considered that the area depicted in the photograph was consistent with his memory of what the courtyard looked like where they found the tunnel. He stated “So things like the grass. The grass was – was stuff that was covering part of the – the – the matting that was covering the tunnel. The grass is – is consistent with normally where they keep their animals, their feed, potentially overnight if they bring them in during the night. It’s – it doesn’t look overly well-maintained, and I think I said at the start my experience is whilst Afghans live in mud huts, they maintain their living area quite well, so that doesn’t look well-maintained as a normal living area would be. There is a couple of those oval/circle shapes which – which is normally their cooking areas, which again can be – can be sometimes slightly outside – outside their compounds. So it – it looks like it could be the area where the – the tunnel was found”.³⁶¹
- (b) Person 43 also gave evidence that the grass or the hay shown in the photograph was the grass or hay, or similar to the grass or hay that was kicked over by Person 35 that was covering the entrance to the tunnel.³⁶²
- (c) Person 29 gave evidence that when clearing the tunnel Person 35 handed Person 29 a “ubiquitous yellow palm oil container”.³⁶³ Such a container can be seen in the top right of page 5 of Ex R-6. Whilst Person 29 attempted to minimise the significance of this evidence by stating that “yellow palm oil containers are everywhere in any around compounds in Afghanistan”,³⁶⁴ its presence strongly corroborates the location of that photograph being the tunnel courtyard.

150. Moreover, the timing of the SSE photographs taken by Person 18³⁶⁵ in Ex R-18 also supports that EKIA 56 was killed in the courtyard and lay in close proximity to the tunnel entrance. The timestamps on the photographs show that:

- (a) Approximately three minutes elapsed between the last photograph Person 18 took of EKIA 50 and the first photo he took of EKIA 57;
- (b) Approximately four minutes elapsed between the last photograph Person 18 took of EKIA 57 and the first photo he took of EKIA 56;

³⁵⁹ See, e.g., T.1599/17-18 (P14); T.3334/19-20 (P40); T.3355/44-45 (P43); T.3017/23-27; 3019/6-10 (P18).

³⁶⁰ At page 4.

³⁶¹ T.2101/46-2102/28 (P42).

³⁶² T.3355/1-5 (P43).

³⁶³ T.5475/5-8; 5523/20-25; 39-47 (P29).

³⁶⁴ T.5523/27-37 (P29).

³⁶⁵ T.3017/12-14; 29-30; 3018/45-46; 3019/17-28 (P18).

- (c) Approximately one minute elapsed between the last photograph Person 18 took of EKIA 56 and the first photo he took of the tunnel.

151. It may be inferred from the order in which those photographs were taken, as well as the travel time from EKIA 56 to the tunnel, especially compared to the prior travel time between bodies, that the body of EKIA 56 was located relatively proximate to the tunnel entrance, and not where Mr Roberts-Smith says it was (which would have been in between EKIA 50 and EKIA 57).

152. There was an indirect and general line of cross-examination, to the effect that sometimes bodies were moved for SSE photographs, and that Person 18 did not know whether the bodies he exploited at W108 were moved after the time of engagement and before he conducted SSE.³⁶⁶ Nothing in that line of questioning undermines the obvious inference that the body of EKIA 56 was shot where it was found by Person 18. That is so for several reasons:

- (a) *First*, the questioning was ambiguous in the sense that it was unclear whether Person 18 was being asked about a body being moved around for the purpose of taking photographs (e.g. rolled from one side to the other), or moved to a totally separate location. The questioning was not capable of establishing that Person 18 accepted the possibility that any particular body he saw may have been moved from an entirely separate location.
- (b) *Secondly*, the evidence of Mr Roberts-Smith was inconsistent with the body of EKIA 56 having been moved. He agreed that he was the person pictured on page 9 of Ex R-8,³⁶⁷ and that that photo was taken inside the tunnel courtyard.³⁶⁸ That photograph was taken approximately six minutes after the SSE photographs of EKIA 56 were taken.³⁶⁹ It follows that if the body of EKIA 56 had been moved into the tunnel courtyard *after* he was shot, but *before* SSE was performed on the body, the body would have been in the tunnel courtyard when Mr Roberts-Smith was assisting with SSE. Mr Roberts-Smith did not suggest that the body was moved; indeed his evidence was that “the body dropped and lay where it fell”³⁷⁰ and he denied that the body, during the SSE process, was “inside the compound wall”.³⁷¹
- (c) *Thirdly*, the physical circumstances of the body in Ex R-6 are inconsistent with the body having been moved after it was shot. The significant blood flow and brain matter³⁷² shown in Ex R-6 makes it clear that the person was killed in the location he was photographed.
- (d) *Fourthly*, no reason at all was identified for why the body would have been moved. In circumstances where the bodies of EKIA 50 and EKIA 57 were left outside the compound and SSE conducted on them outside, there could be no reason why EKIA

³⁶⁶ T.3215/25-35; CCT 8.3.2022, T.6/1-18 (P18).

³⁶⁷ T.454/40-41 (BRS).

³⁶⁸ T.454/43-455/15 (BRS).

³⁶⁹ See Ex R-18.

³⁷⁰ T.571/19 (BRS).

³⁷¹ T.539/38-39 (BRS).

³⁷² The Respondents note that this information is NPO Information within the meaning of the s38B orders.

56 would have been moved inside the compound.

- (e) *Fifthly*, it was not put to any witness that they moved the body, or saw it being moved, or had seen it in some other location.

153. Overall, therefore, it is submitted that the Court can be comfortably satisfied that EKIA 56 was killed in the tunnel courtyard. Because no witness suggested there were any legitimate engagements inside the compound, that fact thus corroborates Person 41's evidence, and undermines the evidence of Mr Roberts-Smith and his witnesses about EKIA 56 occurring outside the compound. It is thus powerful evidence that EKIA 56 was found in the tunnel, and executed by Person 4 in the circumstances described by Person 41.

Mr Roberts-Smith's account of the killing of EKIA 56 and EKIA 57

154. Mr Roberts-Smith's account of the death of EKIA 56, of course, was that he was shot outside the north-west corner of the compound by an unknown SAS operator very shortly after he himself had shot EKIA 57 in broadly the same area. It is apparent, however, that the location of the body of EKIA 56 has proved a significant problem for his account. To take but the most obvious examples:

- (a) On the afternoon of 17 June 2021, Mr Roberts-Smith gave evidence that the unknown SAS operator who shot EKIA 56 dragged the body in the immediate aftermath of the engagement,³⁷³ before recanting that evidence the next morning.³⁷⁴
- (b) The only witness apart from Mr Roberts-Smith who gave evidence that they saw the body of EKIA 56 outside the compound was Person 5. His evidence was that as he left W108 to conduct reconnaissance on W109, he passed the body of EKIA 57 at the point he marked "S" on Ex A-194,³⁷⁵ and the body of EKIA 50 at the point he marked "P".³⁷⁶ The body of EKIA 56 was not there at that point in time.³⁷⁷ When he returned, however, he said "there was now another body"³⁷⁸ near the body of EKIA 57, which he marked "T" on Ex A-194.³⁷⁹ He said that he was told by Mr Roberts-Smith that that body was one of the two squinters that had earlier been engaged, and had at some point been "dragged back" from the other side of a field wall where he had been shot.³⁸⁰
- (c) Person 29 said that he only recalled seeing two bodies on the way to W109, being one which Person 18 was kneeling next to (in the position shown on page 5 of Ex R-5) and another one.³⁸¹ In his evidence Person 29 said he did not recall any identifying features of the second body.³⁸² In fact, Person 29 had previously approved an outline of evidence stating that he recalled seeing two bodies, one of which was the body of

³⁷³ T.435/1-15, T.437/34-438/9 (BRS), Ex R-4 (markings "H" and "I").

³⁷⁴ T.443/9-18 (BRS).

³⁷⁵ T.4875/43-47, T.4876/27-28, T.4879/6, T.4923/22-24, T.5047/8-10 (P5).

³⁷⁶ T.4878/9-14 (P5).

³⁷⁷ T.5047/14 (P5).

³⁷⁸ T.4879/4 (P5).

³⁷⁹ T.4923/43-47 (P5).

³⁸⁰ T.5047/30-44 (P5).

³⁸¹ T.5480/35-5481/47 (P29).

³⁸² T.5482/12-13 (P29).

the insurgent with the prosthetic leg.³⁸³ It is submitted that Person 29 approved that outline, in the belief that there were only two bodies outside W108, representing EKIA 56 and EKIA 57. When he subsequently learned that the body of EKIA 50 was outside W108, he needed to preserve the possibility that there was a third body outside W108, and thus that he may have seen EKIA 56.³⁸⁴ In any event, Person 29 provided no support for the existence of EKIA 56 outside W108.

155. The inconsistencies in the evidence of Mr Roberts-Smith's witnesses concerning the location of the body of EKIA 56 are explicable, it is submitted, as a product of the fact that the true location of that body was inside the tunnel courtyard. A close consideration of the account of Mr Roberts-Smith and his witnesses reveals other, equally fundamental, problems, however.
156. Before turning to consider the substance of those witnesses' accounts, however, it is important to record that there was no attempt whatsoever made to put the engagement that Mr Roberts-Smith says occurred to any of the Respondents' witnesses who would have been in a position to observe it. No challenge was made to the evidence of Persons 14, 24, 40 and 41 that they were, at the relevant time, located in a position that would have enabled them to see and/or hear the engagement that Mr Roberts-Smith says resulted in the death of EKIA 56 and EKIA 57. It was, in those circumstances, incumbent on Mr Roberts-Smith to put to those witnesses what it is that he says occurred. The failure to do so is no mere formality; it deprived each of those witnesses of the opportunity of providing evidence or reasoning as to why their evidence that no such engagement occurred should be accepted. The failure to put the true facts, on Mr Roberts-Smith's case, that those witnesses would have observed, means that the Court should not disbelieve their evidence as to what they say in fact happened.
157. In any event, the engagement described by Mr Roberts-Smith is inherently implausible.
158. *First*, the explanation provided by Mr Roberts-Smith for leaving the compound does not survive scrutiny. He said that he decided to "go out into the other side of the compound and have a look at the area ... and just provide some security in that area so I wasn't just standing around and not doing anything".³⁸⁵ He went alone without arranging for anyone to accompany him.³⁸⁶ The suggestion that he would have wandered out, alone, on his account to an unsecured part of the compound is not plausible. The real reason that Mr Roberts-Smith was comfortable moving outside the compound in that area was because he knew that there was a cordon patrol there providing perimeter security.³⁸⁷
159. *Secondly*, on Mr Roberts-Smith's account, two armed insurgents appeared within metres of the compound. Even putting to one side the extreme implausibility of that happening at almost the precise instant (three seconds after³⁸⁸) Mr Roberts-Smith walked outside, it is implausible that it could have occurred at all in circumstances where it is not disputed that

³⁸³ T. 5518/6-21 (P29), Ex R-271.

³⁸⁴ See T.5519/19-5522/3 (P29).

³⁸⁵ T.429/44-430/2 (BRS).

³⁸⁶ T.430/7 (BRS).

³⁸⁷ T.533/36-38 (BRS).

³⁸⁸ T.430/41 (BRS).

there was in place a cordon, looking for threats emerging from that very same direction.³⁸⁹ If the two insurgents had in fact managed to get as close to the compound as Mr Roberts-Smith contends, it would have amounted to a serious failure on the part of the cordon team, and one would expect there to be some contemporaneous complaint, or reporting of the incident and/or enquiry into what went wrong with the cordon team.³⁹⁰ However, there is no record at all in the after-action reporting of the engagements as Mr Roberts-Smith contends they occurred.

160. *Thirdly*, Mr Roberts-Smith's professed lack of knowledge of the identity of his colleague who shot EKIA 56 is inherently implausible, and indicative of a fabricated account. On Mr Roberts-Smith's evidence, this person saved his life.³⁹¹ Mr Roberts-Smith thought it was either Person 18 or Person 4, but on his own evidence, he never asked either of them if it was them who saved his life.³⁹² It is not that he cannot recall the identity of the other soldier: he says that he does not remember seeing that person on the day, and that he does not have any recollection of anyone ever telling him that they shot that man.³⁹³ In that respect, his evidence is also inconsistent with that of Person 5, who gave a detailed account of Mr Roberts-Smith and Person 4 being together for an extended period of time in the vicinity of the engagement in its aftermath.³⁹⁴ Other witnesses also gave evidence of discussion in the immediate aftermath of the mission about being informed of Person 4 having had an engagement.³⁹⁵
161. *Fourthly*, Mr Roberts-Smith's evidence about dragging the body of EKIA 57 was inherently implausible in three respects: *first*, that he would have dragged the body at all in the immediate aftermath of the engagement; *secondly*, that having dragged the body, he would have returned for a second time to grab the weapon, and; *thirdly*, that if he did drag the body and retrieve the weapon, that he would not have dragged the body and retrieved the weapon of EKIA 56 as well. In particular:
- (a) It is implausible that a body would have been dragged for the purpose of clearing it in circumstances where two insurgents had only just unexpectedly appeared very close to the compound, and the nature of the threat remained very much unknown. Mr Roberts-Smith initially stated that the reason he needed to immediately clear the body was because it was "the drill" that the body needed to be cleared as soon as he was not in threat,³⁹⁶ (although he later said that that it was up to each individual operator what they wanted to do³⁹⁷). Even accepting that proposition, on no view was the threat removed (indeed, the necessity of dragging the body was said to be by reason of the existence of a threat in the immediate area). In any event, the preponderance of the evidence did not support the existence of any drill or standard operating procedure to clear a body in the circumstances identified by Mr Roberts-

³⁸⁹ T.425/26-36, 430/38-45 461/1-9, 533/36-534/20 (BRS) See also T.6174/40-40-47 (P81).

³⁹⁰ T.5121/44-5122/8 (P5); T.6174/40-43 (P81).

³⁹¹ T.565/9-30 (BRS).

³⁹² T.433/43-434/2 (BRS).

³⁹³ T.525/4-11 (BRS).

³⁹⁴ See, e.g., T.4863/24-31, T.4878/23-4879/14,

³⁹⁵ T.5296/15-23 (P35); T.5122/10-40 (P5).

³⁹⁶ T.435/22-25 (BRS).

³⁹⁷ T.531/37-39 (BRS).

Smith.³⁹⁸ Perhaps the most powerful evidence of the absence of any drill requiring the immediate clearance of a body in those circumstances is the fact that EKIA 50, the body killed by Person 14, lay very close to where Mr Roberts-Smith said EKIA 57 lay. That body remained in place for the duration of the mission. It was not cleared until the SSE process began, even though Person 14 had heard a mobile phone ringing in the vicinity of the body, which was a known indicator of being an insurgent.³⁹⁹ To drag the body in the circumstances described by Mr Roberts-Smith involved unnecessarily exposing himself to danger, in circumstances where the tactical situation did not require it. It is to be recalled that the need to drag the body was because there was a risk of enemy fire at the original location of the body. To drag the body required Mr Roberts-Smith not only to expose himself to that fire, but to do so in circumstances where he could not effectively utilise his weapon (because he was dragging the body).⁴⁰⁰ Finally, dragging the body back to the position indicated by Mr Roberts-Smith did not, in fact, achieve the stated objective of shielding Mr Roberts-Smith from enemy fire. He remained exposed to fire from a wide area, including the direction of W109.⁴⁰¹

- (b) Even if he had moved out to drag the body, it is implausible that Mr Roberts-Smith would have exposed himself to danger a second time simply in order to retrieve the weapon he left behind. Or, alternatively, if the real concern was leaving a weapon lying in open ground, that he would have retrieved the weapon before dragging the body.
- (c) Finally, if it was so important to both drag the body of EKIA 57 to clear it, and to remove that man's weapon from the battle space, then it is utterly inconceivable that he would have left the body of EKIA 56 and his weapon lying out there. The notion that it was somehow the sole responsibility of the operator who killed that other man ought to be rejected. A soldier of Mr Roberts-Smith's position and ability would never have allowed a threat to remain simply because it was someone else's job to deal with it.⁴⁰²

162. Finally, as a general matter in this regard, it should be observed that the photographic evidence does not support Mr Roberts-Smith's claim that he dragged the body of EKIA 57 back about five metres. Ex R-6 (an NPO Document), shows a significant quantity of blood on the ground which can be seen on pp 2, 3, 4 and 6, and there is a complete absence of drag marks or a blood trail. In Ex R-16 Mr Roberts-Smith marked what he contended were drag marks.⁴⁰³ Nothing in that image resembles drag marks and, in any event, a close up of the same area he marked can be seen on page 5 of Ex R-6, which makes clear that there are in fact no drag marks in that area. In any event, if what Mr Roberts-Smith marked were

³⁹⁸ T.564/3-40 (BRS); T.4842/31-36 (P5) (Person 5 says they would be SSE'd during the post assault procedure); See, e.g. T.1620/39-1621/29, T.1741/43-46 (P14); T.5464/13-31 (P29).

³⁹⁹ Ex R-5, page 5; T.1406/23-41; 1620/39-1621/6, 1741/43-46 (P14); T.4878/9-21 (P5) (Person 5 observed the body in the location marked P on Ex A-194 on the way back from W109 to W108); T.5480/32-5481/20 (P29) (Person 29 gave evidence that he walked past Person 18 as he is depicted in Ex R-5, page 5, and marked at the letter E on Ex A-219); T.3110/15-31 (P18); T.3334/32-3335/5 (P40); T.2094/28-42 (P42).

⁴⁰⁰ T.172/15-32, 436/15-17 (BRS).

⁴⁰¹ T.569/5-570/6 (BRS).

⁴⁰² T.570/25-571/11 (BRS).

⁴⁰³ T.528/22-35 (BRS).

in fact drag marks, those drag marks would suggest that the body was dragged away from the compound, not towards it as Mr Roberts-Smith contends.⁴⁰⁴

163. Overall, in relation to the dragging of bodies it is submitted that:

- (a) The reason Mr Roberts-Smith gave implausible evidence about “dragging” the body of EKIA 57 is because he recognised that it would be entirely unbelievable that an insurgent would have been as close to the compound as the location where that body was lying when it was exploited during the SSE process. He thus needed to explain how it was that the body came to be so close to the compound, and developed a lie to the effect that he dragged it back there.⁴⁰⁵
- (b) The overnight change in Mr Roberts-Smith’s evidence about whether or not EKIA 56 was also “dragged” reflected a recognition that the logic underpinning his lie that EKIA 57 was dragged should also have applied to EKIA 56, but a belated appreciation that the photographic evidence would contradict such a story. It will be recalled that Mr Roberts-Smith originally said that EKIA 56 fell slightly more to the north, about three metres from the body he had engaged.⁴⁰⁶ Initially, Mr Robert-Smith said that he remembered that the other operator grabbed hold of the other body and dragged it back behind the wall as well, a couple of metres from the body he had engaged.⁴⁰⁷ He marked where the two bodies were dragged to as H and I on Ex R-4.⁴⁰⁸ During the overnight adjournment, Mr Roberts-Smith reflected on his earlier evidence and indicated that his evidence about the other operator dragging the other body back was incorrect.⁴⁰⁹ This change in Mr Roberts-Smith’s evidence is significant. It is indicative that Mr Roberts-Smith’s evidence is an invention and that he appreciated overnight that he would be caught giving false evidence given it is obvious from Ex R-6 that the second body had not been moved after the insurgent was engaged.

164. *Fifthly*, Mr Roberts-Smith’s evidence about the weapons asserted to have been carried by EKIA 56 and EKIA 57 should not be accepted when there was no challenge to Person 18’s evidence that he discovered those weapons during a search of the compound. It will be recalled that Mr Roberts-Smith said that the weapon pictured on the far left of page 17 of Ex R-8 (also pictured on page 20) is the rifle he recovered from the insurgent he killed (EKIA 57), and the one on the right is the weapon recovered from the other insurgent (EKIA 56).⁴¹⁰ Person 18’s evidence, however, was that towards the end of the mission, after he had taken the photograph on page 29 of Ex R-18, he leant up against the hay store, or what remained of it, and his arm fell in, and he found the weapons which are shown in the photograph on page 30 of Ex R-18. He took another photo of the weapons at a later stage.⁴¹¹ Person 18’s evidence in this regard was not challenged, and is consistent with the contemporaneous description of the provenance of the weapons in Ex A-10 (a closed court exhibit). In these

⁴⁰⁴ T. 528/19-529/16 (BRS); See Ex R-6.

⁴⁰⁵ T.527/44-528/17 (BRS).

⁴⁰⁶ T.433/35-41 (BRS).

⁴⁰⁷ T.434/25-435/25; 437/34-40 (BRS).

⁴⁰⁸ T.438/4-9 (BRS).

⁴⁰⁹ T.443/9-18; 523/33-524/11 (BRS).

⁴¹⁰ CCT 11.6.21, T.18/13-20; T.456/45-457/4 (BRS).

⁴¹¹ T.3019/40-3020/23 (P18).

circumstances, his evidence as to the provenance of these weapons should be preferred over Mr Roberts-Smith's.

165. *Sixthly*, Mr Roberts-Smith's evidence about clearing the body and then returning inside the compound to provide "situational awareness" to others and to assist with the SSE is also implausible.⁴¹² For one thing, returning inside to assist with SSE is inconsistent with his initial assertion that the reason he went outside was to "provide security". Having moved outside, and engaged two insurgents within a matter of seconds, it is implausible that he would have then decided not to remain outside and provide security, but rather immediately to return inside and help with SSE. If there was in fact a threat Mr Roberts-Smith's evidence suggested, he would never have left the area unguarded (or with a single, unknown, colleague left alone) until a properly organised presence was in the area to provide security.⁴¹³ Mr Roberts-Smith appreciated this implausibility in his evidence, and changed his testimony to say that he probably made a radio call to alert the rest of the Troop to the situation.⁴¹⁴ This was another example of Mr Roberts-Smith changing his evidence to accommodate implausibilities as they were revealed to him.
166. The dishonesty of Mr Roberts-Smith's evidence about clearing the body is further demonstrated by the inconsistencies in his accounts of when he saw the prosthetic leg on EKIA 57. In his evidence in chief, Mr Roberts-Smith said that upon his first search of the body he did not notice the prosthetic leg,⁴¹⁵ only finding it later when he was assisting with SSE.⁴¹⁶ In cross-examination Mr Roberts-Smith at first said that he could see there was a prosthetic leg on the initial search.⁴¹⁷ When pressed he then said that he "couldn't remember".⁴¹⁸ He then made an entirely unpersuasive attempt to suggest that there was no inconsistency in his evidence.⁴¹⁹
167. His evidence was also inconsistent in relation to the removal of the prosthetic leg to search for explosives. In his evidence in chief, Mr Roberts-Smith suggested it was his own idea to take the prosthetic leg off the insurgent.⁴²⁰ However in cross-examination, Mr Roberts-Smith said that at the end of SSE, when they were "basically done", Person 5 came out spoke to him and asked if he had checked inside the leg because a certain objective was known to carry explosives inside his leg, and at that point Mr Roberts-Smith removed the leg.⁴²¹ Indeed, Mr Roberts-Smith then said that until Person 5 spoke to him it had not occurred to him to remove the leg.⁴²² Once again, it is submitted that the changes in Mr Roberts-Smith's evidence concerning his searches of EKIA 57 reveal the construction of a false narrative to make the killing of EKIA 57 appear legitimate.
168. The implausibility of the evidence is reinforced by the different and inconsistent evidence of

⁴¹² T.447/25-40 (BRS).

⁴¹³ T.565/36-47 (BRS).

⁴¹⁴ See T.565/32-569/3 (BRS).

⁴¹⁵ T.172/34-35 (BRS).

⁴¹⁶ T.180/1-4 (BRS).

⁴¹⁷ T.437/27-29 (BRS). See also T.571/29-575/38.

⁴¹⁸ T.572/30-32 (BRS). See also T.571/29-575/38.

⁴¹⁹ T.573/24-46 (BRS).

⁴²⁰ T.180/15-20 (BRS).

⁴²¹ T.449/29-450/7; 540/40-42 (BRS).

⁴²² T.450/6-7 (BRS).

Person 5 and Person 29. In particular:

- (a) Person 5 said that he became aware of the engagement when he heard gunshots outside the north-west corner during the patrol commanders' rendezvous. He said that he left the patrol commanders' rendezvous and ran out towards where the gunshots were coming from where he saw Mr Roberts-Smith and Person 4, who verbally informed him that they had engaged two squirters to the north.⁴²³ He said that he then reported that back to the rendezvous. Person 5's account demonstrates that an engagement as described by Mr Roberts-Smith would have been regarded as a serious matter, requiring immediate reporting up the chain of command. It also means that there would have been no occasion for Mr Roberts-Smith to need to return inside the compound.
- (b) Person 29 said that the engagement was reported over the radio.⁴²⁴ This however is inconsistent with the evidence of Person 81 that he did not recall receiving any reports of EKIA's from when he entered W108 until he left for W109⁴²⁵, and was not put to the Respondents' witnesses. Person 40's evidence said that the radio traffic comprised of *questions* about the gunfire that had been heard, not *reports* of an engagement.

169. *Seventhly*, it is apparent that the account of the engagement provided to this Court differs significantly from earlier accounts given by Mr Roberts-Smith and Person 5. The dramatic change in description of the engagement of EKIA 56 and EKIA 57 shows that Mr Roberts-Smith has been unsuccessfully searching for an account of the killings capable of fitting with the objective evidence, ever since 12 April 2009:

- (a) Person 5's evidence was that Mr Roberts-Smith's first description of the engagements on 12 April 2009 was that he had "just engaged two [squirters] to the north" who "ran away to the northwest".⁴²⁶ Further submissions concerning another previous account of Person 5 of the circumstances of the engagement of EKIA 56 and EKIA 57 is set out in paragraphs A9 to A10 of the Respondents' Closed Court Submissions.
- (b) It is certainly the case that the original explanation provided to officers for the killings was that the two men were "squirters". That is the explanation for the deaths of the two men that is recorded in the Patrol Debrief,⁴²⁷ which is earliest reporting to discuss the topic. It records that "upon breaching the compound and commencement of clearance INS attempted to squirt, but were engaged".⁴²⁸ Person 81 approved that document for release,⁴²⁹ and confirmed that that is what he would have been told after the mission.⁴³⁰ He confirmed that if he had been told that insurgents who were *approaching* the compound had been engaged, he would not have described them in the Patrol Debrief as "squirters".⁴³¹ The concept of a "squirter" is well-known and well-

⁴²³ T.4863/6-31 (P5).

⁴²⁴ T.5478/1-6 (P29).

⁴²⁵ T.6169/33-6170/33 (P81).

⁴²⁶ T.4863/29, T.5047/1-2, T.19-21 (P5).

⁴²⁷ Ex R-195, Tab 1.

⁴²⁸ At [26]. See also [5(f)(iv)(2)].

⁴²⁹ T.6172/7-8 (P81).

⁴³⁰ T.6173/33-6174/3 (P81).

⁴³¹ T.6174/10-12 (P81).

defined,⁴³² and could never have been applied to the insurgents in the engagement described by Mr Roberts-Smith.

- (c) It is likely that the description of the men as “squirters” was connected with an early false assertion that the tunnel had a second exit outside the compound walls. Person 5 said that he “thought that they came from the tunnel up until a couple of years ago”, at which point, after IGADF, Person 35 told him that the tunnel had no second exit.⁴³³ Person 29 gave evidence that he had discussed with either or both of Person 5 and Person 35 that the tunnel had a second exit.⁴³⁴ The tunnel plainly had no second exit, and no one who had been inside it ever could have contemplated the possibility that it did.⁴³⁵ The discussion of the possibility of a second exit can only be seen as an attempt to explain (a) that no one was found inside the tunnel (because they could have escaped out the other end) and (b) the source of the two insurgents who appeared just outside the northern wall of the compound without having been observed by the cordon.⁴³⁶
- (d) The version of the engagement given to this Court (that the two men approached from the direction of W109), is simply the latest attempt to construct a narrative that accommodates, as best it can, the objective facts and known evidence.⁴³⁷

170. *Eighthly*, the accounts of other witnesses called by Mr Roberts-Smith in relation to the engagements were themselves implausible or contradicted by other evidence, and do not provide any support for Mr Roberts-Smith’s account:

- (a) In relation to Person 5’s evidence, it was not just his evidence that Mr Roberts-Smith’s contemporaneous account was that EKIA 56 and EKIA 57 were “squirters” who were “running away” from the compound that contradicts the version now propounded by Mr Roberts-Smith:⁴³⁸
 - (i) Person 5’s evidence that he heard the engagements during the commanders’ rendezvous, and then ran outside, before returning to provide an update, was not put to Person 43, and was contradicted by both Person 29 and Person 81.⁴³⁹ This is not an example of the kind of difference between the evidence of different witnesses that is capable of explanation as honest misrecollection. It is only explicable as a lie, borne out of a recognition of the need to explain how his friend’s version could be reconciled with events inside the compound.
 - (ii) Person 5’s account of the aftermath of the asserted engagement, including the lengthy presence of Mr Roberts-Smith and Person 4 outside the corner of the compound and in the presence of the bodies was inconsistent with Mr Roberts-

⁴³² See T.134/13-17 (BRS); T.1652/26-27 (P14); T.5651/30-32 (P11); T.5863/35-38 (P32); T.5937/17-22 (P38); T.6174/5-12 (P81).

⁴³³ T.5059/8-20 (P5).

⁴³⁴ T.5548/34-5550/14 (P29).

⁴³⁵ T.5296/40-47 (P35).

⁴³⁶ T.5550/16-29 (P29).

⁴³⁷ T.171/41-172/7; T.527/19-528/17 (BRS); Ex R-4; T.4875/43-47, T.4876/27-28, T.4879/6, T.4923/22-24, T.5047/8-10 (P5); See, e.g., T.5550/31-37 (P29).

⁴³⁸ T.5047/19-21 (P5).

⁴³⁹ T.5529/32-45 (P29), T.6159/47, T.6179/30-34 (P81).

Smith's evidence that he had no idea who the other shooter was, and returned immediately to inside the compound. Furthermore, Person 5's evidence of seeing the body of EKIA 56 moved to a position in close proximity to EKIA 57 was not supported by any other evidence (except Mr Roberts-Smith's evidence on 17 June 2021 before he recanted it the next day).

- (b) Person 29's evidence was that he heard a radio call while he was helping Person 35 clear the tunnel reporting engagements outside the compound.⁴⁴⁰ The fact that he did not hear the engagements himself, when Mr Roberts-Smith was using an unsuppressed Minimi,⁴⁴¹ is inherently implausible if he was in the tunnel courtyard. He also said that while he couldn't recall "specifically", he was "sure" that Person 81 reported the engagements to the commanders' rendezvous.⁴⁴² That evidence was, of course, contradicted by Person 81 who did not recall receiving any reports of engagements at W108.⁴⁴³
- (c) Person 35's evidence was notable for its emphasis on the singular proposition that no men were found in the tunnel. He could not recall hearing any Minimi fire, and could not recall seeing any bodies. His evidence provided no support for Mr Roberts-Smith's version, other than the false denial of any men in the tunnel. In so confining his evidence, he avoided the risk (that befell Mr Roberts-Smith's other witnesses) that his positive lie would be inconsistent with objective or other testimonial evidence. But its silence on these matters is equally problematic for Mr Roberts-Smith.
- (d) On Person 38's account, at the exact point in time that Mr Roberts-Smith says he had the engagement (ie, within 10-20 minutes after the discovery of the tunnel⁴⁴⁴), Person 38 and Person 41 would have been in the precise area from which Mr Roberts-Smith said that the two insurgents appeared (i.e., the area directly to the north of the tunnel courtyard). Thus, not only did Person 38 not hear the engagements (hearing no Minimi fire, only "single shots or ... at most, double taps"⁴⁴⁵), his very presence is inconsistent with Mr Roberts-Smith's case. Of course, the Respondents do not contend that Person 38 is telling the truth. The inconsistency between his evidence and Mr Roberts-Smith's evidence rather confirms that, in the attempt to explain away two unlawful killings, they have *both* lied.

171. Overall, it is submitted that the account of the engagement of EKIA 56 and EKIA 57 outside the northwest corner of W108 given by Mr Roberts-Smith is inherently implausible, and his not supported by the evidence of any other witness. It is not consistent with the contemporaneous reporting of the killings, which were themselves an attempt to conceal unlawful executions.

The Respondents' witnesses' account of the killing of EKIA 57

172. In contrast to the implausible account of Mr Roberts-Smith, the Respondents' witnesses

⁴⁴⁰ T.5478/1-3 (P29).

⁴⁴¹ T.435/36-47 (BRS); T.1358/11-17, 1359/46-1360/5 (P41); See, e.g. T.1602/21-22 (P14).

⁴⁴² T.5539/26-28 (P29).

⁴⁴³ T.6160/1-2, T.6170/27-33 (P81).

⁴⁴⁴ T.5950/33-34, T.5954/26-29 (P38).

⁴⁴⁵ T.5954/23-24, T.6006/5-6007/8 (P38).

provided a coherent account, from several different vantage points, of the unlawful killing of EKIA 57. The first group of witnesses (Persons 40 and 41) were located around the animal sheds just outside the western wall of the compound. The second group (Persons 14 and 24) were located in the cordon off the north-western corner of the compound. The coherence of the account from those two different groups of witnesses (especially in circumstances where there is not suggested to be any collusion between them) is a powerful indicator of the veracity of their evidence.

Person 41

173. After Person 41 had looked at the body of the old man dressed in white, he walked off to the exit towards the north-western side of the compound, along the dotted line he marked on Ex R-92, and stopped on a footpad on his way to the buildings he marked F.⁴⁴⁶ He was trying to decide whether he should walk on the grass or the footpad when he saw Mr Roberts-Smith out of the corner of his eye. He saw Mr Roberts-Smith approximately at the point he marked G on Ex R-92. Mr Roberts-Smith was about five metres away from him.⁴⁴⁷

174. Person 41 described that Mr Roberts-Smith was holding another Afghan male, who was wearing a dark-coloured top, by the scruff of his clothing (the equivalent of a shirt collar area around near the shoulder) with his left arm.⁴⁴⁸ Mr Roberts-Smith was holding his weapon in his right hand.⁴⁴⁹ He gave evidence as follows:⁴⁵⁰

I turned to face RS to see what was happening. He then proceeded to throw the Afghan male down onto the ground. The Afghan male landed on his back. RS then reached down, grabbed him by the shoulder, flipped him over onto his stomach, and then I observed him lower his machine gun and shoot approximately three to five rounds into the back of the Afghan male. After he had done that, he looked up and saw me standing there, and he looked at me and said, "Are we all cool? Are we good?" And I just replied, "Yeah, mate, no worries." I continued to look at him. He then stood up and walked past me and went back into the exit that I had come towards the courtyard.

175. Person 41 recognised EKIA 57 as the person that he saw shot by Mr Roberts-Smith outside the compound.⁴⁵¹

176. Person 41 did not recall seeing anyone else around this area until he ran into Person 40 and had the conversation referred to above, although he accepts it is possible that there were other members of the patrol there that he did not see.⁴⁵²

177. In terms of the challenge to Person 41's evidence in this regard:

(a) There did not appear to be any challenge to his evidence that he was near the animal

⁴⁴⁶ T.1239/19-30 (P41).

⁴⁴⁷ T.1240/20-1241/15 (P41).

⁴⁴⁸ T.1241/17-26; 1359/14-22 (P41).

⁴⁴⁹ T.1359/4-10 (P41).

⁴⁵⁰ T.1241/28-40 (P41).

⁴⁵¹ T.1242/1-5 (P41).

⁴⁵² T.1314/4-35 (P41).

sheds at the time Mr Roberts-Smith shot EKIA 57 outside the northwest corner of W108. He was asked whether he saw Mr Roberts-Smith's engagement, but that question seemed to be concerned with what he witnessed while he was at the animal sheds, not with challenging his presence in that area.⁴⁵³ It is certainly the case that it was never put to him, consistently with the evidence of Person 38, that he was clearing an orchard on the northern side of the compound. By reason of that failure to comply with the rule in *Browne v Dunn*, Person 41's evidence that he was present at the animal sheds would never be rejected on the basis that Person 38's evidence should be preferred.

- (b) The failure to challenge Person 41's evidence that he was present near the animal sheds at the time Mr Roberts-Smith points to a far more significant failure to comply with the rule in *Browne v Dunn*: namely, the failure to put to Person 41 what Mr Roberts-Smith contends were the circumstances of the *actual* engagement outside W108. The failure to do so deprived Person 41 of the opportunity of explaining why such an engagement could not have happened. It is a failure that means that the Court should accept the evidence of Mr Roberts-Smith over that of Person 41.
- (c) The Court is thus left in the unsatisfactory position of it having been put to Person 41 that his account was false, but without what are contended to be the true facts having been put.⁴⁵⁴ It is submitted that in those circumstances, the only submission that is open to Mr Roberts-Smith is one that Person 41's evidence (when considered in light of all the other evidence relied upon by the Respondents) is incapable of supporting a finding for the Respondents on the balance of probabilities. For the following reasons, such a submission should not be accepted.
- (d) The principal basis upon which Person 41's evidence in relation to this topic was sought to be discredited in the cross-examination was the contention that if EKIA 57 had in fact been executed by Mr Roberts-Smith, then Person 41 would not have drunk from his prosthetic leg.⁴⁵⁵ The first matter to note in that regard, of course, is that it is not capable of explaining why Person 41 might have later manufactured a story about seeing Mr Roberts-Smith execute the man. No explanation (other than the one discussed above about not "cutting it" at W108) for why Person 41 might have fabricated his evidence was identified, and it is submitted that there is no basis for finding that he did. As to the asserted incongruity of drinking from the prosthetic leg of a man he knew to have been unlawfully killed, Person 41 stated that "everyone was all in it together and it was almost like an amusing thing to do".⁴⁵⁶ He acknowledged that it was wrong, and that he now felt ashamed of it.⁴⁵⁷ It is submitted that in the circumstances of the culture of the SASR, and especially Person 41's status as a junior trooper at the time,⁴⁵⁸ that the fact he drank from the leg does not cast any real doubt over the accuracy of his evidence. Indeed, the fact that he had drunk numerous

⁴⁵³ T.1358/11-15 (P41).

⁴⁵⁴ See T.1360/27-1362/22 (P41).

⁴⁵⁵ T.1361/22-1362/22 (P41). See also T. 1324/38-1325/32 (P41).

⁴⁵⁶ T.1324/41-42 (P41).

⁴⁵⁷ T.1324/19-42, T.1325/3-6, T.1362/13-20 (P41).

⁴⁵⁸ See, e.g., T.1242/28-30 (P41).

times from the leg might be thought to provide an incentive to say that the man had been engaged *lawfully*.

- (e) The cross-examination also probed the fact that Person 41 had not reported the fact that he had witnessed a war crime to his superiors.⁴⁵⁹ Person 41 provided a convincing explanation of his failure to report, namely, “because [he] wanted to keep [his] job, and [he] was afraid what would possibly happen to [him] if [he] was seen to be the bloke who was speaking out about incidents and not playing the team game”.⁴⁶⁰ He said there was an “unwritten rule [that] you just go along with whatever happens”.⁴⁶¹ Once again, however, it may be observed that the fact he did not report something he would have been obliged to report makes it objectively *less* likely that he would subsequently invent a false story which would involve him in his own wrongdoing.
- (f) Finally, perhaps the most powerful argument in favour of the credibility of Person 41’s evidence is its consistency with the evidence of Person 14 and Person 24. There was absolutely no suggestion of collusion (and it would need to be collusion because there can be no credible suggestion of innocent fabrication on the part of Person 41) between the evidence of those witnesses and Person 41. There is thus no explanation for how Person 41 could have concocted a story that matches the evidence of other witnesses.

178. It is thus submitted that there is no reason to doubt the honesty of Person 41, nor the substance of his evidence.

Person 40

179. About 20 to 25 minutes after Person 40 saw the PUCs marched off by Mr Roberts-Smith and Person 35 as described above, whilst he was in the position marked A on Ex R-137, Person 40 heard a burst of machine gun fire from a Minimi. Person 40 was facing out and the sound came from his right side, maybe about 30m from him.⁴⁶² He said there was some confusion, with radio chatter saying “What was that? Where did that come from”.⁴⁶³

180. Person 40 was not challenged in any way on that part of his evidence. It may be accepted that, in and of itself, Person 40’s evidence is consistent with *both* the Respondents’ case and Mr Roberts-Smith’s case. But only to a point. Person 40 only gave evidence that he heard a burst of machine gun fire. He did not give evidence of hearing either suppressed or unsuppressed fire from an M4.⁴⁶⁴ A number of witnesses gave evidence that even a suppressed M4 makes a noise that is capable of being heard by those in the vicinity.⁴⁶⁵ If

⁴⁵⁹ T.1264/37-1265/5 (P41). See also T.1249/23-28, T.1251/41-1252/7, T.1252/43-1253/1, T.1292/34-1295/5 (P41).

⁴⁶⁰ T.1364/20-22 (P41). See also T.1293/40-1294/5, T.1294/22-28 (P41).

⁴⁶¹ T.1242/29-30 (P41).

⁴⁶² T.3267/15-3268/11 (P40).

⁴⁶³ T.3268/20-23; 3269/18-20 (P40).

⁴⁶⁴ Assuming the second shooter in Mr Roberts-Smith’s account to have been Person 4, then the evidence is that his weapon would have been unsuppressed: T.2997/13-29 (P18); CCT 9.3.22 p.2/8-3/8 (P18); See R-135 (a closed court exhibit). In any event, even if the weapon was suppressed, the evidence was that a distinct and audible noise is still made: See, e.g. T.1602/36-1603/4 (P14); T.1303/6-10 (P41); T.3094/26-28 (P18).

⁴⁶⁵ T.1303/6-10; T.1307/36-46; T.1350/34-37 (P41); T.3094/26-28 (P18).

the engagement had occurred in the manner described in Mr Roberts-Smith's evidence, then Person 40 should have been in a position to hear that second engagement. The failure to put Mr Roberts-Smith's case can only be interpreted as driven by fear that the witness would convincingly reject it.

Person 14

181. Person 14 was located in the cordon (as discussed above) and gave evidence that:⁴⁶⁶

I was looking towards Whisky 109 and I heard, like, noises to my right, which was similar to stomping or heavy footsteps, and a little bit of, you know, chatter, like some kind of people talking. Wasn't clear to me. But anyway, it – it caught my attention, obviously, and as I turned to my right – my head, only my head to my right – there was, like, three Australian soldiers, and a black object which was, like, similar to a human was – was thrown to the ground, and there was, like, a – a thud when the – when that person hit the ground. There was a - that kind of noise, expulsion of air when someone is kind of winded, and – then a soldier raised their Minimi F89 Para and fired, like an extended burst. It was loud; it was, like [Person 14 then impersonated a machine-gun burst] one second, and I was like, "Okay." And that person turned and walked away out of sight back into Whisky 108, which was – walked towards – on this one, point A.

182. He marked the point he saw what looked like a human body thrown on the ground with an E on the second page of Ex R-98.⁴⁶⁷ The reference to "point A" in the passage just quoted was to page one of Ex R-98.⁴⁶⁸

183. Person 14 did not recognise who the soldier who fired the Minimi was, but observed that in addition to carrying that distinctive weapon, he was wearing distinctive cam paint of grey / brown which Person 14 understood to be associated with Person 5's patrol.⁴⁶⁹ There is no dispute that Mr Roberts-Smith was carrying the Minimi in Person 5's patrol on that day. Further, grey cam paint can be seen on Mr Roberts-Smith's face on page 25 of Ex R-18.⁴⁷⁰

184. Person 14 did not recognise the other two soldiers, but one was wearing the same or similar cam style paint.⁴⁷¹ He said that they were standing there, observing.⁴⁷² It is possible that one of the soldiers who Person 14 observed was Person 41 in light of Person 41's evidence summarised above. It may also be noted that Person 40 was, on his own account, present in that same general area.⁴⁷³ It was put to Person 14 that Person 29's patrol also used the same cam paint as Person 5's patrol, a proposition Person 14 accepted as possible.⁴⁷⁴

⁴⁶⁶ T.1414/20-31 (P14).

⁴⁶⁷ T.1414/40-42 (P14).

⁴⁶⁸ T.1414/28-34 (P14).

⁴⁶⁹ T.1415/5-39 (P14).

⁴⁷⁰ See also Person 27's evidence that custom cam paint, other than the supplied green and brown, could be bought by people with their own money.

⁴⁷¹ T.1416/29-31 (P14).

⁴⁷² T.1622/38-42 (P14).

⁴⁷³ See Ex R-137 and Ex R-98 (Person 40 marked his location when he left the courtyard and was waiting for extraction with the letter A on Ex R-137, which corresponds with Person 14's marking of E on page 2 of R-98); T.3267/5-33 (P40).

⁴⁷⁴ T.1733/10-11 (P14).

185. Person 14 recalls turning to his 2IC, Person 73, and saying “What the hell was that?” . He recalled that Person 73 shrugged his shoulders and nodded his head.⁴⁷⁵
186. While it was put to Person 14 that his evidence in relation to the killing of EKIA 57 was false,⁴⁷⁶ no persuasive or coherent theory as to *why* he would have made up such a lie was developed, nor *how* that lie was consistent with the accounts of other witnesses (such as Person 41 and Person 24). There were a variety of topics relevant to Person 14’s evidence in relation to EKIA 57, and his credit generally, that were explored in cross-examination:
- (a) A range of asserted “inconsistencies” between the outline of evidence filed in relation to Person 14 and his evidence were put to him.⁴⁷⁷ None of those matters could fairly be described material. For example, the Outline referred to Person 14 as having seen a soldier throw a “dark object”, but in his evidence Person 14 added that the dark object looked “similar to a human”.⁴⁷⁸ To take another example, the Outline referred to the dark object being thrown “from shoulder height”, whereas Person 14 said it was thrown from “somewhere between the knee and the waist”.⁴⁷⁹ Some were particularly trivial. For example, while the outline referred to Person 14 observing an Australian soldier “throw a dark object”, in his evidence Person 14 said the object was “black”.⁴⁸⁰ Overall, it is submitted that none of the matters raised with Person 14 in relation to his Outline are capable of casting any doubt over his honesty, or the reliability of the substance of his evidence. If nothing else, it was apparent that the document was not prepared by Person 14, and not approved by him before it was finalised. When he read it after it had been finalised, it was clear he did not read it closely in order to approve it, and simply regarded it as being “close enough”.⁴⁸¹
 - (b) Person 14 was also cross-examined by reference to notes taken by Mr Masters at a meeting on 27 February 2018.⁴⁸² A particular focus was the final paragraph on the first page of Ex A-63, which said “R-S had an M-14 and [Person 4] a Minimi. Understood [Person 4] had shot an old guy with a prosthetic leg.”⁴⁸³ Person 14 agreed that “on the ground” he had thought that Person 4, as the “junior soldier”, was carrying the Minimi.⁴⁸⁴ Consistently with his earlier evidence, though, he said that he “later came to learn who was carrying the Minimi”.⁴⁸⁵ Person 14, however, denied that the notes in all respects accurately recorded what he had told Mr Masters.⁴⁸⁶ In particular, he denied telling Mr Masters that it was Person 4 who shot the man with the prosthetic leg.⁴⁸⁷ It is clear on their face that the notes are a very abbreviated summary of what was said at the meeting, do not purport to be a transcript, and also incorporate

⁴⁷⁵ T.1416/45-1417/2 (P14).

⁴⁷⁶ T.1779/16-1780/46 (P14).

⁴⁷⁷ Ex R-96.

⁴⁷⁸ T.1507/1-1508/18 (P14).

⁴⁷⁹ T.1508/43-1509/16 (P14).

⁴⁸⁰ T.1508/20-41 (P14).

⁴⁸¹ T.1513/46-1514/31 (P14).

⁴⁸² See T.1781-1795 (P14). The notes are Ex A-63.

⁴⁸³ See T.1789/12-1790/37, T.1794/18-33 (P14).

⁴⁸⁴ T.1789/16-46 (P14).

⁴⁸⁵ T.1789/46 (P14).

⁴⁸⁶ See, e.g., T.1794/10-1795/23, T.1799/11-16 (P14).

⁴⁸⁷ T.1790/1-30 (P14).

Mr Masters' own impressions on the subject matter. Overall, it is submitted that there is no reason to doubt Person 14's evidence that they do not accurately capture the complexity of his account (being an initial assumption that the shooter was Person 4, and then a later realisation that it was Mr Roberts-Smith).

- (c) It was put to Person 14 that he had doubts about Mr Roberts-Smith's Victoria Cross (which he admitted was true⁴⁸⁸), and was jealous of Mr Roberts-Smith (which he denied⁴⁸⁹). It was never put to Person 14 that, as a result of his alleged jealousy, he had told a lie about what happened at W108. And, in any event, it is submitted that jealousy about a medal could never be an adequate explanation for such an extreme step as making up a false account of a war crime.
- (d) Person 14 was also cross-examined extensively on his contact with journalists. Except to the extent discussed above (i.e., concerning asserted inconsistencies between the version of events told to journalists compared to his evidence in Court), Person 14's dealings with journalists are irrelevant to any matter of substance, or his credit, in this case. It is accepted, however, that Person 14 was to start with not completely honest in answering questions about his dealings with journalists. That lack of candour must, however, be viewed in the context of the clear reluctance of Person 14 to speak about that topic (as evidenced by his unwillingness to answer questions on that topic, even with the protection of a s. 128 certificate).⁴⁹⁰ As he candidly accepted, he was also dishonest about his contact with the media when asked by the Australian Defence Force.⁴⁹¹ Person 14 explained that the reason he had been untruthful with the Australian Defence Force was because he was focused on self-preservation, security and safety, because in that period of time people who were seen to have spoken to the media were being targeted, and that there was a quick turnaround for the record of conversation and he was under a lot of pressure.⁴⁹² The record of conversation was conducted with the unit at short notice in an attempt to determine who had disclosed information to the media about an address given to the unit by SOCAUST.⁴⁹³ It is clear from the evidence that there was a very strong feeling within the regiment against members who had spoken to the media.⁴⁹⁴ In those circumstances, it is apparent that his lack of complete honesty was confined to a discrete topic, of no substantive relevance to these proceedings, in circumstances where there were particular reasons for him to fear personal and professional consequences if he were to speak candidly. It is thus submitted that Person 14's initial lack of complete candour about his contact with journalists does not provide a basis not to accept his evidence on other issues.

187. Overall, that Person 14 was not seeking to dishonestly implicate Mr Roberts-Smith in a crime is supported by the fact that Person 14 was candid about the limits of his observations,

⁴⁸⁸ See, e.g., T.1456/3-7, T.1571/37-1573/33, T.1574/45-1578/5 (P14).

⁴⁸⁹ T.1799/21-32 (P14)

⁴⁹⁰ T.1488/20-21 (P14).

⁴⁹¹ CCT 9.2.22, T.9/4-10/8 (P14).

⁴⁹² CCT 9.2.22, T.10/13-20; 14/9-28 (P14).

⁴⁹³ CCT 10.2.22, T.8/44-9/26 (P14);

⁴⁹⁴ See, for example, T.3845/24-37; 3849/36-38 (P7).

including in relation to such critical matters as the identity of the soldier he saw shoot EKIA 57. That is to say, Person 14 was very clear that not only could he not identify the soldier who shot EKIA 57, he could not even say that the Minimi he saw Mr Roberts-Smith carrying at the VDOP was the Minimi used to shoot him.⁴⁹⁵ Had Person 14 in fact been attempting falsely to implicate Mr Roberts-Smith in a war crime, it would have been expected that his testimony would have done so directly. Finally, there is no explanation for how the evidence of Person 14 is so consistent with that of Person 41, other than that both are true.

188. In addition, the Court may more comfortably accept Person 14's evidence in circumstances where Mr Roberts-Smith's version of the engagement of EKIA 57 was not put to him. On Person 14's unchallenged evidence as to his location, he would have been perfectly placed to observe the engagement of both EKIA 56 and EKIA 57 if Mr Roberts-Smith's account was correct. The failure to put that account to Person 14 deprived him of the opportunity of providing a detailed rejection of it. It may be inferred that the account was not put to Person 14 for fear of what would be said about it.

Person 24

189. Person 24 saw Mr Roberts-Smith walk out of the compound at the spot he marked B on Ex R-141, carrying a man who was making a grunting noise, and carried him to the point he marked C where he shot him with about eight to ten rounds of machine gun fire.⁴⁹⁶ He could tell it was Mr Roberts-Smith based on the size and shape of the man and the gait with which he walks.⁴⁹⁷ Person 24 described what he observed as follows:⁴⁹⁸

At this stage, he was holding a man in his hand. It appeared that he had come off his feet and he was being held parallel to the ground. He was held by the pants or the back of the shirt.⁴⁹⁹ He marched approximately 15 metres directly out from that entrance, dropped the man on the ground and immediately began with a machine gun burst into his back.

190. Person 24 said that Mr Roberts-Smith stopped firing because the gun had a stoppage. Mr Roberts-Smith then immediately turned back towards the entrance of the building and started walking back the way he came, rectifying the stoppage as he was moving, and went back inside the compound.⁵⁰⁰ Person 24 said to Person 14 "Did we just witness an execution".⁵⁰¹ Person 24 later saw the body, and identified the person in Ex R-7 as the man who was shot by Mr Roberts-Smith.⁵⁰²

191. There were two broad themes to the challenge to Person 24's evidence:

- (a) The first was concerned with his mental health and the effect that, and his medication, had on his memory.⁵⁰³ Person 24 accepted that for a time he had memory issues,

⁴⁹⁵ T.1521/7-25, T.1780/25-27 (P14).

⁴⁹⁶ T.3450/10-17; 25-37 (P24).

⁴⁹⁷ T.3489/1-18 (P24).

⁴⁹⁸ T.3450/18-23 (P24).

⁴⁹⁹ In cross-examination he clarified that he was referring to the "lower back region": T.3477/18-23 (P24).

⁵⁰⁰ T.3450/39-3451/1 (P24).

⁵⁰¹ T.3451/6-7 (P24).

⁵⁰² T.3452/1-25 (P24).

⁵⁰³ See, e.g., T.3468/32-3470/16, 3494/1-12, T.3544/34-3546/2, CCT 15/3/22 T.16-20 (P24).

and that he has “difficulty recalling some events from [his] time in Afghanistan”.⁵⁰⁴ But he said that since 2017 his memory has improved,⁵⁰⁵ and in any event he said that he did not find it difficult to recall “watching an execution”.⁵⁰⁶ Ultimately this challenge is not capable of undermining Person 24’s evidence on any matter of importance.⁵⁰⁷ No expert evidence was adduced to prove a causal relationship between Person 24’s health and his ability to give honest and accurate evidence. To the extent that Person 24’s memory on matters of detail may be deficient, there was no suggestion that he misremembered or otherwise imagined any of the key events the subject of his evidence. If Person 24’s evidence is to be challenged, it could only be on the basis of deliberate dishonesty.

- (b) The second challenge was an outright attack on the honesty and truthfulness of his evidence about seeing Mr Roberts-Smith carry a man, throw him on the ground, and shoot him.⁵⁰⁸ A significant part of that attack involved a suggestion that Person 14 had, in effect, told him what to say, and that he was simply giving evidence to “back up” Person 14.⁵⁰⁹ It is necessary to deal with that attack in Closed Court Submissions. See paragraphs A11 to A14 of the Respondents’ Closed Court submissions. Ultimately, though, it is submitted that Person 24 persuasively rejected the suggestion that his evidence was fabricated.

192. As a general matter, it is very difficult for Mr Roberts-Smith to attribute any convincing motive to lie to Person 24. It was apparent that Person 24 felt a great deal of sympathy for Mr Roberts-Smith, both in terms of the things that Person 24 saw him do, and the general situation in which he found himself. He did not “want to be here” and found it “extremely difficult to stomach having to give evidence against” Mr Roberts-Smith.⁵¹⁰ Person 24 referred on multiple occasions to how unfair he considered the media and other scrutiny of Mr Roberts-Smith to be.⁵¹¹ He openly stated that he had “no qualms” about what happened to EKIA 56 and EKIA 57.⁵¹² His concern was only for those Australian soldiers who he thought had been adversely affected by being blooded; and in particular Person 4.⁵¹³ It was thus apparent that Person 24 was giving evidence in relation to the killing of EKIA 57 (a killing in which Person 4 was not involved) most reluctantly. His “support” for Person 4 thus involved nothing more than telling the truth.

193. The suggestion that Person 24 was giving evidence merely to “back up” Person 14 should be rejected. As dealt with below, on some important details their evidence differs. Those differences are consistent with honest differences in recollection; they are difficult to reconcile with a dishonest attempt to give corroborative evidence. In any event, it is

⁵⁰⁴ CCT 15/3/22 T.17/22-25 (P24).

⁵⁰⁵ CCT 15/3/22 T.17/27-37 (P24).

⁵⁰⁶ T.3524/36-37 (P24).

⁵⁰⁷ See also Person 31’s evidence that Person 24 told him a private conversation that he had witnessed Mr Roberts-Smith engage an Afghan at W108. This conversation took place whilst they were both still serving in the regiment: T4655/44-4656/15 (P31).

⁵⁰⁸ See, e.g., T.3453/12-25, T.3475/30-3476/27, T.3479/5-15, T.3565/10-18, T.3566/38-3567/6 (P24).

⁵⁰⁹ See, e.g., T.3467/40-3468/27, T.3479/5-11, T.3488/3-29, T.3534/36-43, T.3535/10-11; T.3567/8-19 (P24).

⁵¹⁰ T.3572/11-14 (P24).

⁵¹¹ T.3460/23-26, T.3485/38-39, T.3523/28-31 (P24).

⁵¹² T.3463/31-33 (P24). See also T.3516/18-20 (P24).

⁵¹³ T.3463/33-39 (P24).

important to note that Person 24's evidence is not just consistent with that of Person 14. It is also consistent with Person 41. There has been no suggestion whatsoever of any friendship, let alone collusion, between those two witnesses.

194. Finally, as with Persons 14, 40, and 41, no attempt was made to put Mr Roberts-Smith's version of the engagement that occurred outside the compound to Person 24. As with those other witnesses, the failure to do so deprived Person 24 of the opportunity to give a detailed explanation of why that account could not have occurred. Once more, therefore, it may be inferred that Mr Roberts-Smith feared what Person 24 would have been able to say.

Analysis of Respondents' Witnesses' Evidence

195. In circumstances where Mr Roberts-Smith's account was not put to the Respondents' witnesses, it is submitted that the Court should not accept his evidence over theirs. The question is simply whether the evidence of those witnesses is capable of discharging the Respondents' onus of proof.
196. It is anticipated that Mr Roberts-Smith will contend that differences between the accounts of Persons 14, 24 and 41 mean that the Court could not be satisfied on the balance of probabilities that Mr Roberts-Smith executed EKIA 57. There are perhaps six differences each of which is dealt with below. As a general proposition, however, it is submitted that none of those differences are anything other than the expected variation between honest recollections of an event occurring more than a decade ago. The differences are:
- (a) Where Mr Roberts-Smith was holding EKIA 57. As identified above, Person 41 observed Mr Roberts-Smith to be holding EKIA 57 by the scruff of his clothing (i.e., the collar/shoulder area). Person 24, on the other hand, said that he was holding his clothing in the region of his lower back. Person 14 did not say that he saw where EKIA 57 was being held. It is submitted that those differences are immaterial in the context of witnesses viewing the, on any view, rough manhandling of a struggling PUC, from different directions and at different distances. What is more significant is that both Person 41 and Person 24 recalled Mr Roberts-Smith holding EKIA by his clothing at the back.
 - (b) Whether Mr Roberts-Smith "flipped" EKIA 57. Person 41's evidence was that Mr Roberts-Smith threw EKIA 57 down where he landed on his back, and Mr Roberts-Smith turned him over before shooting him in the back. Person 24's evidence was that Mr Roberts-Smith threw the man on the ground and immediately shot him in the back. Person 14's evidence was silent on this point. Once again, in the context of recollections from different perspectives and distances, of an event that was fast moving and involved a struggling man, it is submitted that this difference is of no real significance. Once again, it is perhaps more telling that independent witnesses both say they saw Mr Roberts-Smith shoot a man in the back.
 - (c) The number of rounds fired by Mr Roberts-Smith. Person 14 said he heard an "extended burst" of Minimi fire, which he estimated to be 10 to 15 rounds.⁵¹⁴ Person 24

⁵¹⁴ See T.1509/23-1510/10 (P14).

estimated 8 to 10 rounds.⁵¹⁵ Person 41 estimated 3 to 5 rounds.⁵¹⁶ Person 40 did not say how many rounds were in the burst of Minimi fire that he heard. All of those estimates need to be considered, not just in the context of natural variation in memory, but in the context of the difficulty in estimating the number of rounds given the rate of fire of a Minimi.⁵¹⁷ With those considerations in mind, the differences in the witnesses' accounts are immaterial. That is particularly so when it is recalled that it is uncontroversial that Mr Roberts-Smith did fire a burst from his Minimi outside W108. There is no real significance to the number of rounds that were fired, and for that reason any difference between the witnesses could only be regarded as honest. On the topic of the Minimi, to the extent that Mr Roberts-Smith will submit that all of the witnesses' evidence is implausible because they all observed a burst longer than 2 to 3 rounds, and all observed him firing the gun with one hand, that submission should be rejected. The cross-examination on those topics was directed to the correct operation of a Minimi in ordinary battle conditions. Those standard procedures have no application to an illegal murder.

- (d) Whether Mr Roberts-Smith had a stoppage. Person 24 recalled that Mr Roberts-Smith had a stoppage after he fired the burst from the Minimi. Person 14 did not recall a stoppage.⁵¹⁸ The evidence of Person 40 and Person 41 was silent on the topic. This again is a minor detail that could easily have been forgotten. It must also be recalled that Mr Roberts-Smith says that he had a stoppage in his engagement outside W108.⁵¹⁹ This difference is, once more, submitted to be immaterial.
- (e) How many other soldiers were in the vicinity. Person 14 said he could see three soldiers in the vicinity of EKIA 57. Person 41 said he could see no one other than Mr Roberts-Smith. Person 24's evidence was to the same effect.⁵²⁰ Those differences are likely to be a product of either or both of different witnesses observing events from different perspectives, or different memories as a result of the natural tendency to focus on the most arresting event (namely, the execution of an unarmed man).
- (f) Who said what to whom in the cordon. Person 14 recalls saying "What the hell was that?" to Person 73. Person 24 recalls asking "Did we just witness an execution?" to Person 14. It is possible that both witnesses' evidence is correct. It is possible that they are both recalling the same comment, but remembering the precise words, and who said what to whom differently. On any view, such a difference does not provide a reason for rejecting either witnesses' account generally.

197. Any perceived differences pale in comparison to the significant and substantial similarities on the critical facts. *First*, each of Persons 14, 24 and 41 observed a PUC being forcibly and aggressively moved in an area outside the northwest part of W108. *Second*, they each heard, together with Person 40, an extended burst, from a machine

⁵¹⁵ T.3450/34-37 (P24).

⁵¹⁶ T.1241/28-40 (P41).

⁵¹⁷ Person 5 said that the maximum rate of fire of the Minimi is somewhere between 700 to 1100 rounds a minutes, so it's firing somewhere between 9 and 13 rounds a second:T.5112/43-5113/5 (P5).

⁵¹⁸ T.1622/23-25 (P14).

⁵¹⁹ T.171/41-172/7 (BRS).

⁵²⁰ T.3451/3-4 (P24).

gun. *Third*, they each witnessed a soldier (who Person 41 and 24 identified as Mr Roberts-Smith) fire a burst of machine gun fire into the body of a human being outside the northwest corner of W108. It is impossible that they have each independently imagined or misremembered that collection of critical facts; nor is there any evidence before the court which establishes that these three individuals have ever colluded. In the case of Person 41, there is no evidence that he has ever spoken to *anyone* in the SAS about this event, such that it could be said their accounts are the product of collusion.

198. Overall, it is submitted that the evidence of Persons 14, 24, 40 and 41 comfortably proves to the required standard that:
- (a) Mr Roberts-Smith forcibly moved EKIA 57 from inside the compound to an area just outside the northwest corner;
 - (b) Mr Roberts-Smith threw EKIA 57 onto the ground;
 - (c) Mr Roberts-Smith fired an extended burst from his Minimi into the back of EKIA 57, killing him.

Conversation between Mr Roberts-Smith and Person 5 regarding the ISR

199. Before moving to W109, a thorough SSE process was undertaken at W108. After he finished helping Person 35 clear the tunnel, Person 18 moved back to the area on the western side of the compound that he had previously been searching.⁵²¹ At some point after that, he was searching a room in the vicinity of the point marked “B” on Ex A-117.⁵²² Mr Roberts-Smith and Person 5 were standing right outside that room, at the point he marked “H” on Ex A-117.⁵²³ Person 18 was no more than three metres away from them, and could see them side on.⁵²⁴
200. At that point he heard a conversation between them in which Person 5 said words to the effect “You’ve just done this – done this whilst the ISR is still flying above and may have recorded you”. Mr Roberts-Smith responded “We need to find out if the ISR was still above us”. Person 5 then sent a message on the troop internal chat to the JTAC to ask “Where the ISR platform was and was it recording?” The JTAC replied with words to the effect “No. He pushed the ISR off station after we made entry and was – and pushed into another area that was a threat area.”⁵²⁵
201. It was put to Person 18 that the conversation between Person 5 and Mr Roberts-Smith was “just something [he’d] made up”, which he denied.⁵²⁶ The only reason suggested to him as a reason why he would make it up was that he wanted to “add to the rumour” about W108.⁵²⁷ But Person 18’s evidence was that he had not mentioned that conversation to anyone before

⁵²¹ T.3014/10-11, T.3132/15-20 (P18).

⁵²² T.3133/40-3134/30 (P18).

⁵²³ T.3133/44-46, T.3134/35-38 (P18).

⁵²⁴ T.3136/27-36 (P18).

⁵²⁵ T.3014/13-23; 3136/38-3137/16 (P18).

⁵²⁶ T.3146/25-26 (P18).

⁵²⁷ T.3146/28 (P18).

the time he “commenced [his] first inquiry interview” in 2018.⁵²⁸ While he conceded that he could not rule out the possibility that he had mentioned it to someone, he could not remember doing so.⁵²⁹ No witness said that he had mentioned it to them, and indeed, the only evidence of the conversation came from Person 18 himself. In those circumstances, the suggestion that Person 18 made up the conversation to add to the “rumour club” is implausible. Person 5’s denials, on the other hand, were implausible, and plainly motivated by his interest in denying the commission of war crimes at W108.⁵³⁰

202. This conversation in relation to the ISR platform is only explicable as an expression of concern on the part of Person 5 that the unlawful killing of EKIA 57, outside the compound, may have been recorded. That Person 5 would have had that concern is consistent with the fact that he was aware that the “TIC” was open, and one reason to leave the TIC open was to “get assets above you”.⁵³¹ He believed that the ISR was operating in the vicinity of W108 and W109 (which were only a short distance apart) during the clearance of W108, including “looking for threats coming in towards the compound”.⁵³² Although he quibbled with the quality of the imagery provided by ScanEagle drones,⁵³³ he acknowledged that at least in cleared areas such as tracks, it would pick up potential threats moving towards the compound.⁵³⁴ It follows that a concern that the ISR platform may have recorded an execution in a cleared area just outside the compound was consistent with Person 5’s understanding of the situation on the ground at W108.

203. The terms of the conversation recounted by Person 18 are also consistent with the objective facts in another respect. That is to say, Person 18’s evidence about the response from the JTAC is consistent with the uncontroversial fact that, contrary to Person 5’s initial understanding on the ground, the ISR was in fact not on station, and not recording, at the time. This is confirmed by Ex R-208, which states that the ISR had moved off station at 1230DE. See also the note that there was a “lack of post strike images due to re-tasking of UAV”. The ISR was not back on station until 1845DE.⁵³⁵

The move to W109

204. It is likely that different elements of the Troop moved to W108 at different times.⁵³⁶ The first to leave were those individuals who were going to participate in the clearance of W109. It is not entirely clear exactly which members were involved in the initial clearance of that compound, but it seems likely that some or all of Person 29’s patrol were involved,⁵³⁷ and possibly others.⁵³⁸ Person 42 described a “collective of people” who assaulted W109, and given the varying recollection of different witnesses that is perhaps likely to be the true

⁵²⁸ T.3139/37-3140/4 (P18).

⁵²⁹ T.3140/6-28, T.3146/7-39 (P18).

⁵³⁰ T.5116/16-5121/1 (P5)

⁵³¹ T.4852/6-20 (P5).

⁵³² T.5039/12-13, T.5048/27-5049/8, T.5116/34-5117/18 (P5).

⁵³³ As to which see Ex R-285 (a closed court exhibit).

⁵³⁴ T.5049/14-33 (P5).

⁵³⁵ Ex R-209.

⁵³⁶ T.3019/44 (P18), T.1422/38-39 (P14), T.3353/41-43, T.3383/15-19 (P43).

⁵³⁷ T.5477/38-39, T.5478/19-42 (P29).

⁵³⁸ T.4879/29-38 (P5) (but Cf. T.3112/23 (P18)), T.3353/45-47, T.3361/28-29, T.3384/34-35 (P43).

position.⁵³⁹ The timing of the departure from W108 and subsequent movements of the Troop until the return to the VDOP are described in paragraph A2 of the Respondents' Closed Court Submissions.

205. As the Troop left W108, two matters of significance occurred:

- (a) First, either as they were getting ready to leave, or as they were leaving, W108, Person 40 and Person 43 had the conversation described in paragraphs 86(b) and 141 above, in which Person 40 described what had happened to the PUCs as "fucked".⁵⁴⁰
- (b) Secondly, as he extracted, Person 40 observed the body of EKIA 57, and recognised it as the body of the man he had earlier seen come out of the tunnel (an association he made on the day).⁵⁴¹

206. As he was preparing to exfil Person 14 went over and inspected the object and saw that it was a human. By this point, Person 18 had performed SSE on the body.⁵⁴² Person 14 described the person as laying on his back, with a shaved head, a little bit of a beard, dark Afghan robes and a white leg which was a prosthetic leg. He noticed blood generally concentrated around the upper torso / the centre of mass, and some blood coming out of the nose and the mouth.⁵⁴³ Person 14 identified the body as the EKIA shown in Ex R-7.⁵⁴⁴

207. No witness gave evidence of seeing the body of EKIA 56 outside of W108 as they departed.

Confirmation that the rookie had been blooded

208. On return to the VDOP after mission, Person 18 hear Mr Roberts-Smith and Person 5 saying "that they've blooded the rookie".⁵⁴⁵ Person 14 also said that he heard Person 5 say "I finally blooded the rookie".⁵⁴⁶ Neither of those witnesses was challenged about that evidence, and it supports the conclusion that Person 4 was, in fact, "blooded" during W108. To the extent that those statements may have been consistent with Person 4 having had either a lawful or an unlawful kill, the fact that Mr Roberts-Smith and Person 5 denied ever using the term "bleeding" (including at the VDOP immediately after the mission⁵⁴⁷) strongly indicates a recognition on their part that their references to "bleeding" were to unlawful killings.

Post-mission discussion and reporting

209. Numerous witnesses also gave evidence that they were informed shortly after the mission that Person 4 had had an engagement at W108.⁵⁴⁸ Even Person 5 said that Person 4 was identified as the person responsible for an EKIA at W108.⁵⁴⁹ That evidence significantly undermines Mr Roberts-Smith's evidence that he *never* had any knowledge of who shot the

⁵³⁹ T.2112/13 (P42).

⁵⁴⁰ T.3354/6-24 (P43).

⁵⁴¹ T.3268/28-3270/1 (P40).

⁵⁴² T.1417/46-47 (P14).

⁵⁴³ T.1417/22-41 (P14).

⁵⁴⁴ T.1418.5-16 (P14).

⁵⁴⁵ T.3020/25-34 (P18).

⁵⁴⁶ T.1424/38-46 (P14).

⁵⁴⁷ T.5121/9-14 (P5).

⁵⁴⁸ T.5122/10-40 (P5); T.5296/15-23 (P35).

⁵⁴⁹ T.5122/10-28 (P5).

second insurgent in the engagement he described.

210. There was also evidence that shortly after the mission, it was reported that there had been two men found in the tunnel who had been shot.⁵⁵⁰ See paragraph A6 of the Respondents' Closed Court Submissions.

211. The initial reporting relating to the W108 mission did not include any reference to the engagement of EKIA 56 and EKIA 57, or the circumstances of the engagements. See paragraphs A7 and A8 of the Respondents' Closed Court Submissions. The first description of the circumstances of the engagement of those men was contained in the Patrol Debrief, discussed above, which reflected the now admittedly false account that they were "squirters". The lack of any contemporaneous support for the account that Mr Roberts-Smith now advances, supports the conclusion that that account is a recent invention, and false.

Use of the prosthetic leg as a drinking vessel

212. There is no dispute that the prosthetic leg was removed from the battlefield by Person 6.⁵⁵¹ It was used as a drinking vessel in the Fat Lady's Arms in Tarin Kowt⁵⁵² and then was brought to Australia.⁵⁵³ It is not known who arranged for it to be brought to Australia.

213. Mr Roberts-Smith did not himself drink from it,⁵⁵⁴ although he has cheered on other soldiers as they drank from the prosthetic leg⁵⁵⁵ and he has been in photos with people that are drinking from the leg.⁵⁵⁶ He owns two glass replicas of the prosthetic leg with the emblem of 2 Squadron engraved on it.⁵⁵⁷ Mr Roberts-Smith agreed that as a senior member of the troop, he encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.⁵⁵⁸

C. Credibility of the Respondents' witnesses

214. Persons 40, 41, 42 and 43 were among the most powerful witnesses to give evidence in these proceedings. Those witnesses did not have any link, either to each other, to other witnesses in the case, or the parties, that would give rise to any concern about their honesty. None of them had made any attempt to contact the Respondents to make known their capacity to give evidence or otherwise offer assistance; indeed, the very *existence* of those witnesses only became known to the Respondents in the circumstances set out in *Roberts-Smith (No 12)*.

215. That independence places those witnesses in stark contrast to the witnesses of Mr Roberts-Smith, who were all bound by ties of close personal friendship, who had discussed their respective accounts of the mission with each other many times over, and who had a range of other interests and motives to lie that are detailed below and elsewhere in these submissions. The essential consistency of the evidence of Persons 40, 41, 42 and 43 can

⁵⁵⁰ CCT 31.522, p.10/16-39 (P27).

⁵⁵¹ See, e.g., T.182/4-16; T.1428/42-1429/5; 1629/26-28 (P14); T.3452/8-15 (P24); T.4885/10-25 (P5).

⁵⁵² See, e.g., T.182/18-25 (BRS); T.1429/7-19 (P14); T.1361/28-32 (P41); T.4885/27-35 (P5).

⁵⁵³ See, e.g., T.1361/36-40 (P41); T.1361/T.3515/35-40 (P24).

⁵⁵⁴ T.182/44 (BRS).

⁵⁵⁵ T.582/37-38 (BRS).

⁵⁵⁶ T.582/40-42 (BRS).

⁵⁵⁷ T.582/27-35 (BRS).

⁵⁵⁸ T.582/44-46 (BRS). See also Person 5's evidence at T.4885/37-39 (P5).

only be explained by the fact that it is true.

216. It may be accepted that the other witnesses called by the Respondents in relation to W108 (that is, Persons 14, 18 and 24) do have certain connections and interests that Mr Roberts-Smith will no doubt contend makes them unreliable. The specific challenges that have been made to the honesty and reliability of those witnesses have been addressed elsewhere. But an important overarching consideration which must at all times be kept in mind is the extent to which the evidence of Persons 14, 24 and 18 is corroborated by the evidence of those other witnesses, and Person 41 in particular.
217. There is, for example, absolutely no suggestion of collusion or other contamination between Persons 14 and 24, on the one hand, and Person 41, on the other. And yet Person 41's evidence of what he saw Mr Roberts-Smith do to EKIA 57 corresponds closely to the evidence of those other two witnesses.
218. Nor is there any suggestion that Person 18 and Person 41 have colluded in relation to their evidence, or even knew of the others' account. But once again, Person 41's evidence in relation to the location of the body of EKIA 56 is entirely consistent with where Person 18 said it was (and, moreover, as has already been observed, with the contemporaneous documentary record).
219. In other words, the unimpeachable evidence of Persons 40, 41, 42 and 43 was not only impressive on its own terms. It removes any possible suggestion that any of the attacks made on the evidence of Persons 14, 18 and 24 were of substance.
220. None of that is to say, of course, that Persons 14, 18 and 24 were not impressive witnesses on their own account. The challenges to their evidence have been addressed above. Perhaps the fundamental point, though, is that none of the matters put to them in cross-examination as to their possible motivations to lie could ever rationally be regarded as explaining the manufacture of allegations of murder. The fact that the most powerful explanation that Mr Roberts-Smith can muster to discredit the evidence of the Respondents' witnesses is personal dislike, or jealousy, speaks eloquently to the lack of any substance to the attack upon them.

D. Credibility of Mr Roberts-Smith's witnesses

Mr Roberts-Smith

221. For the reasons outlined below, the Court should reject Mr Roberts-Smith's account of the killings of EKIA 56 and EKIA 57 and find that the account was deliberately false.
222. *First*, his account involves a series of compounding implausible propositions:
- (a) Person 6's patrol was in a materially different location from where the members of that patrol (Person 14 and Person 24) placed it (see paragraphs 37-50);
 - (b) out of all the SASR members present at W108, it was the unusual combination of a small group of Mr Roberts-Smith and his closest friends who were present when the tunnel was discovered (see paragraphs 54-75);
 - (c) EKIA 56 and EKIA 57 were insurgents engaged running around the outside of the building who somehow managed to evade the cordon of elite SASR soldiers and then

appear at the precise moment Mr Roberts-Smith walked outside (see paragraphs 126-171);

- (d) Mr Roberts-Smith, to this day, remains unaware of who shot EKIA 56 despite (i) being physically present when it occurred; (ii) that person (on his account) saving his life; and (iii) uniformly consistent evidence from other witness that however the engagement occurred, Person 4 shot EKIA 56 (see paragraphs 154-171);
- (e) Mr Roberts-Smith unnecessarily exposed himself to possible enemy fire, twice, to move out and drag the body of EKIA 57 and recover a weapon (see paragraphs 161);
- (f) the bodies of EKIA 56 and 57 were both dragged from the location of their respective engagements without leaving any trace that can be seen with the naked eye on the photographs, such as a blood trail or drag marks (see paragraphs 162-163);
- (g) the word “tunnel” on the SSE bag for EKIA 56 has some meaning other than EKIA 56 was found in, and shot next to, the tunnel in the tunnel courtyard.

223. Mr Roberts-Smith’s evidence on each of these points was a deliberate lie on a material fact. Each of them evidences his consciousness of guilt and they should be relied on as admissions against interest to support the Respondents’ case.

224. *Secondly*, Mr Roberts-Smith changed his evidence overnight on a material point (that the body of EKIA 56 was moved). That change in position is compelling evidence that Mr Roberts-Smith’s account was a fabrication that was not properly thought through in advance.

225. *Thirdly*, Mr Robert-Smith has colluded extensively with Persons 5, 29 and 35 in relation to the W108 mission (see Section XIII, paragraphs 40-45, 99-101, 104-108 and 158-161). The primary consequence of that collusion is that no weight can be placed on his evidence concerning W108. A further consequence of the collusion and contamination is that his account on W108 cannot be corroborated by, nor can his evidence corroborate, the account of any other person involved in the collusion.

226. *Fourthly*, despite his extensive collusion with Persons 5, 29 and 35, the detail of Mr Roberts-Smith’s account of the engagements was unsupported by – and in fact positively inconsistent with – the accounts of all other witnesses. Person 5 was the only other witness who described seeing the bodies of EKIA 56 and EKIA 57 bodies outside the W108 compound, but contrary to Mr Roberts-Smith’s account, Person 5 claimed Mr Roberts-Smith told him that the two EKIA’s were squinters (see paragraphs 168-170 above).

227. *Fifthly*, Mr Roberts-Smith’s account was not put to any witness who reasonably ought to have seen the engagements (had they occurred as described by Mr Roberts-Smith), namely Persons 14, 24 and 41. The Court should infer that this failure was the result of a lack of confidence in Mr Roberts-Smith’s account and fear that the witnesses who observed the killing of EKIA 57 (Persons 14, 24 and 41) would comprehensively discredit it.

228. *Sixthly*, Mr Roberts Smith attempted to intimidate Person 18 in relation to the IGADF Inquiry and influence Persons 14 and 40 not to give evidence for the Respondents in this proceeding (see Section XIII, paragraphs 46-75). That conduct evidences consciousness of guilt and

should be relied on as admissions against interest to support the Respondents' case.

229. *Seventhly*, Mr Roberts-Smith concealed evidence of his collusion with Persons 5 and 29 and swore false affidavits of discovery verification to conceal those failures (see Section XIII, paragraphs 110-115). Again, this conduct evidences consciousness of guilt and they should be relied on as admissions against interest to support the Respondents' case.
230. *Eighthly*, Mr Robert-Smith has three relevant motives to lie. He has a financial motive to lie in support of his damages claim in this case. He has a reputational motive in lying to rehabilitate his reputation that he says was destroyed by the Respondents' reporting. Most importantly, he has a personal interest in influencing the decision making of police and prosecutors not to charge him with murder. A decision in his favour at a civil standard may have that effect.
231. *Ninthly*, Mr Roberts-Smith arranged for Persons 5 and 35 to be provided with a material financial benefit in the form of payment of their legal fees in relation to the IGADF inquiry and any future criminal proceedings concerning their service in Afghanistan (see Section XIII, paragraphs 28-29). The Court should infer those arrangements are intended to incentivise Persons 5 and 35 to remain aligned with Mr Roberts-Smith. The highly unusual nature of the arrangement, and Mr Roberts-Smith's deliberate and dishonest attempts to conceal it from the Respondents, indicate that the Court should approach his evidence on W108 with particular caution.
232. *Finally*, the Court should have regard to Mr Roberts-Smith's credit on other aspects of the case. If the Court finds that he has lied in relation any material aspect of Darwan or Chenartu or Fasil, or the removal of Person 12 from Rotation 18, or being separated from his wife at the time of the Person 17 affair, or any other material matter, that should be a further matter that should lead to the rejection of his evidence on W108.

Person 5

233. The Court should similarly reject the evidence given by Person 5 concerning the mission to W108 and the conversations before and after concerning "blooding the rookie".
234. *First*, Person 5's account of the deaths of EKIA 56 and EKIA 57 was implausible for the reasons identified at paragraphs 154-171.
235. *Secondly*, Person 5 colluded with Mr Roberts-Smith and Person 29 prior to giving evidence in the proceedings (see Section XIII, paragraphs 40-45, 81-87 and 158-161). Person 5 also spoke with other witnesses about W108 (see Section XIII, paragraph 43). Even taken at its most innocent, these discussions have irreparably contaminated his recollection and his evidence can be given no weight. He cannot be corroborated by, nor can his evidence corroborate, the account of any other person involved in the collusion.
236. *Thirdly*, despite the collusion with other witnesses, Person 5's account was materially inconsistent with the evidence of every other witness whose account intersected with his on critical points (other than on the central points of (a) there were no men in the tunnel and (b) there were no executions). His evidence that he found the tunnel with an Afghan partner force member was inconsistent with every other witness. His account of the patrol commanders' rendezvous (both the location and content) was inconsistent with every other

witness. His account of running outside and returning during the commanders' RV was unsupported by any other witness. He was the only witness to say that the two EKIA were "squirters". He was the only witness, other than Mr Roberts-Smith, to see both EKIA 56 and EKIA 57 outside the compound. Yet even on that point, his evidence both as to the timing when EKIA 56's body supposedly appeared, as well as the fact that he saw Mr Roberts-Smith and Person 4 next to it, was inconsistent with Mr Roberts-Smith's account (see paragraph 170).

237. *Fourthly*, Person 5 is an interested witness who has three motives to give false evidence in support of his close friend Mr Roberts-Smith. The three motives to lie are:

- (a) Mr Robert-Smith and Person 4 were under his command at W108. If neither Mr Roberts-Smith or Person 4 is found to have murdered a PUC at W108 in this case, that may make it less likely that they (and by extension Person 5 as their commander) would ever face criminal charges. He has a material personal interest both in keeping Mr Roberts-Smith onside and influencing the decision-making of authorities not to charge him with murder.
- (b) His current work is connected with and relies upon his reputation as a former special forces soldier. He has both a reputational and a financial interest in ensuring that there is no judicial finding that one or two soldiers under his command murdered a PUC.
- (c) He has received a material financial benefit arranged by Mr Roberts-Smith, by way of payment of his legal fees in the amount of approximately \$65,797.00⁵⁵⁹, in connection with an investigation of an alleged murder of which they are co-accused (see Section XIII, paragraphs 28-39). He has an interest in giving favourable evidence for Mr Roberts-Smith in order to ensure that financial benefit is maintained into the future against the possibility that he may one day face criminal proceedings.

Person 29

238. The Court should also reject the evidence given by Person 29 concerning the mission to W108, in particular on the point of whether two men came out of the tunnel.

239. *First*, Person 29 is a close friend of Mr Roberts-Smith's and colluded with him and Person 5 prior to giving evidence in the proceedings (see Section XIII, paragraphs 40-45 and 158-161). He spoke to Mr Roberts-Smith on the phone regularly and they exchanged marked-up photos of W108 and (what P29 thought was) the area in an effort to reconstruct the W108 mission. Their closeness is reflected by the fact that Person 29 visited Mr Roberts-Smith on the night of Person 11's IGADF interview on 13 June 2018, and on the night of Mr Roberts-Smith's own IGADF interview on 4 December 2019 (see Section XIII, paragraphs 76-80). The collusion (and resulting contamination) between Mr Roberts-Smith, Person 29 and Person 5 means that Person 29's account can be given no weight. His account could not be corroborated by, nor could his account corroborate, the evidence of anyone else involved in the collusion.

240. *Secondly*, Person 29 also used his position as Person 40's superior in an attempt to

⁵⁵⁹ Ex R-195; T.4964/8-14 (P5).

persuade Person 40 not to give evidence on behalf of the Respondents and to deliver the veiled threat that otherwise Mr Roberts-Smith would “see you in Court” (see Section XIII, paragraphs 141-143). This was a wholly inappropriate attempt, done with Mr Roberts-Smith’s knowledge, to further Mr Roberts-Smith’s interests in the proceedings. It evidences his willingness to improperly influence the evidence that would be put before this Court and should again lead the Court to place no weight on his evidence.

241. *Thirdly*, Person 29 has a prior inconsistent account on a material matter, that is, when was the tunnel discovered (see paragraph 71 above). The purpose of the change in Person 29’s account was this: if the tunnel was discovered *before* the compound was declared secure, then it could credibly be said that Persons 40, 41, 42 and 43 could not have been in the tunnel courtyard at the time the tunnel was discovered, and therefore, they could not have seen two men emerge from the tunnel. Properly understood, this is a crucial lie on a material matter that was designed to deliver a knock-out blow to four witnesses at one go. His explanation for the changed account was unpersuasive (see paragraph 71). Accordingly, even if (contrary to the submissions at paragraphs 238 and 240) the Court was prepared to accept some aspects of Person 29’s evidence, the consequence of this particular inconsistency is that the Court should place no weight on his evidence concerning (a) who was in the tunnel courtyard, and (b) whether two men came out of the tunnel.

Person 35

242. The Court should reject the evidence all of the evidence of Person 35 concerning W108.
243. *First*, Person 35 is not a witness of truth. He was an architect (if not the architect) of the deliberate falsehood concerning Person 12 (see Section VII, paragraphs 51-89). His unwillingness to concede error in the face of overwhelming contrary evidence marked his evidence as obviously false rather than merely mistaken. He also gave untrue evidence concerning the location of the interpreter at Darwan (see Section VI, paragraph 72). Again, his unwillingness to accept obvious propositions about the deployment of the interpreter were indicators of dishonesty rather than misrecollection. Person 35 is demonstrably prepared to say anything – even in the face of overwhelming contrary evidence - to advance the interests of Mr Roberts-Smith.
244. *Secondly*, Person 35 colluded with Mr Roberts-Smith on the topic of W108 prior to giving evidence in the proceedings (see Section XIII, paragraphs 40-45 and 158-161). As with the other witnesses involved in this collusion, even if the conversations were innocent, his recollection is contaminated and his evidence can be given no weight. He cannot be corroborated by, nor can he corroborate, the account of anyone else involved in the collusion.
245. *Thirdly*, Person 35 has the same prior inconsistent statement as Person 29 on a material matter (that is, when was the tunnel discovered (see paragraph 72 above)). As with Person 29, his explanation for the changed account was unpersuasive (see paragraph 71). Accordingly, even if (contrary to the submissions at paragraphs 243 and 244) the Court was prepared to accept some aspects of Person 35’s evidence, the consequence of this particular inconsistency is that the Court should place no weight on his evidence concerning (a) who was in the tunnel courtyard, and (b) whether two men came out of the tunnel.

246. *Fourthly*, Person 35 has received a material financial benefit arranged by Mr Roberts-Smith, by way of payment of his legal fees in the amount of approximately \$86,904.33 (see Section XIII, paragraphs 28-39).⁵⁶⁰ That gives rise to the following interest in this case. It is his understanding that he faces, or may face, criminal investigation over the two 'almond room' killings at Darwan.⁵⁶¹ He has an interest in obtaining free legal representation not only for the IGADF inquiry (which is now complete) but also into the future in the event that the almond room investigation continues or results in a criminal trial. Accordingly, he has an interest in assist Mr Roberts-Smith with favourable evidence in order to preserving the financial benefit arranged by Mr Roberts-Smith into the future.

Person 38

247. Person 38's evidence should be rejected in its entirety. He was a dishonest witness who fabricated new evidence in an attempt to undermine the account of Person 41. On 18 May 2022, Person 38 gave evidence that during the W108 clearance he observed an orchard area to the northeast of the compound which he subsequently cleared with Person 41.⁵⁶² This evidence about the clearance of an orchard was a recent invention in Mr Roberts-Smith's case. It had not been put to Person 41 or Person 40 during cross-examination, nor any of the Respondents' other W108 witnesses. The supposed clearance of the orchard was also not included in Person 38's outline of evidence, despite the fact that Person 38 attempted to make sure that all key details were in there at the time.⁵⁶³ Indeed, Person 38 conceded that he does not recall "ever telling anybody that I've cleared that orchard."⁵⁶⁴

248. As discussed at paragraph 73, this evidence was intended to contradict the critical evidence of Person 41. In the Respondents' submission, Person 38's evidence about the clearance of an orchard was fabricated in order to place Person 41 in the orchard with Person 38 so that it was impossible for Person 41 to have witnessed the murders at W108. The Court should find that it was deliberately dishonest and reject his evidence entirely.

E. Conclusion

249. For the reasons set out above the Court should find that:

- (a) the two men who became EKIA 56 and EKIA 57 came out of the tunnel and were placed under confinement by Australian soldiers;
- (b) EKIA 56 was executed by Person 4 in the tunnel courtyard, at the direction of Mr Roberts-Smith; and
- (c) EKIA 57 was executed by Mr Roberts-Smith outside the northwest corner of the compound.

250. The evidence summarised above is overwhelming to establish the Particulars of Truth at [40]-[55], and the substantial truth of Imputations 2, 3, 4, 5, 6 and 9.

⁵⁶⁰ Ex R-228; T.5281/31-5285/38 (P35).

⁵⁶¹ T.5281/20-29 (P35).

⁵⁶² T.5946/1-8; 5969/9-10 (Person 38)

⁵⁶³ T5962/28-34 (P38)

⁵⁶⁴ T5963/10-11 (P38)

SECTION V: 2012 PRE-DEPLOYMENT TRAINING

1. In 2012, Mr Roberts-Smith deployed to Afghanistan as a patrol commander for the first and only time. In the pre-deployment period his patrol was comprised of Person 4 as the 2IC, Person 11, Person 19 and Person 10.¹
2. Pre-deployment training for Rotation XVIII took place over about five months in 2012. Person 7 was heavily involved in the training.² Pre-deployment training took place at both the Bindoon training facility, and the Lancelin training facility.
3. Two incidents that took place during this period are relevant to subsequent events during Rotation XVIII. The first involved a discussion during a training exercise in which Mr Roberts-Smith not only expressed his willingness to summarily execute individuals he suspected of being an enemy combatant, but also discussed the use of throwdowns to make such an execution appear legitimate. This tactic would later be used in relation to at least the Darwan and Fasil murders. The second involved Mr Roberts-Smith training a junior member of his patrol to execute a PUC because, he said, "that's how it's going to be on the day".
4. Those actions during training are properly seen as preparatory conduct for the later murders that were carried out during Rotation XVIII. That is to say, Mr Roberts-Smith specifically trained and prepared members of his patrol to carry out and cover up extra-judicial killings. These incidents in training are thus themselves evidence that makes it more probable that the substantive murders discussed below in fact occurred.
5. The relevant Particulars of Truth are [65]-[66] and [66A]-[66C]. Although the mock execution at Lancelin is referred to in the Group 3 articles, Mr Roberts-Smith has not sued on any imputation in relation to that allegation. The conduct is not *directly* relevant to any imputation, but it is relevant to the substantial truth of at least Imputations 1, 2, 3, 11 and 14.

A. May/June 2012: Informal discussion about SSE at Bindoon

6. In May or June 2012, there was a troop training exercise at the Bindoon training facility. At one stage during the exercise, Mr Roberts-Smith's patrol and Person 31's patrol were conducting training and an assault on a mud brick compound in the Afghan village in Bindoon Training Area.³ Of Person 31's patrol, Person 35 and Person 56 were present.⁴
7. The patrols conducted an assault of the target compound, and conducted the fight through or the initial assault, at which stage they paused and started a discussion on what they would do for the sensitive site exploitation and the reorganisation.⁵ The patrol commanders, Person 31 and Mr Roberts-Smith were standing while the rest of the patrol members were sitting in a semi-circle on the ground in a courtyard of the mud brick compound.⁶ The patrol members included Persons 19, 4, 10, 11, 31, 35 and 56.⁷

¹ T.2316/36-43 (P19); T.4513/45-4514/14 (P10); T.3599/38-40 (P7).

² T.3599/105 (P7).

³ T.2319/10-14; 2364/30-31 (P19).

⁴ T.2319/19-20 (P19).

⁵ T.2319/22-27 (P19).

⁶ T.2319/29-33; 2364/30-31 (P19).

⁷ T.2364/10-11 (P19).

8. During that discussion, Mr Roberts-Smith said words to the effect "Any unmanned aerial vehicles would be pushed off station so they weren't observing the target area", and "you will shoot the bad cunts".⁸ He also said that officers would be kept outside the compound until they were ready to receive them, and "that's when any people that we suspect of being enemy combatants, we take them into a room and shoot the cunts".⁹
9. During this discussion either Mr Roberts-Smith or Person 35 also said "if someone has been shot you can put a weapon that you carried into target down and photograph them so that they would be deemed an enemy combatant".¹⁰ After the discussion, the patrols continued on with training.¹¹
10. The key witness for this event was Person 19. There were general attacks made on Person 19, none of which provided any basis for disbelieving his evidence.
11. First, it was suggested that Person 19 held Mr Roberts-Smith responsible for the disciplinary action taken against him in relation to his removal of ammunition and other service equipment from base, and as a result harboured anger and resentment towards him.¹² Person 19 did not regard Mr Roberts-Smith as in any way responsible for what happened to him. He did agree that he thought that Mr Roberts-Smith had not told "the full truth" at his hearing, and that he had "to some degree" made a scapegoat.¹³ But he explained that what he meant by that was that other people in the unit had also taken service equipment off base, and they had not been punished.¹⁴ He did not in any way resile from his own culpability, and plainly did not blame Mr Roberts-Smith for what had happened to him.
12. Ultimately, perhaps the most powerful indication of the fact that Person 19 was not motivated by any desire to give evidence against Mr Roberts-Smith is the fact that he spoke with Person 10 about how they could both avoid giving evidence in the case.¹⁵
13. The second general attack made on Person 19 was premised on his dismissal from the Australian Defence Force following his conviction on a charge of recklessly gaining a financial advantage (which related to the signing of a false statutory declaration concerning his girlfriend's place of residence, in connection with an accommodation allowance).¹⁶ He pleaded guilty to that charge, and fully acknowledged the wrongfulness of his conduct.¹⁷ It cannot be concluded from that incident that Person 19 is a generally dishonest person, and the circumstances of that event are entirely dissimilar from the present context, and indicate no reason why there would be apprehended to be a concern about Person 19's honesty in this case.
14. Otherwise, it was simply put to Person 19 that he was making up his evidence, or "relaying

⁸ T.2319/41-46 (P19); T.2363/1-9 (P19).

⁹ T.2320/1-7 (P19).

¹⁰ T.2320/9-17; 2363/45-2364/2 (P19).

¹¹ T.2365/19-20 (P19).

¹² See, e.g., T.2327/29-34, T.2340/15-35 (P19).

¹³ T.2373/7-40, T.2381/40-2382/42 (P19).

¹⁴ T.2382/41-42 (P19).

¹⁵ T.2332/30-33, T.2371/36-39 (P19); T.4568/39-40 (P10).

¹⁶ T.2345/22-46 (P19).

¹⁷ T.2345/24-46 (P19).

rumours that [he had] heard, rather than anything [he had] seen”.¹⁸ He rejected all such accusations, and his evidence demonstrated a genuine attempt to recall the events in question. Indeed, he was candid about the matters that he could not recall either at all or with precision,¹⁹ even where that lack of precise recollection might be thought to assist Mr Roberts-Smith.

15. Each of Mr Roberts-Smith, Person 11, and Person 35, of course, denied that this incident occurred.²⁰ For the reasons set out elsewhere in these submission none of those witnesses are witnesses of credit, and each has a powerful motive to give false evidence on this topic. Their denials do not provide a basis to disbelieve the credible evidence of Person 19.

B. 2012: Mock execution at Lancelin training base

Mr Roberts-Smith’s plan to blood Person 10

16. Mr Roberts-Smith had two “rookies” as part of his patrol in 2012: both Person 10 and Person 19 were new to the SASR, although Person 19 was a multiple tour veteran, having deployed previously to Afghanistan with the Commandos.²¹
17. One morning in 2012 Person 19 went to breakfast with Mr Roberts-Smith and Person 4 at a local café up the road from Swanbourne Barracks.²² At that breakfast Mr Roberts-Smith said that Person 10 needed to be blooded, and that he needed to prove himself. Mr Roberts-Smith told Person 19 that he didn’t need to prove himself as he had already done a number of deployments previously.²³
18. Mr Roberts-Smith rehearsed his plan to blood Person 10 in May 2012 during a live fire training exercise at the Lancelin training base. Person 4 was not present on that occasion as he was deployed to Afghanistan over that period.²⁴

Live fire and PUC detention simulation exercise at Lancelin training base

19. At the very end of the pre-deployment training, before the troop went on pre-deployment leave, the troop conducted training at the Lancelin training base.²⁵
20. The final exercise in the week involved simulating the detention of a PUC in order to give the incoming Troop Commander and Troop Sergeant (who were both doing their first deployment in those positions) an understanding of the process.²⁶ The exercise involved a live fire exercise (that is, hitting targets), a dog serial, and a mock assault and clearance of a makeshift Afghan compound under live fire conditions.²⁷ There was a Conex/shipping container at the training base with partitions on the eastern side of it to give the effect of a

¹⁸ T.2364/4-5 (P19).

¹⁹ See, e.g., T.2320/15-17 (P19).

²⁰ T.827/33-45 (BRS); T.5694/4-7 (P11); T.5323/13-5324/10 (P35).

²¹ T.825/21-26 (BRS); T.2316/29-31 (P19).

²² T.2320/22-28; 2355/33-2356/27 (P19).

²³ T.2321/17-20; 2356/29-45; 2357/33-2358/4 (P19). Person 4 said that it was possible that he had a meeting with Mr Roberts-Smith and Person 19 at a café near the base where Person 10 was discussed, but he could not recall it: T.2642/35-41 (P4).

²⁴ T.2633/17-24 (P4).

²⁵ T.3599/7-9 (P7).

²⁶ T.3599/11-17 (P7).

²⁷ T.4514/19-24 (P10); T.2317/40-42 (P19); T.3600/6-22 (P7).

compound, and there were steel-head targets within the training area used for the live fire part of the exercise.²⁸

21. Pausing here, there was some evidence from a number of Mr Roberts-Smith's witnesses in relation to the respective characteristics of the Lancelin training area and the Bindoon training area, to the effect that it was the Bindoon training area that had a mock-up of an Afghan village.²⁹ To the extent that evidence is directed to discrediting the evidence of the Respondents' witnesses about this incident at the Lancelin training base, it is pertinent that neither Person 7 nor Person 31's evidence about the Conex/shipping container was challenged. It was not suggested to any of the Respondents' witnesses about this incident that the training exercise took place at Bindoon. In any event, Mr Roberts-Smith himself did not dispute that this particular training took place at Lancelin³⁰ and in cross examination Person 11 agreed that his patrol would have participated in live fire training exercises at Lancelin which involved practicing mock assaults of compounds.³¹
22. For the purpose of the training exercise, Mr Roberts-Smith's patrol was the assault or clearance team, Person 7's patrol was assigned as a roof team, and the other teams were given the task of being a cordon around the compound.³² Person 31's patrol was involved in the exercise, and were offset outside the compound, held in position.³³ Person 9 was acting as a non-combatant for the purpose of the clearance exercise.³⁴ As he was the target of the dog he was wearing a bite suit. Once the live fire part of the activity was complete he made himself known, was taken down by the dog and then detained by Mr Roberts-Smith's patrol. He was then brought inside the partitions and the PUC process was started.³⁵
23. At this point Person 7 put the ladder up and got on top of the Conex/shipping container. He told the rest of his team to remain out to the west because there was no need for them to get up onto the Conex for a quick exercise.³⁶ From there he could see inside the partitioned area.³⁷ Person 31 was also on top of the shipping container and could see the scene below.³⁸

Mock execution of a PUC

24. Mr Roberts-Smith, Person 10, Person 11 and Person 19 were all present within the compound.³⁹ Once the compound had been secured Person 10 was tasked as security. He was standing slightly inside the doorway, and was facing out.⁴⁰ Mr Roberts-Smith walked

²⁸ T.3599/19-27; 3600/7-12 (P7). See also T.4637/15-18 (P31).

²⁹ See T.4827/26-41 (P5); T.5693/19-31; 5704/15-20 (P11); T.5882/28-38 (P32)

³⁰ T.825/39-826/3 (BRS).

³¹ T.5825/10-12 (P11)

³² T.3599/25-32 (P7).

³³ T.4637/11-15 (P31).

³⁴ T.2318/15-22 (P19).

³⁵ T.3600/24-36 (P7). See also T.2317/40-2318/4 (P19).

³⁶ T.3600/30-33 (P7).

³⁷ T.3600/38-40 (P7).

³⁸ T.4637/19-31 (P31); T.3601/11-14 (P7)

³⁹ T.4515/21-25 (P10); T.2318/11-13 (P19). To the extent Person 19 indicated that Person 4 was present this is likely informed by his recollection that "the entire patrol" was present.

⁴⁰ T.4514/44-46; 4607/35-38 (P10).

up to Person 10 and called him to come with him.⁴¹ Person 10 was taken to a location where the rest of the patrol were and Person 9 was bound, simulating being a PUC. He was on his knees facing the corner/wall.⁴²

25. The patrol was standing in a semi-circle and Mr Roberts-Smith discussed what would be done at that stage of an assault.⁴³ Mr Roberts-Smith said to Person 10 words to the effect of, "shoot him". Person 10 responded, "But it's [Person 9]". Mr Roberts-Smith again said, "shoot him" and Person 10 went "bang, bang". Mr Roberts-Smith then said, "that's how it's going to be on the day".⁴⁴ Person 19 described seeing the look on Person 9's face, as he was quite surprised, as no one had expected to hear that phrase.⁴⁵
26. Person 7 witnessed the incident from his perspective on top of the shipping container. Person 31 recalls that either on the Conex or in the car Person 7 to him words to the effect "for fucks sake, Mr Roberts-Smith has had Person 10 do a scenario of executing a PUC".⁴⁶ Person 31 said to Person 7, words to the effect, "what was that all about?" and Person 7 responded, "Geez. He's a fucking idiot."⁴⁷

Subsequent discussions confirm the event

27. The incident was talked about amongst the group after the exercise. Whilst still at Lancelin, Person 9 said to Person 10 "Don't get involved in that shit. It's not good."⁴⁸ In the car later Person 19 said to Person 10 words to the effect of, "Can you believe that bullshit?".⁴⁹
28. More significantly, Mr Roberts-Smith was warned by the two senior sergeants that the conduct was not acceptable:
 - (a) After the exercise had finished and Person 7 had finished packing his equipment for the day, he approached Mr Roberts-Smith and said, "RS, you got a second?", he turned around and Person 7 could see that he was annoyed. Mr Roberts-Smith walked over to Person 7 who said "What was that shit all about?", Mr Roberts-Smith responded, "What shit?", and Person 7 said, "You know what shit I'm talking about."⁵⁰ Person 7 said, "Pull you head in. Grow up, and wake up to yourself." With that, Mr Roberts-Smith turned around, and Person 7 heard him mumble something, the only words he could decipher or understand were, "Fucking war."⁵¹
 - (b) Either that night or the next afternoon, Person 31 walked past Mr Roberts-Smith outside the mess accommodation and stopped to say words to the effect, "Fuck. You

⁴¹ T.3601/4-7 (P7); T.4514/46-4515/7; 4608/30-36 (P10). Person 10 says he was called to come to Mr Roberts-Smith's location but does not recall how this was communicated to him.

⁴² T.4515/14-19 (P10); T.3600/43-44 (P7); T.2318/29-30 (P19).

⁴³ T.2318/27-31 (P19).

⁴⁴ T.4515/27-42; 4609/10-11 (P10). See also Person 7's evidence that the words used were "fucking kill him", "kill him" (after Person 10 had a confused look), and "Are you good with that? Because that's how it's going to be when we get over there" (T.3601/16-21) and Person 19's evidence that Mr Roberts-Smith said "I want you to shoot the PUC" (T.2318/33-47).

⁴⁵ T.2318/37-39 (P19).

⁴⁶ T.4637/37-45 (P31).

⁴⁷ T.3601/24-26 (P7).

⁴⁸ T.4516/3-14 (P10). In cross-examination Person 10 said that he couldn't be 100% sure that this was Person 9 as opposed to Person 7, as he and Person 7 share similar complexion/look the same: T.4612/10-22.

⁴⁹ T.2336/35-45 (P19).

⁵⁰ T.3601/27-37 (P7).

⁵¹ T.3601/34-37 (P7).

need to pull – you know, pull your head in. You know, you can't be doing that shit."⁵²
Mr Roberts-Smith looked down, grunted, nodded and walked off.⁵³

29. Although Person 9 was on Mr Roberts-Smith's witness list, he was not ultimately called to give evidence following the failure of an application to call him via AVL. An explanation for the failure to call him is the evidence given by Person 4 about what Person 9 said to him about this incident. Person 4 said that Person 9 told him that Mr Roberts-Smith pointed to or spoke to another individual and told that individual to shoot Person 9, and that Person 9 found it odd.⁵⁴ Person 4's evidence in this regard was not challenged. That evidence was admitted on the expectation that Person 9 would be called, and thus that the exception to the hearsay rule in s. 64(3) of the *Evidence Act*.⁵⁵ In those circumstances, the inference in accordance with *Jones v Dunkel* that applies in relation to Mr Roberts-Smith's failure to call Person 9, that the evidence would not have assisted him, is particularly powerful.

Witnesses

30. The credit of each of Person 7, 10 and 19 has been addressed elsewhere in these submissions. In relation to Person 31:
- (a) It was clear that he harboured no animus towards Mr Roberts-Smith. He candidly accepted that things he had heard were concerning to him, and that as a result he thought less of Mr Roberts-Smith than he had previously.⁵⁶ But he was plainly able to distinguish between what he himself saw and heard, and things he was told.
 - (b) The fact that he said that he threw the flashbang that had been thrown by Person 24 in 2011 does not reflect adversely on his credit. He said that he did that because he was Person 24's patrol commander, and he took responsibility for what had happened.⁵⁷ It was a very specific set of circumstances, that does not give rise to any general concern about his honesty. He candidly admitted to what had happened, which in fact confirms his honesty in giving evidence in these proceedings.
 - (c) No other matter, including matters raised in Closed Court, is capable of negatively affecting Person 31's credit. It was plain that giving evidence against Mr Robert-Smith was something that Person 31 did not do willingly.⁵⁸ There could be no suggestion that he had any interest in manufacturing false evidence against Mr Roberts-Smith.
31. Once again, the denials of Mr Roberts-Smith and Person 11 should not be accepted.⁵⁹ Each has a powerful motive to lie, and for the reasons set out in detail elsewhere in these submissions should not be accepted as a witness of credit. Those denials are particularly implausible in the face of the number of witnesses to the contrary, each of whom witnessed the event from a different perspective.

⁵² T.4637/46-4638/2; T.4680/43-44 (P31).

⁵³ T.4638/4-6 (P31).

⁵⁴ T.2633/27-36; 2636/10-17 (P4).

⁵⁵ See T.2633-2636.

⁵⁶ T.4652/13-32 (P31).

⁵⁷ T.4706/37-4707/17 (P31).

⁵⁸ T.4696/37-43 (P31).

⁵⁹ T.211/22-212/5; 826/12-29 (BRS); T.5694/9-11 (P11).

SECTION VI: DARWAN - 11 SEPTEMBER 2012**A. Introduction**

1. On 11 September 2012, in the village of Darwan, Mr Roberts-Smith kicked a handcuffed PUC named Ali Jan off a cliff and then entered a joint criminal enterprise with Person 11 pursuant to which Ali Jan was shot by Person 11 and killed. The relevant Particulars of Truth are paragraphs [93]-[117] of the Third Further Amended Defence. They are relied upon in relation to the substantial truth of Imputations 1, 2 and 3.
2. The ultimate issue for determination is whether Mr Roberts-Smith and Person 11 murdered a PUC (Ali Jan) or whether they engaged a spotter legitimately on their way to the extraction HLZ. That involves determining (at least) the following subsidiary questions:
 - (a) Did Person 56 and the interpreter make it to the last compound or were they sent away from Mr Roberts-Smith's patrol at an earlier point in the mission?
 - (b) Was Person 56 absent from his already-undermanned patrol for an hour and a half?
 - (c) Did Person 47 and the military working dog make it to the last compound or were they sent away from Mr Roberts-Smith's patrol at an earlier point in the mission?
 - (d) Did Mr Roberts-Smith's patrol find fighting aged Afghan males (namely Hanifa, Mangul and Ali Jan) in the last compound?
 - (e) Is it plausible that a spotter could have remained undetected in the cornfield for the whole 5-hour mission, evading both human and electronic warfare scans of the area?
 - (f) Was the evidence of the Respondents' witnesses truthful, accurate and reliable both individually and collectively?
 - (g) Was the evidence of Mr Roberts-Smith and Person 11 truthful, accurate and reliable?
3. Each of these questions – and the ultimate issue – should be determined in the Respondents' favour. Person 4, Person 56, Mangul, Hanifa and Shahzada gave truthful, accurate and reliable evidence that is consistent with the objective evidence and materially consistent with each other. There has no suggestion at all that Person 4 and Person 56 have deliberately lied. The suggestion that Person 4 and Person 56 were mistaken, or in the case of Person 4 innocently "delusional", is implausible. The suggestion that the Afghan witnesses fabricated their evidence is equally implausible. None had a motive to lie. Their evidence contained detail that could only be known to people who were there. Most compelling of all: collusion between the SASR witnesses and Afghan witnesses is impossible. The answer for the consistent accounts is a much simpler one. Each of them is telling the truth.
4. In contrast, accepting the account given by Mr Roberts-Smith and Person 11 requires the acceptance of a compounding sequence of improbable events. It is unlikely that Mr Roberts-Smith cleared the end compounds with only three patrol members. It is unlikely that Person 56 went missing for an hour and a half while his patrol was shorthanded and still clearing compounds. It is unlikely that Mr Roberts-Smith cleared the end compounds with no interpreter or working dog. Neither Mr Roberts-Smith nor Person 11 could account for the hour (plus) they spent in the end compound. It is highly unlikely that a spotter could have

remained undetected in the cornfield for five hours, despite multiple human and electronic warfare scans of the area. It is unlikely that if the overwatch and the electronic warfare scans missed the spotter, Person 11 was nevertheless able to see and engage him through 15 metres of thick vegetation. It is unlikely that Mr Roberts-Smith would misremember scaling a non-existent 1.5-metre-high embankment during the engagement. It is unlikely that the extraction would have proceeded if a spotter had killed right to an HLZ three minutes out from extraction.

5. Each of these factors, by itself, is unlikely. Collectively, the compounding effect is so pronounced it can only lead to one conclusion. The Court should find that the accounts given by Mr Roberts-Smith and Person 11 were deliberate falsehoods designed to cover-up the murder of Ali Jan. Each component of their lie, as well as the overall false narrative, is evidence of their individual and collective consciousness of guilt for the murder of Ali Jan.

B. Proposed factual findings

Mohammed Hanifa Fatih, Mangul Rahmi, Shahzada Fatih and Ali Jan

6. Ali Jan Faqir was born and lived in the village of Baag. Baag was three hours' walk away from Darwan. Ali Jan lived there his whole life and had three children. For work, he took care of animals such as his cattle, irrigated his fields, and brought woods to sell.¹ Ali Jan was not connected to the Taliban in any way and was not a fighter for anyone.² He sought to provide for his children and protect his family and his property.³ Ali Jan is no longer alive. He died one summer, when soldiers raided Darwan, when the corn and almonds were growing.⁴
7. Mohammed Hanifa Fatih (**Hanifa**) is a farmer born in Darwan in 1983.⁵ He lived his whole life in Darwan until 2021.⁶ He grew up as a child with Ali Jan. He used to go to Ali Jan's house and Ali Jan used to come to his house.⁷ As a farmer, Hanifa worked on the land cultivating wheat, corn, kidney beans and tomatoes.⁸ In 2012, he lived in his father Shahzada's house with all but three of his brothers, including one named Mohammed Sha.⁹ His father's house is the second-last house at the southern end of the village.¹⁰ His neighbour on one side was Mangul.¹¹ He shared a guest house with Mangul.¹²
8. Mangul Rahmi (**Mangul**) is a farmer who lived in Darwan.¹³ He lived in the southern-most compound in the village of Darwan.¹⁴ He was neighbours with Hanifa and Shahzada.¹⁵ As a farmer, Mangul cultivated crops of wheat, tomatoes, and potatoes.¹⁶

¹ T.923/19-924/3 (MH); T.1050/34-1052/11 (MR); T.1136/37-1137/19 (SF).

² T.924/40-46 (MH); T.1052/13-16 (MR); T.1137/45-47 (SF).

³ T.924/46-47 (MH).

⁴ T.924/5-40 (MH); T.1051/30-41 (MR); T.1137/21-34 (SF).

⁵ T.920/39 (MH).

⁶ T.920/45-921/7 (MH).

⁷ T.923/8-9 (MH).

⁸ T.921/15-16 (MH).

⁹ T.925-28-926/6 (MH).

¹⁰ T.927/11-29 (MH); Ex R-87 (marking "A").

¹¹ T.927/38-47 (MH); Ex R-87 (marking "B").

¹² T.928/1-8 (MH); Ex R-87 (marking "C").

¹³ T.1050/1-5 (MR).

¹⁴ Ex R-88 (marking "A"); T.1053/21-40 (MR).

¹⁵ T.927/38-40 (MH).

¹⁶ T.1050/1-5 (MR).

9. Shahzada Fatih / Aka (**Shahzada**) is Hanifa's father.¹⁷ He was born in Darwan and lived his whole life there until (just before giving evidence in 2021) he came to Kandahar and then Kabul.¹⁸ In Darwan, Shahzada was a farmer who worked his own land. He had two wives (one who was alive), five daughters and 11 sons. Hanifa was the eldest.¹⁹ His neighbours in Darwan were Mangul (on one side) and Amir Jan Aka (on the other).²⁰ Ali Jan was Shahzada's brother-in-law.²¹ Shahzada's wife (and Hanifa's stepmother) is Bibi Jan, Ali Jan's sister.²² Before Ali Jan died, Shahzada would see him around once a month.²³

10 September 2012: Ali Jan travelled to Darwan

10. On the day before the raid, Shahzada saw Ali Jan in the riverbed near Shahzada's house.²⁴ Ali Jan said he had come to Darwan to mill wheat.²⁵ Ali Jan told Shahzada he was going back to the mountain in the morning.²⁶ Shahzada told Ali Jan to take Hanifa with him so Hanifa could bring back his stepmother Bibi Jan.²⁷
11. Hanifa also saw Ali Jan that day. Ali Jan said he had brought wheat to mill, and he would go to the mountain tomorrow. Hanifa said he would go with Ali Jan to the mountain the next day "to bring woods". He also wanted to bring his stepmother Bibi back with him.²⁸
12. That night, Ali Jan spent the night at Haji Wali Jan's house.²⁹ Haji Wali Jan owned the mill.³⁰

0547DE: the SASR inserted into Darwan

13. On 11 September 2012, the SAS and Commandos conducted a rotary-wing mission to Darwan in search of Hekmatullah. 42 Australian soldiers and 18 ANA soldiers were involved in the mission.³¹ Four Blackhawk helicopters, two Apache AH64 helicopters, two manned ISR aircraft and one unmanned aerial vehicle were used as air support.³² The unmanned aerial vehicle was a Heron drone.³³
14. On that day, Mr Roberts-Smith's patrol was comprised of him (as Patrol Commander), Person 4 as 2IC,³⁴ Person 11,³⁵ Person 56³⁶ and Person 47, who was the troop dog handler.³⁷ The other patrol commanders on the mission were Persons 7, 31, 55 and 57.³⁸

¹⁷ T.921/28 (MH).

¹⁸ T.1135/27-47 (SF).

¹⁹ T.1135/29-47 (SF).

²⁰ T.1136/7-16 (SF).

²¹ T.1136/24 (SF).

²² T.923/1-4 (MH).

²³ T.1137/40-44 (SF).

²⁴ T.1138/1-7 (SF).

²⁵ T.1138/10-15 (SF).

²⁶ T.1138/10-15 (SF).

²⁷ T.1138/4-21 (SF).

²⁸ T.939/8-39 (MH).

²⁹ T.1113/1-17 (MR).

³⁰ T.928/17-35 (MH); Ex R-87 (marking "E").

³¹ Ex R-11, pages 1-2.

³² Ex R-11 page 5 ("FR MILITARY HARDWARE"); T.3609/12-13 (P7).

³³ T.3609/12-13 (P7).

³⁴ T.2606/14-17 (P4).

³⁵ T.2920/8 (P4).

³⁶ T.4746/24-25 (P56).

³⁷ T.232/3 (Applicant); T.2607/29-39 (P4); T.5660/43 (P11).

³⁸ T.5660/45-46 (P11).

15. At 05:32DE, Mr Roberts-Smith's patrol departed Tarin Kowt for Darwan as part of the turn 1 insertion.³⁹ There were two insertions into Darwan, each of which used two Apache helicopters and four Blackhawk helicopters.⁴⁰ The SASR inserted on turn 1. The Commandos inserted on turn 2.⁴¹
16. At 05:47DE, the turn 1 Blackhawks landed in Darwan.⁴² Mr Roberts-Smith's patrol inserted on the same helicopter as Person 7's patrol.⁴³ Their helicopter landed at a helicopter landing zone (HLZ) with the codename "Stream 2".⁴⁴ Two other helicopters landed in the vicinity of "Stark 5", "System 5" or "Stark 7".⁴⁵ The overwatch team landed at the HLZ with the codename "Bottle 3".⁴⁶ Bottle 3 was on a hill directly opposite Mangul's compound, no more than 450 metres away and with a clear line of sight.⁴⁷
17. Early that morning, before the helicopters arrived, Hanifa asked his sister to get the donkey ready so he could take wheat to the mill then go to the mountain. He started his prayers then heard "honking". He went out of his house and saw two helicopters with four helicopters following (six in total). They passed by his house then three landed near Mohammed Gul's house. A fourth stayed in the air, then left and came back and landed near his cousin's house.⁴⁸ Hanifa's evidence that six helicopters arrived in a 2 plus 4 formation is consistent with the evidence that the SASR inserted with two Apaches and four Blackhawks.⁴⁹
18. On the day of the raid, Shahzada's wife and his children, including Hanifa and another son named Mohammed Sha, were living at his house.⁵⁰ Early that morning, Shahzada did his prayers at Haji Amir Jan's mosque.⁵¹ As he started going home, he saw "planes". Three came towards Shahzada's house and one went towards the mountain and landed there.⁵² Shahzada then went back to his house and sat in the house there.⁵³
19. Early that morning, Mangul did his morning prayers at Haji Amir Jan's mosque⁵⁴ and then went to irrigate his fields.⁵⁵ On his way, Mangul saw Ali Jan and Haji Wali Jan sitting in front of Haji Wali Jan's mosque.⁵⁶ At that time, he heard the sound of helicopters. He observed one helicopter land on the hillside and the other helicopters passed by.⁵⁷ Mangul identified the "hillside" as the hill on the other side of the river from his house.⁵⁸
20. Shahzada and Mangul's evidence that three helicopters passed by, and Hanifa's evidence

³⁹ Ex R-10, page 2; Ex R-11, page 2.

⁴⁰ T.3609/9-10 (P7).

⁴¹ T.360936-40 (P7).

⁴² Ex R-10, page 2; Ex R-11, page 2.

⁴³ T.5661.8-9 (P11); T.3610/18 (P7); T.2608/3 (P4).

⁴⁴ T.3610/18 (P7).

⁴⁵ T.3609/45-47 (P7).

⁴⁶ T.3610/1-8 (P7).

⁴⁷ See Ex R-1, which has a 1:5000 scale (i.e. each grid square is 100 metres).

⁴⁸ T.940/1-941/11 (MH).

⁴⁹ Ex R-11 p5 ("FR MILITARY HARDWARE"); T.360912-13 (P7).

⁵⁰ T.1138/45-1136/26 (SF).

⁵¹ T.1138/38-44 (SF).

⁵² T.1139/28-43 (SF).

⁵³ T.1139/41-44 (SF).

⁵⁴ T.1064/1-4 (MR).

⁵⁵ T.1064/28 (MR); (marked A on page 4 of Ex R-88).

⁵⁶ T.1065/10-19; 1055/27-1056/6 (MR); Ex R-88 (marking "D").

⁵⁷ T.1065/38-45 (MR).

⁵⁸ T.1066/11-12 (MR).

that three helicopters passed by then landed near Haji Mohammed Gul's house (compound 31) is consistent with the evidence that the other three helicopters inserted at or around the Stream 2 HLZ⁵⁹. These are both in the vicinity of compound 31, which was a target of the raid and the site of the "almond room" killings by Person 32 and 35 (see below).⁶⁰ Mangul and Shahzada's evidence that one helicopter landed on the hillside or mountain (and Hanifa's evidence that one helicopter landed in a different location to the other three) is also consistent with the evidence that the overwatch team landed at the Bottle 3 HLZ.⁶¹

21. After hearing the helicopters land, Mangul decided to go home.⁶² On the way, he ran into Hanifa⁶³ who said, "there is a raid, where are you going?"⁶⁴ Mangul replied, "Yes, a raid is taking place. Go home."⁶⁵ Mangul went back to his house. Hanifa then called Mangul to come to the guesthouse in front of Mangul's house, and they both sat down there together.⁶⁶

0610DE: the 'almond room' killings by Person 32 and Person 35

22. Person 35's patrol was comprised of himself as patrol commander,⁶⁷ Person 32 as 2IC⁶⁸ and approximately three to four NDS members.⁶⁹ Person 13, an interpreter, supplemented the patrol at points in the mission.⁷⁰ After landing, Person 35's patrol cleared two compounds north of the Stark 5 HLZ.⁷¹
23. At approximately 0610DE, Person 35 and Person 32 approached a compound and made entry.⁷² This was Haji Mohammed Gul's house⁷³ and was designated compound of interest 31.⁷⁴ Person 32 gave evidence that as he and Person 35 made entry, they cleared around and into the almond room and engaged two insurgents in there.⁷⁵ These engagements are recorded as EKIA 1 and EKIA 2 in the OPSUM⁷⁶ and on the storyboard.⁷⁷ The names of these two EKIA's were Haji Nazar Gul and Yaro Mama Faqir.⁷⁸
24. After the initial engagement and the initial clearance, the NDS and possibly the interpreter came into the compound and started PUC'ing other individuals.⁷⁹ Person 35 recalled four fighting aged males being PUC'd in the second compound.⁸⁰ Person 35 said they were taken under control, searched, cuffed, and then accompanied the patrol on the subsequent

⁵⁹ T.3610/18 (P7).

⁶⁰ Ex R-1.

⁶¹ T.3610/1-8 (P7).

⁶² T.1065/38-45 (MR).

⁶³ T.1066/42 (MR).

⁶⁴ T.941/15 (MH).

⁶⁵ T.1101/12-14 (MR).

⁶⁶ T.1066/27-44 (MR).

⁶⁷ T.5202/24-26 (P35); T.5874/11-12 (P32).

⁶⁸ T.5875/7-8 (P32).

⁶⁹ T.5874/14-15 (P32).

⁷⁰ T.5202/45-46 (P35); T.5874/24-28 (P32).

⁷¹ T.5324/17-28 (P35) (as depicted in Ex R-1).

⁷² Ex R-11, page 2.

⁷³ T.928/39-929/19 (MH); Ex R-87, page 1 (marked a dot and letter F next to the graveyard which is near Haji Mohammed Gul's house); T.997/23-998/4 (MH); T.1110/46-1111/6 (MR).

⁷⁴ Ex R-1.

⁷⁵ T.5895/37-41; T.5896/7-14 (P32).

⁷⁶ Ex R-11 (page 3).

⁷⁷ Ex R-1.

⁷⁸ T.965/33 -966/39 (MH); T.1088/19-1090/18 (MR).

⁷⁹ T.5896/26-28 (P32).

⁸⁰ T.5204/30-45 (P35).

clearing of the compounds as they moved in a northerly direction.⁸¹

0547DE - 0623DE: Ali Jan and Hanifa shot at attempting to leave

25. Hanifa and Mangul were in the guesthouse when they saw Ali Jan with two or three donkeys coming towards them.⁸² He was coming in the riverbed from the village towards Mangul's house, passing by Haji Wali Jan's house.⁸³ Hanifa's evidence was that Baag (Ali Jan's home) was to the south of Darwan.⁸⁴ Ex R-1 shows that walking out of Darwan, past Mangul's house, is travelling in a southerly direction.
26. Ali Jan was holding the rope of one donkey and one was walking in front of him.⁸⁵ When Ali Jan arrived at the area near the guesthouse, Hanifa shouted to Ali Jan, "wait, I also want to go with you".⁸⁶ Hanifa joined Ali Jan and took one of the donkeys from him while Ali Jan took another one.⁸⁷ They walked away together and Mangul lost sight of them.⁸⁸
27. As Hanifa and Ali Jan were walking away together, two shots were fired at them.⁸⁹ Hanifa saw the soldiers who fired at them sitting "at the top of the mountain".⁹⁰ The mountain was on the east side of the village.⁹¹ Mangul could not see Ali Jan and Hanifa when he heard the two shots fired but could see two soldiers on the other side of the river on the hilltop.⁹²
28. Shahzada was sitting at his house at this time. Only his (small) children and daughters were with him; Mohammed Sha had gone to the fields and Hanifa had gone into the riverbed with Ali Jan to bring his mother back.⁹³ Shahzada saw Hanifa and Ali Jan walking in the valley and saw shots fired at them by soldiers sitting at the top of the mountain.⁹⁴ Shahzada saw the shots impact in front of them, which he interpreted as meaning they should not go on.⁹⁵
29. Hanifa, Mangul and Shahzada's evidence that the shots were fired by soldiers "at the top of the mountain" (and to the east of the village according to Hanifa) is consistent with the location of the overwatch.⁹⁶ It was near the Bottle 3 HLZ on top of a mountain on the east side of the village.⁹⁷ Photographs taken from the overwatch show soldiers in that location had a clear line of sight to Mangul's compound and up the dry riverbed to the south.⁹⁸
30. The shots caused Hanifa and Ali Jan to turn around and go to Mangul's house.⁹⁹ Ali Jan and Hanifa went to the guesthouse where Hanifa gave the donkeys to the children to tie up.¹⁰⁰

⁸¹ T.5205/1-7 (P35).

⁸² T.1067/13-25 (MR); T.942/0-3 (MH).

⁸³ T.1067/13-25 (MR).

⁸⁴ T.974-975 (MH). See also T.1098/45-1099/3 (MR).

⁸⁵ T.942/0-3 (MH).

⁸⁶ T.1067/30 (MR); T.942/7-15 (MH).

⁸⁷ T.942/15 (MH).

⁸⁸ T.1067/11 (MR).

⁸⁹ T.944/3 (MH).

⁹⁰ T.990/39-992/2 (MH).

⁹¹ T.991/44-995/2 (MH).

⁹² T.1068/13-18, 1102/35-1103/1 (MR).

⁹³ T.1140/9/20 (SF).

⁹⁴ T.1156/1-3 (SF).

⁹⁵ T.1140/25-32 (SF).

⁹⁶ T.232/23-28 (BRS).

⁹⁷ Ex R-1.

⁹⁸ T.944/25-31 (MH); Ex R-1, page 1.

⁹⁹ T.1140/25-36 (SF).

¹⁰⁰ T.942/40 (MH).

Mangul told his children to tie up the donkeys and to give them something to eat.¹⁰¹ Hanifa, Ali Jan and Mangul then sat in the guesthouse and ate melon and drank tea.¹⁰² Ali Jan told them he had left his flour behind because a raid had started.¹⁰³

31. At 6:08DE, the Turn 2 helicopters departed Tarin Kowt for Darwan with FE-B (the Commandos). Wheels down in Darwan was at 6:23DE.¹⁰⁴
32. Hanifa, Mangul and Ali Jan were sitting in front of the guest house when four more helicopters arrived.¹⁰⁵ It was put to Hanifa that the evidence he gave about the second group of four helicopters was not true, but in fact it is perfectly consistent with him having observed the turn 2 insertion.¹⁰⁶ That places Ali Jan and Hanifa's failed attempt to leave the village sometime after the arrival of Turn 1 at 0547DE and before the arrival of Turn 2 at 0623DE.

0805DE: Mr Roberts-Smith's engagement over the river

33. Meanwhile, Mr Roberts-Smith's patrol had moved to its predesignated position¹⁰⁷ and commenced its initial task of patrolling the river.¹⁰⁸ They proceeded from the HLZ to the river by entering the green belt to the point they could see across the river.¹⁰⁹ Mr Roberts-Smith's patrol fanned out in a formation to clear the low ground,¹¹⁰ located down towards the riverbed, and continued their clearance towards the blocking position.¹¹¹
34. A message came over the radio from the overwatch team saying a squirter had been observed crossing the river and was out of sight to the overwatch team. Mr Roberts-Smith responded to the message and said, "roger that, we will look after it".¹¹² Elements of Mr Roberts-Smith's team identified the individual on the opposite side of the river walking away from the target area.¹¹³ Both Mr Roberts-Smith and Person 11 fired shots at the individual.¹¹⁴
35. Person 11 gave the 'thumbs down' signal.¹¹⁵ Mr Roberts-Smith deployed the patrol into an extended line¹¹⁶ and at that point, they saw an individual make his way down and take cover behind a series of rocks.¹¹⁷ Person 11 and Mr Roberts-Smith moved up the river to cross it to assault the rocky outcrop.¹¹⁸ The individual was on the opposite side of the river, walking towards a large cliff face,¹¹⁹ on a foot track running along the base of a cliff with a rifle slung

¹⁰¹ T.1068/24-30 (MR).

¹⁰² T.1068/35-40 (MR); T.944/16 (MH).

¹⁰³ T.1102/6-11 (MR).

¹⁰⁴ Ex R-10, page 2.

¹⁰⁵ T.944/30-31 (MH).

¹⁰⁶ T.992/24-25 (MH).

¹⁰⁷ T.2608/8 (P4).

¹⁰⁸ T.4747/22-24 (P56).

¹⁰⁹ T.4791/27 (P56).

¹¹⁰ T.2797/1-7 (P4).

¹¹¹ T.2608/11-16 (P4).

¹¹² T.3610/40-47 (P7).

¹¹³ T.2608/17-18 (P4).

¹¹⁴ T.2608/25-29 (P4).

¹¹⁵ T.4791/31 (P56).

¹¹⁶ T.4792/27 (P56); T.2608/31-33 (P4).

¹¹⁷ T.2608/31-33 (P4).

¹¹⁸ T.4792/2-5 (P56).

¹¹⁹ T.2608/36-38 (P4).

over his back and carrying what appeared to be a brown sack over his shoulder.¹²⁰

36. Once the individual dropped out of sight, Mr Roberts-Smith decided they should clear that individual.¹²¹ Mr Roberts-Smith left with Person 11 to find a crossing point and directed other members of the patrol to stay in location to maintain eyes on the individual.¹²² They identified a crossing point and attempted to cross.¹²³ The river was flowing and was deep, so Mr Roberts-Smith made the decision that he would cross alone.¹²⁴ He directed Person 11 to stay in location and secure his armour and communications.¹²⁵ Mr Roberts-Smith crossed the river.¹²⁶ He was not visible to Person 4 or Person 56 and he had no communications.¹²⁷
37. Mr Roberts-Smith emerged on the other side of the river then walked in the opposite direction of the patrol's initial advance.¹²⁸ Mr Roberts-Smith came back into view as he was coming back towards their position but on the opposite side of the river,¹²⁹ towards where the enemy had gone to ground.¹³⁰ Mr Roberts-Smith was minus his body armour and was wet.¹³¹ Mr Roberts-Smith then moved up and engaged the individual.¹³² This EKIA occurred by no later than 0653DE, when three EKIA (this killing and the two "almond room" killings) were reported by FE-Alpha on the Same Time Chat.¹³³
38. After disappearing behind a large rock for a period, Mr Roberts-Smith emerged and lifted the insurgent's body so Person 4 could take a photo for SSE purposes.¹³⁴ Mr Roberts-Smith claims that before lifting the body for the SSE photograph, he first put his foot on the deceased individual's back which pushed him down an embankment, and the body rolled down to the base.¹³⁵ Mr Roberts-Smith said his purpose was to get the body to the base, hold it up, then get Person 4 to take a photo with the digital camera.¹³⁶
39. This evidence was intended to play a prominent role in Mr Roberts-Smith's case. That was apparent from the opening address by senior counsel for Mr Roberts-Smith. Initially, Mr McClintock SC said the body was "dragged."¹³⁷ He then returned after an adjournment to "clarify" that "I said he dragged him down ... in fact, he kicked him down ... by kicking him with his boot or pushing him with his boot. Whether that had a knock-on effect to other events that day or perceptions of other [e]vents that day is a matter that can wait till later."¹³⁸
40. However, Mr Roberts-Smith's account found no support. Person 4 did not recall seeing

¹²⁰ T.2920/21-23 (P4).

¹²¹ T.2608/40-45 (P4).

¹²² T.2609/1-3 (P4).

¹²³ T.2797/9-10 (P4).

¹²⁴ T.2797/10-11 (P4).

¹²⁵ T.2797/11-12 (P4).

¹²⁶ T.2797/12 (P4).

¹²⁷ T.2797/12-13 (P4); T 4747.35-40 (P56).

¹²⁸ T.4793/11-14 (P56).

¹²⁹ T.2797/13-15 (P4).

¹³⁰ T.2609/5-7 (P4).

¹³¹ T.2609/13-14 (P4).

¹³² T.2797/15-16, 2611/43 -2612/1 (P4); Ex R-126.

¹³³ Ex R-10, page 2.

¹³⁴ T.2609/26-30 (P4); T.4748/7-16 (P56); T.4794/14 (P56).

¹³⁵ T.236/21-23 (BRS).

¹³⁶ T.236/23-26 (BRS).

¹³⁷ T.33/37.

¹³⁸ T.45/40-46/4.

Mr Roberts-Smith use his foot to push the body of an insurgent down an embankment.¹³⁹ Person 56 said he did not see Mr Roberts-Smith use his foot to roll the body down to the river's edge.¹⁴⁰ Person 11 said Mr Roberts-Smith "dragged"¹⁴¹ then "held up the body...then dropped the body where it lay".¹⁴² Person 4 denied a suggestion that when Mr Roberts-Smith later told colleagues "I kicked the cunt off the cliff,"¹⁴³ he was referring to this incident.¹⁴⁴ Person 31 similarly denied a suggestion that in late 2012 or early 2013, when Person 7 told him Person 4 had disclosed that Mr Roberts-Smith kicked a PUC off a cliff, Person 31 heard of an "embankment" rather than a cliff kick.¹⁴⁵

41. In the Respondents' submission, it is impossible to see how the "cliff kick" allegation had its roots in a different, innocent story that no-one else saw, no-one spoke about, and no-one heard about. The truth is Mr Roberts-Smith fabricated this evidence to provide an innocent explanation for the cliff kick allegation. Mr Roberts-Smith's decision to promulgate a false alternative is evidence of his consciousness of guilt of the murder of Ali Jan.
42. Returning to the narrative, after the SSE photo was taken, Mr Roberts-Smith placed the body down and grabbed the equipment he had removed.¹⁴⁶ Mr Roberts-Smith then contoured back around to his crossing point and recrossed the river and married up with Person 11.¹⁴⁷ Person 4 received a radio call that Mr Roberts-Smith was back on communications and wanted them close to his position,¹⁴⁸ so they closed up to his location.¹⁴⁹ Upon closing up, members of the patrol could see Mr Roberts-Smith had recovered a number of items from the body on the other side of the river. Person 4 observed that Mr Roberts-Smith had retrieved an AK variant that had been struck by a round during the engagement with the EKIA,¹⁵⁰ a length of det cord and an ICOM radio.¹⁵¹ The items were bagged in an evidentiary bag by Person 11, and from there the patrol proceeded to move up towards the elements of tactical headquarters that were on the ground, attached to the assault force.¹⁵²
43. The OPSUM (Ex R-11, page 3) and the storyboard (Ex R-1) record one Chicom-type 56 assault rifle, one ICOM radio and one PCD with two SIM cards were recovered from the EKIA.¹⁵³

By 0906DE: Mr Roberts-Smith's patrol re-joined the rest of the troop

44. Mr Roberts-Smith's patrol then conducted some deconfliction and moved towards an element of troop headquarters, which was in a series of compounds.¹⁵⁴ The weapon and the

¹³⁹ T.2923/45 -2924/5 (P4).

¹⁴⁰ T.4793/29-36, 4797/25-29 (P56).

¹⁴¹ T.5666/13-15 (P11).

¹⁴² T.5666/26-32 (P11).

¹⁴³ T.2893/1-13 (P4).

¹⁴⁴ T.2943 (P4).

¹⁴⁵ T.4673/13-39 (P31).

¹⁴⁶ T.2609/41- 2610/4 (P4).

¹⁴⁷ T.2610/6-7 (P4).

¹⁴⁸ T.2797/20-22 (P4).

¹⁴⁹ T.2610/10-11 (P4).

¹⁵⁰ T.4748/20-33 (P56).

¹⁵¹ T.2610/13-16 (P4). Note: Mr Roberts-Smith could not recall whether an ICOM was found on the body of that insurgent: T.386/10 (BRS).

¹⁵² T.2797/23-25 (P4).

¹⁵³ Ex R-11 (page 3).

¹⁵⁴ T.2610/23-38, 2612/2-6 (P4); Ex R-126 Darwan photographs marked by P4.

- det cord recovered from the EKIA was handed over to the Troop Sergeant.¹⁵⁵ The Respondents' case is that the ICOM was not handed over by Mr Roberts-Smith's patrol.¹⁵⁶
45. Mr Roberts-Smith's patrol were then tasked to push forward to the limit of exploitation of the furthest callsign, being the assault callsign, and their patrol would continue the assault¹⁵⁷ of the remaining compounds.¹⁵⁸
 46. Person 35 gave evidence that following the clearance of compound 31, his patrol moved in a northerly direction, towards the area labelled Stark 1 on Ex R-1, and he saw Mr Roberts-Smith there, who was soaking wet, following the engagement on the other side of the river.¹⁵⁹ Person 16 (who was attached to the tactical headquarters patrol, with the troop Bravo)¹⁶⁰ gave similar evidence that when his patrol was about two thirds of the way through the clearance of the compounds, with a large PUC train, he saw Mr Roberts-Smith "saturated from the waist down".¹⁶¹
 47. By approximately 0906DE, Mr Roberts-Smith's patrol had reached compound 40 and had several persons under control.¹⁶² At 0907DE, clearance was continuing to move south from the western and eastern compounds.¹⁶³ This equates to right to left by reference to page 1 of the bundle of Darwan photographs, Ex R-175,¹⁶⁴ paralleling the creek bed.¹⁶⁵ Further events took place between 0911DE and 0922DE: see paragraphs B1 to B2 of the Respondents' Closed Court Submissions.
 48. Person 7 saw Mr Roberts-Smith in the vicinity of compound 43 and he was still wet.¹⁶⁶ Person 7 (whose team was the PUC handling team)¹⁶⁷ did not see Mr Roberts-Smith or any member of his patrol after this point.¹⁶⁸
 49. Back at Mangul's compound, Hanifa could see soldiers coming through houses on both sides of the river, including from the direction of Haji Mohammed Gul's house¹⁶⁹ (the location of the almond room killings).¹⁷⁰ He marked the middle set of compounds as the location where he could see the soldiers.¹⁷¹ Hanifa's brother, Mohammed Sha, was still irrigating the fields and providing updates to Hanifa as to where the soldiers were.¹⁷² Mangul and Shahzada also gave evidence that Mohammed Sha was in Darwan on the day of the raid.¹⁷³

¹⁵⁵ T.2797/26-27 (P4).

¹⁵⁶ See paragraphs 128-131 below.

¹⁵⁷ T.2797/28-30 (P4).

¹⁵⁸ T.2611/26-27 (P4).

¹⁵⁹ T.5205/9-22 (P35).

¹⁶⁰ T.1810/24-1811/1. See also Ex A-24 (a closed court exhibit).

¹⁶¹ T.1812/12 (P16).

¹⁶² Ex R-21 (a closed court exhibit).

¹⁶³ OPSUM (Ex R-11).

¹⁶⁴ T.4750/31-32 (P56).

¹⁶⁵ T.4749/14-16 (P56).

¹⁶⁶ T.3611/42-3612/5 (P7); Ex R-144 page 1.

¹⁶⁷ T.3611/1-4 (P7).

¹⁶⁸ T.3612/11-12 (P7).

¹⁶⁹ T.944/35-47 (MH).

¹⁷⁰ T.928/39-929/19 (MH); Ex R-87, page 1 (marked a dot and letter F next to the graveyard which is near Haji Mohammed Gul's house); T.997/23-998/4 (MH); T.1110/46-1111/6 (MR).

¹⁷¹ T.946/8-9; Ex R-87, page 3 (marked with number 5).

¹⁷² T.945/3-6 (MH).

¹⁷³ T.1095/5-8 (MR); T.1140/38-46 (SF).

By 0930DE: Mr Roberts-Smith's patrol moved into southern compounds

50. Mr Roberts-Smith, Person 4, Person 11, Person 56, and Person 47, the dog handler, were all present at the point in time in which the patrol moved from across the gap from one group of compounds to the next.¹⁷⁴ Another patrol had crossed the gap already.¹⁷⁵ Once they crossed the gap, Mr Roberts-Smith's patrol deconflicted with another call sign to find out their extended limit of exploitation and then continued with the assault.¹⁷⁶ Mr Roberts-Smith's patrol deconflicted with the other patrol approximately where the second set of compounds begins.¹⁷⁷ The other patrol informed them of the compound they were positioned in and the compounds that still needed to be cleared.¹⁷⁸
51. Mr Roberts-Smith's patrol took over the main assault for the final series of compounds and cleared each individual compound.¹⁷⁹ Person 56 gave evidence that Mr Roberts-Smith's patrol moved from right to left by reference to page 1 of the Darwan photographs.¹⁸⁰
52. Shahzada saw the soldiers when they got to the house of his neighbour, Amir Jan Aka.¹⁸¹ The soldiers then came with an interpreter to Shahzada's house.¹⁸² He saw many soldiers, including on the rooftop and in the house.¹⁸³ The soldiers had paint on their faces and one of the soldiers was tall.¹⁸⁴ The interpreter said to him, "show me the Taliban." Shahzada replied, "I don't know where the Taliban are".¹⁸⁵ The soldiers did not tie Shahzada's hands.¹⁸⁶
53. Mohammed Sha was still down in the fields when the soldiers came and the soldiers tied his hands and placed him near a well.¹⁸⁷ From his house, Shahzada could see where Mohammed Sha was tied near the well because the house was on higher ground.¹⁸⁸
54. Some of the soldiers, including the tall soldier, then went to Mangul's house while other soldiers took Shahzada to Amir Jan Aka's hut down where the river is, near the fields.¹⁸⁹ When Shahzada got to the hut, Amir Jan Aka was already there with four of his sons.¹⁹⁰ Amir Jan Aka's sons had their hands tied and they were sitting with their heads down. Amir Jan Aka was also sitting there but his hands were not tied.¹⁹¹ There were also soldiers at the hut.¹⁹² At this time, there were still some soldiers still near his house.¹⁹³ Shahzada could not see Mohammed Sha from the hut; Mohammed Sha's location was behind a wall.¹⁹⁴

¹⁷⁴ T.2619/3-5 (P4).

¹⁷⁵ T.2619/8-9 (P4).

¹⁷⁶ T.2619/18-19 (P4).

¹⁷⁷ T.2618/35-43 (P4); marked on Ex R-126 by Person 4 with a dot and the letter A on page 3.

¹⁷⁸ T.2619/22-23 (P4).

¹⁷⁹ T.2620/27-31 (P4); T.2437-17 (BRS).

¹⁸⁰ T.4750/31-32; Ex 175 (P56).

¹⁸¹ T.1141/32, 1136/9 (SF).

¹⁸² T.1142/4-10 (SF).

¹⁸³ T.1442/14-16 (SF).

¹⁸⁴ T.1142/21-23 (SF).

¹⁸⁵ T.1141/44 -1142/10 (SF).

¹⁸⁶ T.1142/2 (SF).

¹⁸⁷ T.1140/38-1141/5 (SF).

¹⁸⁸ T.1171/33-38 (SF).

¹⁸⁹ T.1142/27-30 (SF); Ex R-89 Photographs marked by Shahzada (page 3).

¹⁹⁰ T.1142/36-46 (SF).

¹⁹¹ T.1142/36-46 (SF).

¹⁹² T.1149/3 (SF).

¹⁹³ T.1149/14 (SF).

¹⁹⁴ T.1162/34-1163/2 (SF).

55. It was put to Shahzada in cross-examination that if his evidence about Mohammed Sha was correct, Mohammed Sha would have been visible in the overwatch photographs.¹⁹⁵ That line of questioning was misconceived. Mohammed Sha was on the other side of a wall. He could not be seen from the hut where Shahzada was detained.¹⁹⁶ The overwatch photos were taken from the same perspective as Shahzada, looking towards Mohammed Sha's location. Thus if Shahzada could not see Mohammed Sha, neither could the overwatch.
56. In examination in chief, Person 4 recalled encountering at least one Afghan male in the compound he marked with the letter D on page 3 of Ex R-126.¹⁹⁷ This marking corresponds to Shahzada's compound as marked by Hanifa¹⁹⁸ and Mangul.¹⁹⁹ Person 4 described the Afghan male as "stout, relatively short, relatively heavy, dark beard".²⁰⁰ That description is more consistent with the younger Mohammed Sha than the older Shahzada.²⁰¹ In cross-examination, Person 4 put this encounter two compounds closer to the village²⁰² and said he could not recall one way or another whether his patrol encountered fighting aged males in Shahzada's compound.²⁰³ On either account, Shahzada was uncontradicted.

Mr Roberts-Smith's patrol found Hanifa, Mangul and Ali Jan in Mangul's compound

57. At 0930DE, the FE reported that clearance was nearing completion.²⁰⁴ Practically speaking, that meant the SASR patrols were approaching the limit of exploitation, being the last compound on the southern edge of the village. That compound belonged to Mangul. Ali Jan, Hanifa and Mangul were just moments away from encountering Mr Roberts-Smith and his patrol.
58. As the soldiers got closer, Mangul, Hanifa and Ali Jan went inside the guesthouse.²⁰⁵ Inside the guesthouse, Mangul said to Hanifa and Ali Jan, "let me go and get the children so that the foreigners...don't fire at them".²⁰⁶ Mangul went and got his children and told them to sit down under the hut because "the foreign soldiers are here".²⁰⁷ Hanifa recalled sitting inside the guesthouse with his daughter, two of Mangul's daughters, and Ali Jan.²⁰⁸
59. Hanifa heard noises from the women and children in Mangul's house.²⁰⁹ Hanifa then saw a dog in front of the guesthouse. The dog had glasses and something like a belt around his neck.²¹⁰ Hanifa said the dog was black.²¹¹ Photographs of Darwan taken by the SASR show a black dog was attached to FE Alpha that day.²¹² Mangul also heard shouting in a foreign

¹⁹⁵ T.1172/1-3 (SF).

¹⁹⁶ T.1162/34-1163/2 (SF).

¹⁹⁷ T.2620/35-44 (P4).

¹⁹⁸ T.927/11-26 (MH) (letter A on page 2 of Ex R-87).

¹⁹⁹ T.1053/43 -T.1054/4 (MR) (letter B on page 2 of Ex R-88).

²⁰⁰ T.2621/11-13 (P4).

²⁰¹ Ex R-176 (a closed court exhibit).

²⁰² T.2926/26-43 (P4).

²⁰³ T.2928/1-7 (P4).

²⁰⁴ Ex R-11, p 4.

²⁰⁵ T.1069/6-13 (MR).

²⁰⁶ T.1069/13-15 (MR).

²⁰⁷ T.1069/20 (MR).

²⁰⁸ T.946/14-16 (MH).

²⁰⁹ T.946/25-34 (MH).

²¹⁰ T.946/44-47 (MH).

²¹¹ T.992/35 (MH).

²¹² Ex R-21 (a closed court exhibit).

language then gestured to the soldiers to come and search, at which time the soldiers pointed their guns at him and unleashed the dog.²¹³ The dog attacked and bit Mangul on his right thigh.²¹⁴ The soldiers said something to the dog and the dog then went away.²¹⁵

60. A soldier then pointed a flashlight at Hanifa and said, "get up, stand up".²¹⁶ The soldier grabbed Hanifa by the neck and hit his head against the wall of the guest house.²¹⁷ Hanifa saw the soldiers had one colour of paint on one side and another colour of paint of the other side of their face.²¹⁸ The dog went towards Hanifa's daughter and so he told his daughter to come to him.²¹⁹ Hanifa recalled that the soldiers took Ali Jan's jacket and his turban and tied Hanifa's hands behind his back.²²⁰ Hanifa and Ali Jan were made to stand near the wall in front of the guesthouse.²²¹ The soldiers then searched Mangul, tied his hands behind his back and pushed him towards the ground, such that he went onto his knees and lowered his head.²²² The soldiers took Mangul to the wall in front of the guesthouse²²³ and sat him down facing towards the river.²²⁴ Mangul was tied up next to the oven.²²⁵ When Mangul was sitting down there, he could see Hanifa and Ali Jan under the hut facing the cliff.²²⁶
61. Person 56's evidence corroborates that of Hanifa and Mangul that they, and Ali Jan, were detained by foreign soldiers in Mangul's compound. Person 56 was involved in the clearance of the compound that was the furthest their patrol extended.²²⁷ Person 56 identified the last compound on a photograph;²²⁸ it was the same compound that Mangul, Hanifa and Shahzada all identified as Mangul's compound.²²⁹ Person 56 recalled being present at the compound with Mr Roberts-Smith, Person 4, Person 11, an interpreter, and potentially the other regiment member, who may have been the dog handler.²³⁰ Critically, Person 56 said that in the last compound his patrol found local nationals of both sex, including children and including fighting aged males.²³¹ The Respondents submit that the fighting-aged males Person 56 saw were Hanifa, Mangul, and Ali Jan.
62. In cross-examination, Person 56 reaffirmed he was "sure" about the presence of Afghan local nationals in the end compound, and he rejected the suggestion that his evidence "may be wrong".²³² While Person 56 accepted it was "possible" he was wrong about the

²¹³ T.1069/30-32 (MR).

²¹⁴ T.1070/10-27 (MR).

²¹⁵ T.1071/44 (MR).

²¹⁶ T.946/44-47 (MH).

²¹⁷ T.947/40-45 (MH); Ex R-87, (marked C on page 4 of Ex R-87).

²¹⁸ T.949/40 (MH).

²¹⁹ T.949/38 (MH).

²²⁰ T.950/20 (MH).

²²¹ T.950/45 (MH).

²²² T.1072/5-10 (MR).

²²³ T1072.13-45 (MR); Ex R-88, page 4 (wall of Mangul's guesthouse marked C on page 4 of Ex R-88).

²²⁴ T.1072/13-15 (MR); Ex R-88, page 4.

²²⁵ T.951/14 (MH).

²²⁶ T.1073/14-15; Ex R-88, page 4 (marked D on page 4 of Ex R-88).

²²⁷ Marked C on page 1 of Ex R-175.

²²⁸ T.4751/13-26 (P56); Ex-R175, page 1 (the compound to the right of the line marked C).

²²⁹ T1072.13-45 (MR); Ex R-88, page 2 (wall of Mangul's guesthouse marked C); T.947/41 - 948/8 (MH); Ex R-87, page 2 (marked C as the wall in front of Mangul's house, where the guesthouse is); T.1163/4-39 (SF); Ex R-89, page 4 (marked B where Ali Jan and Mohammed Hanifa were sitting near Mangul's compound).

²³⁰ T.4752/22-25 (P56).

²³¹ T.4751/32-35 (P56).

²³² T.4795/1-11 (P56).

compound in which he observed the Afghan nationals,²³³ when read in the context of his unequivocal affirmations, it is clear Person 56 was doing no more than making an appropriate allowance for the small possibility of error. It was never put to Person 56 that he was, in fact, wrong. Nor was put to him that he was, in fact, thinking of another compound.

63. Person 4's evidence is also consistent with that of Hanifa, Mangul and Person 56. Person 4 said his patrol went to the very last compound in the village.²³⁴ Person 56 and Person 47 (the dog handler) were with the patrol during the clearance of the last compound.²³⁵ As the patrol cleared the last compound, they found one individual approximately where the ascending track terminates into a compound.²³⁶ That is the area Mangul and Hanifa identified as just outside the guesthouse.²³⁷ Person 4 saw that individual when the individual was at the compound.²³⁸ He had a donkey with a distinct red, Afghani designed rug on it and there were baskets on the donkey full of wood.²³⁹ Person 4's description of the donkey is consistent with Hanifa and Mangul's evidence that for work, Ali Jan would bring woods to sell.²⁴⁰ The individual was PUC'd,²⁴¹ handcuffed to the rear, placed up against a wall and placed on the ground.²⁴² Person 4 recalled a second local individual being in the end compound at some point, but he did not recall when.²⁴³
64. Mr Roberts-Smith²⁴⁴ and Person 11²⁴⁵, in contrast, both said there were no Afghan local women, children, fighting aged men or PUCs in the end compound. This evidence should be rejected. Mr Roberts-Smith and Person 11 both have a motive to lie because the detention of Ali Jan is an indispensable link in the Respondents' case that Ali Jan was murdered. The evidence of Hanifa, Mangul, Shahzada, Person 4 and Person 56 should be preferred. Their evidence was materially consistent, none had a credible motive to lie, and the possibility of error or false collusion between all five is inconceivable.

Person 56 and the interpreter were in Mangul's compound

65. Mr Roberts-Smith also gave evidence that Person 56 and the interpreter were not in the final compound. He said *before* his patrol crossed the gap to the southern compound set, he heard a radio call from Bravo asking for the interpreter, so he sent Person 56 with the interpreter back to the troop Bravo.²⁴⁶ He said he next saw Person 56 at the extraction HLZ at the end of the mission.²⁴⁷ Person 11 similarly stated that Mr Roberts-Smith sent Person 56 to escort the interpreter back, but said it was in the vicinity of the southern-most compound

²³³ T.4795/1-11 (P56).

²³⁴ T.2620/19-20 (P4); Ex R-126 (marked C on exhibit R126).

²³⁵ T.2621/33-34; T.2928/29-39 (P4).

²³⁶ T.2621/4-25 (P4); Ex R-126, page 3 (marked D with a dot) T.2929/1-17 (P4).

²³⁷ T1072.13-45 (MR); Ex R-88, page 2 (wall of Mangul's guesthouse marked C); T.947/41 - 948/8 (MH); Ex R-87 (marked C as the wall in front of Mangul's house, where the guesthouse is, on page 4 of Ex R-87).

²³⁸ T.2929/14 (P4).

²³⁹ T.2621/27-31 (P4).

²⁴⁰ T. 923/19 -924/3 (MH); T.1050/34-1052/11 (MR).

²⁴¹ T.2621/39 (P4)

²⁴² T.2622/5-12 (P4).

²⁴³ T.2622/25-29, T.2925/46 (P4).

²⁴⁴ T.402/43-403/7 (BRS).

²⁴⁵ T.5732/5-18 (P11). Person 11 accepted it was "possible" that women and children were there: T.5753/47.

²⁴⁶ T.397/13- 399/40; 478/9-10 (BRS).

²⁴⁷ T.400/4-7 (BRS).

set.²⁴⁸ That evidence was knowingly false. Mr Roberts-Smith and Person 11 knew the presence of the interpreter supported the evidence of the Afghan witnesses so they both sought to undermine that evidence by falsely suggesting that the interpreter never made it there. There were two main flaws in Mr Roberts-Smith and Person 11's account.

66. The *first* flaw concerns the timing. Initially, Mr Roberts-Smith said the patrol cleared to the end of the compounds, waited "in the vicinity of 10 minutes",²⁴⁹ then moved to the HLZ for extraction where he reunited with Person 56.²⁵⁰ Person 11 claimed to have no recollection of the timing, although he denied it was longer than 10 to 15 minutes or a period "well in excess of an hour."²⁵¹ However, in cross-examination, a significant hole emerged in Mr Roberts-Smith and Person 11's timing. The move into the southern compounds occurred no later than 0930DE when the FE reported clearance was nearing completion.²⁵² They reunited with Person 56 after 1109DE (when EKIA was reported) and before 1121DE (when extraction occurred).²⁵³ Applying the objective timing to Mr Roberts-Smith and Person 11's account, Person 56 was separated from his patrol for over an hour and a half.
67. Yet the walk from compound 43 (where Mr Roberts-Smith said he last saw Person 56), back to where the troop Bravo was at the other end of the compound set, should have taken approximately 3-5 minutes.²⁵⁴ It was a 10-minute round trip²⁵⁵ and Mr Roberts-Smith expected Person 56 to return as soon as he had safely delivered the interpreter back to Bravo.²⁵⁶ Mr Roberts-Smith was unable to explain where Person 56 was for the hour and a half he was apparently absent.²⁵⁷ Person 7 (whose team was the PUC handling team)²⁵⁸ did not see Person 56 any point after running into Mr Roberts-Smith at compound 43.²⁵⁹ That indicates Person 56 was not re-tasked to anything PUC-related. The reason Mr Roberts-Smith was unable to explain Person 56's supposed absence was because it never happened. It is wholly implausible that Person 56 went missing for that length of time: particularly at a time when the patrol was short-handed and had not yet finished its task of clearing compounds.²⁶⁰
68. The *second* flaw in Mr Roberts-Smith and Person 11's account is it is contradicted by every other witness who gave evidence on this point:
- (a) Person 56 said he was involved in the clearance of the compound that was the furthest point that their patrol extended.²⁶¹ Person 56 recalled that the interpreter was also present at the last compound.²⁶²

²⁴⁸ T.5673/23-34 (P11); Ex A-228, page 2 (marked with the letter I on Ex A-228).

²⁴⁹ T.406/36-43 (BRS).

²⁵⁰ T.400/4-7 (BRS).

²⁵¹ T.5728/9-17 (P11).

²⁵² Ex R-11, page 4.

²⁵³ Ex R-10, page 4.

²⁵⁴ T.391/41-42 (BRS).

²⁵⁵ T.391/41-42 (BRS).

²⁵⁶ T.478/19-22 (BRS).

²⁵⁷ T.483/14-1; 485/1-13; 491/17-30 (BRS).

²⁵⁸ T.3611/1-4 (P7).

²⁵⁹ T.3612/11-12 (P7).

²⁶⁰ T.490/24-26 (BRS).

²⁶¹ T.4751/24-26 (P56).

²⁶² T.4752/22-27 (P56).

- (b) Person 4 distinctly recalled clearing the southern compound set with Person 56.²⁶³ He said when the limit of exploitation was reached (i.e., Mangul's compound), Person 56 and Person 47 moved together to a small structure above the final two compounds.²⁶⁴ Person 4 also denied that Person 56 was sent back to the PUC holding area before his patrol crossed the gap to the southern compound set.²⁶⁵ Person 4 recalls an interpreter being present in the end compound.²⁶⁶
- (c) Hanifa and Mangul both recalled an interpreter being present in Mangul's compound. We return to this at paragraphs 76 to 83 below.
- (d) Shahzada recalled an interpreter at his compound (the second last compound in the southern compound set).²⁶⁷
69. There is one difference between Person 4 and Person 56 concerning the interpreter. Person 56 recalled entering the southern compound set with the interpreter.²⁶⁸ Person 4, in contrast, said that Mr Roberts-Smith sent Person 56 back to THQ to fetch the interpreter.²⁶⁹ Person 56 then returned to the "end compound" with the interpreter where tactical questioning was conducted.²⁷⁰ The difference is inconsequential. On either account, an interpreter was present in the end compound with Mr Roberts-Smith's patrol.
70. One further matter is relevant to determining the location of the interpreter. There were two interpreters with FE-A during the Darwan mission. One was attached to the Troop Alpha in the overwatch position.²⁷¹ The overwatch was outside the village and there was no ability for the interpreter with the Troop Alpha to move down to the village to help.²⁷² That left just one interpreter – Person 13 – in Darwan village for the entire mission.
71. Person 32's only clear recollection of the interpreter was being on the same helicopter on insertion and being present for the handover of PUCs to THQ.²⁷³ However, Person 32 could not recall whether the interpreter was with Person 35's patrol at other times.²⁷⁴ He agreed it was unlikely that Person 13 would have been with Person 35's patrol for the duration of the time the patrol was waiting for extraction.²⁷⁵ He also said it was frequently the case that their patrol would not have an interpreter with them whilst doing clearances because the interpreter would be required by some other part of the troop, and this occurred on numerous missions.²⁷⁶ Person 32 gave evidence that there were recognised field signals that enabled the patrol to communicate with the NDS members of the patrol, who also had basic English,

²⁶³ T.2937/29-30 (P4).

²⁶⁴ T.29378/1-41 (P4).

²⁶⁵ T.2937/1-5 (P4).

²⁶⁶ T.262225-41 (P4).

²⁶⁷ T.1142/4-10 (SF).

²⁶⁸ T.4750/34-4751/11; 4752/18-27 (P56).

²⁶⁹ T.2622/34-41 (P4).

²⁷⁰ T.2622/25-41 (P4) | NB: At line 41, Person 4 says Person 56 came back to "that compound" with the interpreter. Having regard to line 29, it is clear the compound that Person 4 is referring to is the "end compound". This is reinforced when Person 4 confirms, at line 44, that tactical questioning was conducted with the use of the interpreter at the "last compound".

²⁷¹ Ex A-24 (a closed court exhibit).

²⁷² T.5900/23-25 (P32).

²⁷³ T.5897/23-41 (P32).

²⁷⁴ T.5899/45-46 (P32).

²⁷⁵ T.5902/15-39 (P32).

²⁷⁶ T.5904/14-21 (P32).

allowing them to communicate basic commands.²⁷⁷ Person 32 agreed that for the patrol to function and move, it was not necessary for the interpreter to be with the patrol at all times.²⁷⁸

72. Contrary to every other witness, Person 35 gave evidence that Person 13 was attached to his patrol for the entire mission.²⁷⁹ Person 35 said he did not hand the interpreter to any other team because it would be unsafe for the interpreter and because Person 35 needed the interpreter to communicate with the NDS.²⁸⁰ Person 35 said he was not able to communicate with his NDS team using basic words or phrases or through hand signals.²⁸¹ That evidence was untrue. Many NDS members could communicate in English.²⁸² Person 35 agreed that the interpreter was a troop asset and was attached to Bravo.²⁸³ In addition, Person 35 had no explanation for how any other troop task could have been performed if the interpreter remained with his patrol, including callouts and the tactical questioning of PUCs.²⁸⁴ Person 35's evidence is contradicted by Mr Roberts-Smith's evidence that he had an interpreter with him when he was clearing compounds.²⁸⁵ The truth is that the interpreter was a troop asset and was deployed wherever he was needed in Darwan that day. Person 35's resistance to the obvious proposition that the interpreter was not with his patrol the whole day can only be viewed as a deliberately dishonest attempt to give evidence he thought would assist Mr Roberts-Smith.

Person 47 and the MWD were in Mangul's compound

73. Mr Roberts-Smith and Person 11 also denied that Person 47 and the MWD were in the end compound.²⁸⁶ The Court should reject this evidence and again find that it was a deliberate lie. Mr Roberts-Smith and Person 11 knew that the presence of Person 47 and the MWD supported the evidence of the Afghan witnesses, so they both sought to undermine that evidence by falsely suggesting that Person 47 never made it to the last compound. Their evidence is also militarily implausible. Mr Roberts-Smith and Person 11 both accepted that a dog handler was used for assaulting and clearing compounds.²⁸⁷ It makes no military sense that Person 47 was present for most of the clearance,²⁸⁸ yet left before it was complete. The evidence of Hanifa, Mangul, Shahzada, Person 4 and Person 56 should instead be preferred. Again, their evidence was materially consistent, none had a credible motive to lie, and the possibility of error or false collusion between all five is inconceivable.

Mr Roberts-Smith's patrol was in Mangul's compound for over an hour

74. At or about 0945DE, the clearance, KLE and SSE were complete, and the FE requested extraction.²⁸⁹ Wheels up for turn 1 at Tarin Kowt was planned for 1020DE.²⁹⁰ Factoring in

²⁷⁷ T.5903/22-34 (P32).

²⁷⁸ T.5903/45-5904.5 (P32).

²⁷⁹ T.5327/41-42 (P35).

²⁸⁰ T.5328/20-25; T.5328/18 (P35).

²⁸¹ T.5333/15-24 (P35).

²⁸² See paragraph B4 of the Respondents' Closed Court Submissions; CCT 2.5.22, p.7/28-12/39 (P35).

²⁸³ CCT 2.5.22, p.14/16-35 (P35).

²⁸⁴ CCT 2.5.22, p.16/22-18/25 (P35).

²⁸⁵ T.392/28-36 (BRS).

²⁸⁶ T.403/12-17 (BRS); T.5674/4-5, 5732/29-5734/5 (P11).

²⁸⁷ T.397/1-3 (BRS); T.5733/36-5734/7 (P11).

²⁸⁸ T.397/10-11 (BRS).

²⁸⁹ Ex R-10 (page 3).

²⁹⁰ Ex R-10 (page 3).

a 15-minute flight from Tarin Kowt,²⁹¹ that put the turn 1 extraction from Darwan at around 1035DE. The Turn 2 extraction from Darwan would have been at approximately 1105DE (following a half hour round trip for the helicopters to take the turn 1 extraction back to Tarin Kowt and then return). The upshot was that at 0945DE, Mr Roberts-Smith's patrol had approximately 1 hour and 20 minutes to wait before they would leave the village. That timeframe soon expanded. At 1008DE, a mechanical issue with one extraction aircraft pushed the timeframe back by around 20 minutes.²⁹² In total, that meant Mr Roberts-Smith's patrol had around one and a half hours to wait for extraction at just after 1120DE.

75. Mr Roberts-Smith's recollection was that his patrol remained at the last compound "in the vicinity of 10 minutes" after clearing it,²⁹³ then moved to the HLZ for extraction.²⁹⁴ Person 11 claimed to have no recollection of timing but resisted the suggestion it was more than 10 to 15 minutes.²⁹⁵ That timing was out by well over an hour and neither Mr Roberts-Smith nor Person 11 had any explanation for it.²⁹⁶ It was a deliberate lie designed to cover the true position that Mr Roberts-Smith had over an hour to question and assault the PUCs in the end compound, murder Ali Jan, then take steps to cover up Ali Jan's murder by giving it the false appearance of a legitimate killing.

0945DE – 1045DE: Ali Jan, Hanifa and Mangul were questioned

76. Back in Mangul's compound, the interpreter told Mangul to tell the children to go to their rooms, which Mangul did.²⁹⁷ A soldier then grabbed Mangul by the back of his neck and took him to sit beside Hanifa and Ali Jan.²⁹⁸ Ali Jan, Hanifa and Mangul were taken into the middle of Mangul's house, which was like a balcony with some shade,²⁹⁹ while some soldiers stood on the rooftop of the guesthouse³⁰⁰ and others were inside Mangul's house.³⁰¹ Mangul recalled there were many soldiers around at this time, including on the rooftop and sitting in the guesthouse.³⁰²
77. The big soldier then approached Hanifa and bent his knee.³⁰³ Hanifa saw the big soldier had green-brown eyes³⁰⁴ and was wet up to his chest area³⁰⁵ and there was sand on his uniform.³⁰⁶ The only reasonable inference is that the "big soldier" is Mr Roberts-Smith. It is consistent with Person 4's evidence that Mr Roberts-Smith conducted tactical questioning in the end compound.³⁰⁷ The inference is also irresistible based on the big soldier's height,

²⁹¹ See Ex R-10 (page 2), which records a 15 minute flight time between 0532 Turn 1 E/U TK and 0527DE W/D at the objective.

²⁹² Ex R-10 (page 3).

²⁹³ T.406/36-43 (BRS).

²⁹⁴ T.400/4-7 (BRS).

²⁹⁵ T.5727/41-5728/17 (P11).

²⁹⁶ T.485/26-34 (BRS); T.5730/25-5731/28 (P11).

²⁹⁷ T.1074/6-14 (MR).

²⁹⁸ T.1074/18-20 (MR).

²⁹⁹ T.952/5 (MH).

³⁰⁰ T.951/25-27 (MH).

³⁰¹ T.951/33 (MH).

³⁰² T.1074/35-42 (MR).

³⁰³ T.952/10-15 (MH).

³⁰⁴ T.952/18; CCT 27.7.21, p.21/4-33 (MH).

³⁰⁵ T.952/28 (MH).

³⁰⁶ T.958/7 (MH).

³⁰⁷ T.2623/1-5 (P4).

other witnesses who place Mr Roberts-Smith in the end compound,³⁰⁸ and other witnesses who saw that Mr Roberts-Smith was wet from the waist down.³⁰⁹

78. The soldiers then took Hanifa, Ali Jan and Mangul to the wall and made them face the wall, with their backs facing to the soldiers, so they could not see the soldiers anymore.³¹⁰ Two soldiers came from the direction of Hanifa's house and went up to Hanifa. One put his hand on Hanifa's right shoulder, and he started questioning him.³¹¹ The soldier, through an interpreter said to Hanifa, "Are you a Talib?" and he said, "No." The interpreter said, "Why you are not a Talib?" and then told Hanifa, "Show me Hekmatullah."³¹² There were other soldiers there, but the interpreter was asking the questions³¹³ in Pashto.³¹⁴
79. Hanifa said the interpreter then took out a pistol and put it on Hanifa's throat and said, "You are a Talib. I shot your father."³¹⁵ The interpreter pointed the pistol to Hanifa's head and hit Hanifa with the pistol and said, "show me Hekmatullah, otherwise I will shoot you in the head".³¹⁶ Mangul also saw the interpreter pull out the pistol and hold it towards Hanifa and say, "where are the Taliban?" and Hanifa said, "I don't know".³¹⁷ The interpreter then asked Hanifa where he was going when the shots were fired at him.³¹⁸ Hanifa replied he was going with his uncle (Ali Jan) to the mountain to bring his stepmother, but after the shots were fired, he returned to see what the soldiers wanted and what was going on.³¹⁹ The interpreter again said "we killed Shahzada", to which Mangul replied "why did you shoot Shahzada. Shahzada is Hanifa's dad, why did you shoot him?". The interpreter slapped Mangul and hit Hanifa with the pistol on the forehead.³²⁰
80. The interpreter and the soldier then started to question Ali Jan and Mangul.³²¹ Hanifa did not hear the questions because he was told not to look around.³²² During this time, the big soldier (Mr Roberts-Smith) was sitting beside Mangul. Every time Mangul looked at the big soldier, he hit Mangul.³²³ The interpreter told Mangul not to look at the big soldier because "they don't like people looking at them".³²⁴ The interrogation continued and Mangul was asked about where Hekmatullah and the Taliban were. Mangul said he did not know where they were.³²⁵
81. The soldiers then moved Hanifa and Ali Jan outside and made them stand up in front of the guesthouse. Mangul remained inside the compound, on the other side of the wall, and could

³⁰⁸ T.4752/18-27 (P56); T.2621/15-20 (P4); T.3614/4-16 (P7).

³⁰⁹ T.1812/7-16; 29-31 (P16); 3611/1-44 (P7).

³¹⁰ T.953/3 (MH).

³¹¹ T.953/1-22 (MH).

³¹² T.953/21-22 (MH).

³¹³ T.953/32 (MH).

³¹⁴ T.1074/24-32 (MR).

³¹⁵ T.953/42-45 (MH).

³¹⁶ T.954/1-5 (MH).

³¹⁷ T.1075/9-15 (MR).

³¹⁸ T.954/34 (MH).

³¹⁹ T.954/34-38 (MH).

³²⁰ T.955/42-45 (MH); T.1075.29-39 (MR).

³²¹ T.955/36 (MH).

³²² T.955/44 (MH).

³²³ T.1075/42-44 (MR).

³²⁴ T.1075/45 (MR).

³²⁵ T.1076/1-23 (MR).

- not see Ali Jan and Hanifa anymore.³²⁶ Mangul was asked by the interpreter whether Hanifa and Ali Jan were Taliban, to which Mangul replied "no, they are not Taliban".³²⁷ The interpreter then interrogated Hanifa and Ali Jan, but Mangul could not hear what was said.³²⁸
82. At some point, the big soldier went into the guesthouse followed by the interpreter.³²⁹ Another soldier kicked Hanifa in the back and he fell into the guest room.³³⁰ After that, the interpreter stood behind Hanifa and the big soldier looked into his eyes. The interpreter told Hanifa he must look into the big soldier's eyes.³³¹ When the interpreter asked questions, Hanifa turned around to look at the interpreter, which caused the big soldier to punch him many times.³³² Hanifa again saw that the big soldier's uniform was wet until his lower chest, with sand from the river on his uniform.³³³ The interpreter said "show me Hekmatullah" and asked whether he was a Talib. Hanifa said he was not a Talib, and he did not know where Hekmatullah was. The big soldier kicked Hanifa in the upper abdomen area hard.³³⁴ Hanifa was then forced to sit right near the door entrance.³³⁵
83. The interpreter then brought Ali Jan near to Hanifa and said something to Ali Jan, who smiled. Hanifa told Ali Jan not to laugh or smile because they do not like when you laugh or smile.³³⁶ Ali Jan's hands were still tied behind his back.³³⁷ They were less than two metres away from Hanifa.³³⁸ The interpreter then left and went away from Ali Jan.³³⁹
84. Person 4 observed that, initially, both individuals he recalls in the last compound were present during tactical questioning, but one individual was deemed not to be a primary concern.³⁴⁰ Person 4 recalled that one individual had an evidence bag positioned at his feet.³⁴¹ The Respondents submit that this individual was Ali Jan. The second individual, who was deemed not to be a "primary concern", is likely to be Hanifa. As 2IC, Person 4 was focused outwards from the compound.³⁴² Thus, Person 4's recollection of two PUCs being questioned is likely to have been Ali Jan and Hanifa being questioned outside the compound. Mangul, in contrast, remained in the compound where the patrol commander was focused.³⁴³ The fact that Person 4 did not recall a third Afghan male is likely because Mangul never entered his area of focus.
85. The Respondents' case is that Ali Jan was assessed as the "primary concern" because he was not from Darwan and had been seen attempting to leave the village. Even if Mr Roberts-

³²⁶ T.1076/45-1076/3 (MR).

³²⁷ T.1076/27-36 (MR).

³²⁸ T.1078/1-14 (MR).

³²⁹ T.957/20-31 (MH).

³³⁰ T.957/20-31 (MH).

³³¹ T.958/11-14 (MH).

³³² T.958/20-22 (MH).

³³³ T.958/31-41 (MH).

³³⁴ T.959/6-10 (MH).

³³⁵ T.950/23-24 (MH).

³³⁶ T.959/29-36 (MH).

³³⁷ T.960/11-13 (MH).

³³⁸ T.959/37-40 (MH).

³³⁹ T.959/39-44 (MH).

³⁴⁰ T.2623/7-10 (P4).

³⁴¹ T.2623/31-33 (P4).

³⁴² T.2623/14-18 (P4).

³⁴³ T.2623/14-15 (P4).

Smith did not receive information from the overwatch that two individuals had attempted to leave then returned to the end compound, the mere fact that Ali Jan was not from the area was enough to mark him as suspicious. Mangul is likely to have been assessed as not a “primary concern” once it became apparent that he owned the end compound. Similarly, while Hanifa may have raised an initial concern because he too attempted to leave the village and he was not found in his own compound, the tactical questioning directed at eliciting his relationship with Shahzada must have eventually confirmed that he was from the next-door compound and he too was assessed as not a “primary concern”.

1045DE – 1050DE: Person 56 and the interpreter were sent away

86. Person 56 said that Mr Roberts-Smith's patrol was located in the last compound for some period towards the end of the mission.³⁴⁴ Person 56 said he remained at the last compound for around half an hour,³⁴⁵ during which time he was searching rooms within the compound for anything of interest and then providing security.³⁴⁶ Person 56 observed that part of the compound had internal rooms and there was also a thatched structure within the walls of the compound.³⁴⁷ That thatched structure is visible in the (better quality) overwatch photos of Mangul's compound taken during a mission to Darwan a few weeks later.³⁴⁸
87. At around 1045DE or 1050DE, or approximately half an hour before extraction, an extraction call was made over the radio.³⁴⁹ That prompted the patrol to expediate whatever jobs still required doing and then start their move to their extraction point.³⁵⁰
88. At about this same time, approximately half an hour before the Turn 2 extraction,³⁵¹ Mr Roberts-Smith directed Person 56 to take the interpreter back towards THQ.³⁵² Person 56 recalled being tasked by either Mr Roberts-Smith or Person 4 to leave the end compound and head to an area to select or provide security for an HLZ.³⁵³ Person 56 went with the interpreter (and at some point during that task there was another regiment member with him as well) down to the dry creek bed³⁵⁴ then across to the other side of the flat area into a vegetated area.³⁵⁵ Upon reaching the HLZ, Person 56, the interpreter, and another regiment member (likely Person 47) waited there for approximately half an hour.³⁵⁶ Person 56 did not hear any engagements or any radio calls in relation to engagements whilst waiting there.³⁵⁷
89. As Person 56 and the interpreter left the end compound, Person 4 moved up to the corner of the compound and watched them walk back towards the axis of clearance, towards the

³⁴⁴ T.4751/24-26 (P56).

³⁴⁵ T.4752/32-33 (P56).

³⁴⁶ T.4752/6-10 (P56).

³⁴⁷ T.4753/19-20 (P56).

³⁴⁸ Ex R-177 (a closed court exhibit).

³⁴⁹ Ex R-10, page 3.

³⁵⁰ T.2623/35-39 (P4).

³⁵¹ T.4753/4-6 (P56). Turn 2 extraction was at 1121DE (see Ex R-10, page 4). That places Person 56's evidence of being sent back with the interpreter to approximately 1050DE.

³⁵² T.2624/46-47 (P4).

³⁵³ T.4752/38-44 (P56).

³⁵⁴ T.4753/1-2 (P56) (along the route marked with a dashed line on Ex R-175).

³⁵⁵ T.4753/20-40 (P56) (following the route marked with a solid line on Ex R-175).

³⁵⁶ T.4754/10-11 (P56).

³⁵⁷ T.4754/13-16 (P56).

other call signs, for as long as he could to make sure they were in a position of security.³⁵⁸

90. At 1052DE,³⁵⁹ the turn 1 helicopters extracted the Commandos,³⁶⁰ Mr Roberts-Smith's patrol extracted from the HLZ called Eurodos 1 on turn 2.³⁶¹ For the reasons set out at paragraphs B5 to B9 of the Respondents' Closed Court Submissions, that meant the area around the Eudoros 1 HLZ – including the cornfield in which Ali Jan was shot - was scanned by the Heron drone and the Apache helicopters, using all of their available electronic warfare equipment, and cleared of any threats at or just before 10:52DE.³⁶² The overwatch also had a direct line of sight to the HLZ and the surrounding fields throughout this time (and throughout the entire mission).³⁶³ There is no evidence that any spotters were detected in the cornfields around the Eudoros 1 HLZ by any person or any electronic warfare equipment during the turn 1 scans or extraction.³⁶⁴

Mr Roberts-Smith kicked Ali Jan off the cliff

91. From Amir Jan Aka's hut, Shahzada could see Ali Jan and Hanifa sitting near the wall at Mangul's compound with their hands tied³⁶⁵ and their heads lowered.³⁶⁶ Shahzada could see Hanifa's dark clothes.³⁶⁷ The big soldier then approached Ali Jan and made him stand up.³⁶⁸ There were no other soldiers with the big soldier but there were other soldiers "sitting there" with Ali Jan and Hanifa.³⁶⁹ The big soldier said something to Ali Jan and Ali Jan smiled.³⁷⁰
92. Person 4 was still behind the compound at this stage. Once he was happy with Person 56's position, Person 4 moved down a rocky slope and got to a corner of a compound.³⁷¹ As Person 4 was negotiating the corner, he saw Person 11 positioned with his back towards a large drop-off and holding the PUC who had been found with the donkey.³⁷² The PUC – who the Respondents say is Ali Jan – was handcuffed to the rear and had his back towards the large slope.³⁷³ Person 11 was holding him by his right shoulder.³⁷⁴
93. The sketch on page 3 of Ex A-92 shows the corner of the compound around which Person 4 walked and saw Person 11, the PUC and Mr Roberts-Smith.³⁷⁵ Mr Roberts-Smith is represented by the dot at the top of the sketch, with an arrow pointing from Mr Roberts-Smith to the PUC.³⁷⁶ The arrow denotes Mr Roberts-Smith's direction of travel. To the right of the

³⁵⁸ T.2625/1-11 (P4) (marked with a dot and F on Ex R-126).

³⁵⁹ Based on a departure time of 1035DE and 15 minutes travel time from Tarin Kowt to Darwan: see Ex R-10 page 3.

³⁶⁰ Ex R-10 (page 3).

³⁶¹ Ex A-10, tab 43; T.3614/7-8 (P7).

³⁶² CCT 15.6.21, p.17/42-18/3 (BRS); T.3613/19 – 3614/8 (P7).

³⁶³ T.5736/29-33 (P11); CCT 16.03.22, p.7/32-35 (P7).

³⁶⁴ Ex R-30; CCT 22.06.21, p.46/35-44 (BRS); CCT 22.06.21, p.47/30 – p.48/20 (BRS)

³⁶⁵ T.1149/19-30 (SF).

³⁶⁶ T.1149/36 (SF).

³⁶⁷ T.1171/29-31 (SF).

³⁶⁸ T.1149/41-42 (SF).

³⁶⁹ T.1149/44-1150/2 (SF).

³⁷⁰ T.960/1-4 (MH).

³⁷¹ T.2625/15-17 (P4).

³⁷² T.2625/20-24 (P4).

³⁷³ T.2625/26-28; 2626/45-46 (P4).

³⁷⁴ T.2625/30-31 (P4).

³⁷⁵ T.755ff, 2910/41-2913/34; 2910/41-2915/10 (P4).

³⁷⁶ T.2910/45-2911/7 (P4).

PUC is a circle with an X on it: that is Person 11.³⁷⁷ To the left of the PUC is another dot; that is Person 4.³⁷⁸ Immediately above the dot representing Person 4 is an incomplete box: that is the corner of the compound around which Person 4 walked when he saw this scene unfold.³⁷⁹ The line sitting underneath all of the dots is the cliff and the faint dot under the line is "denoting the end result".³⁸⁰

94. The sketch on page 3 of Ex A-92 is an important and compelling piece of evidence. It was created by Person 4 in a privileged meeting and plainly was not intended for public disclosure.³⁸¹ It was a private attempt to orient his recollection with a photograph taken from the opposite direction which he had not seen for four years.³⁸² Person 4 described it as a "mind map".³⁸³ The circumstances of its creation and disclosure strongly militate against any suggestion it is anything other than a genuine record of Person 4's recollection of the day.
95. This sketch makes clear that the corner of the compound around which Person 4 walked was the southern end of Mangul's compound. Had Person 4 come down the slope next to any other compound, he would have needed to have turned to the right, not to the left, to see Ali Jan and Person 11. On the photograph immediately above the sketch, Person 4 drew an arrow to represent the slope he moved down. However, the position of that arrow is wrong; Person 4 made clear that he was just working through potential positionings.³⁸⁴
96. Mohammed Hanifa, for his part, marked his own position further along the compound wall to the right of where Ali Jan was.³⁸⁵ Thus, had one been looking at Mangul's compound from the direction of the dry riverbed at that moment: Person 4 was on the far left, walking around the southern end of Mangul's compound. Ali Jan was the next person to the right, standing with his back to the cliff. To the right of Ali Jan was Person 11, holding Ali Jan's right shoulder. Another metre or two to the right, sitting down beside the wall, was Mohammed Hanifa. And directly behind Ali Jan was Mr Roberts-Smith.
97. Mr Roberts-Smith walked away approximately three to four metres. Then, as Person 4 was trying to understand what was happening, Mr Roberts-Smith turned around and moved forward at speed and kicked the PUC in the chest.³⁸⁶ Person 11 was still holding the PUC when this occurred.³⁸⁷ The PUC was catapulted backwards and fell down the slope.³⁸⁸ Person 4, who was still negotiating the corner, looked down the drop-off and saw the PUC's face strike a large rock and sustain a serious injury.³⁸⁹ The PUC knocked out a number of his teeth including his front teeth,³⁹⁰ which exploded or were thrown out of his face.³⁹¹

³⁷⁷ T.2911/23-29 (P4).

³⁷⁸ T.2911/31-38, 2912/14-18 (P4).

³⁷⁹ T.2911/40-2912 (P4).

³⁸⁰ T.2912/20-2913/21 (P4).

³⁸¹ T.2753/1-18 (P4).

³⁸² T.2910/41- 2915/10 (P4).

³⁸³ T.2915/1-2 (P4).

³⁸⁴ T.2755, 2915 (P4).

³⁸⁵ Ex R-87 (marked with letters D and E).

³⁸⁶ T.2625/33-37; T 2776.22-30 (P4).

³⁸⁷ T.2625/39-40 (P4).

³⁸⁸ T.2625/42-43 (P4).

³⁸⁹ T.2625/45 -2626.2 (P4).

³⁹⁰ T.2626/4-6 (P4).

³⁹¹ T.2798/21-24 (P4).

98. From his position next to the compound wall, Hanifa also saw the big soldier kick Ali Jan with his toes really hard and Ali Jan went "rolling, rolling down until he reached the river".³⁹² Consistent with Person 4's evidence, Hanifa observed that Ali Jan's hands were still tied behind his back.³⁹³ Hanifa could see Ali Jan rolling in the beginning but then lost sight of him. He could also see the big soldier standing and looking down at Ali Jan.³⁹⁴ Hanifa was scared and lowered his head.³⁹⁵ Hanifa heard the big soldier shout then the soldier disappeared.³⁹⁶
99. From his location at Amir Jan Aka's hut, Shahzada could see Ali Jan's hands were tied up.³⁹⁷ Ali Jan was facing the soldier then the soldier kicked Ali Jan and Ali Jan fell to the river.³⁹⁸ Shahzada then lost sign of Ali Jan because the trees blocked him from Shahzada's sight.³⁹⁹
100. Pausing there, it is unsurprising that Person 4 did not describe seeing another PUC (Hanifa) during this incident, sitting down on the far side of Person 11, Mr Roberts-Smith and Ali Jan. There were three people between Person 4 and Hanifa and a rapidly evolving situation as Mr Robert-Smith moved forward and kicked Ali Jan off the cliff. Immediately after the kick occurred, Person 4 then watched Ali Jan fall down the cliff and observed the injuries he suffered. Person 4 was also in shock.⁴⁰⁰ It is unremarkable that in those circumstances, Person 4 either did not see or recall seeing the second PUC (who was not of "primary concern") sitting by the wall of the compound on the far side of the incident.
101. It is equally unremarkable that neither Hanifa nor Shahzada described seeing a foreign soldier holding Ali Jan by the shoulder or a second foreign soldier come around the corner of the compound as the cliff kick occurred. As a matter of ordinary human experience, it is to be expected that in those moments of extreme fear⁴⁰¹ and shock that their attention would be focused on the welfare of their relatives. It is unsurprising that Hanifa also focused on the big soldier who kicked Ali Jan and who had interrogated and assaulted him repeatedly over the previous hour. It is equally unsurprising that Shahzada did not describe the precise location of the other foreign soldiers (although he did recall other soldiers being there).⁴⁰²

The death of Ali Jan

102. As Ali Jan lay badly injured at the bottom of the cliff, Mr Roberts-Smith and Person 11 started to move along the top of the drop-off face and moved to a track system that led down to the creek bed,⁴⁰³ a Z-like pathway that led down to the creek line.⁴⁰⁴ Person 4 followed Mr Roberts-Smith and Person 11 down the same path.⁴⁰⁵ He was in shock⁴⁰⁶ due to the

³⁹² T.960/1-26 (MH).

³⁹³ T.960/11 (MH).

³⁹⁴ T.960/25-32 (MH).

³⁹⁵ T.960/2-6 (MH).

³⁹⁶ T.961/1-5 (MH).

³⁹⁷ T.1150/6-7 (SF).

³⁹⁸ T.1150/5-20 (SF).

³⁹⁹ T.1150/13-15 (SF).

⁴⁰⁰ T.2626/22-30 (P4).

⁴⁰¹ T.960/4 (MH).

⁴⁰² T.1176/28-1177/18 (SH).

⁴⁰³ T.2626/13-15 (P4).

⁴⁰⁴ T.2798/25-26 (P4).

⁴⁰⁵ T.2626/17-20 (P4).

⁴⁰⁶ T.2626/22-23 (P4).

- incident being something he had never encountered before, as well as the injuries sustained and the visual effect of seeing the PUC go over the side.⁴⁰⁷ Person 4 was numb in his legs.⁴⁰⁸
103. Shahzada watched the big soldier come down a path from Mangul's compound to the riverbed.⁴⁰⁹ Shahzada saw the other soldiers come down after the big soldier.⁴¹⁰
104. Mr Roberts-Smith, Person 11 and Person 4 negotiated the track system into the riverbed, and ended up at the foot of the drop-off, where the PUC was located.⁴¹¹ The PUC was dusty and had sustained a serious facial injury.⁴¹² As they approached the PUC, he attempted to sit up and then fell back down again.⁴¹³ He was still handcuffed to the rear.⁴¹⁴
105. As Person 4 reached the base of the path, Mr Roberts-Smith directed Person 4 and Person 11 to grab the PUC and drag him towards the green area.⁴¹⁵ Person 11 and Person 4 dragged him to a large tree.⁴¹⁶ The PUC was still handcuffed at that point.⁴¹⁷ Hanifa observed Person 4 and Person 11 drag Ali Jan, who was on his back, to the berry tree.⁴¹⁸ Drops of blood were left behind as Ali Jan was dragged to the berry tree.⁴¹⁹
106. The location to which Ali Jan was dragged was marked on photographs by Person 4, Mohammed Hanifa and Mangul.⁴²⁰ Person 4, Hanifa and Mangul all marked the same area. The location marked by Person 4, Hanifa and Mangul is also consistent with the grid reference that appears on the SSE bag placed on EKIA 4 and the GPS coordinates recorded in the metadata of the photographs taken during the SSE process.⁴²¹
107. Once Person 11 and Person 4 dragged the PUC to the point under the tree, Person 4 moved off about four or five metres and Mr Roberts-Smith and Person 11 had a quick conversation.⁴²² Person 4 was facing back towards the HLZ, primarily to try and identify where Person 56 was.⁴²³ As Person 4 moved off and the conversation had started, he quickly turned around and the PUC was standing at that point, and was still handcuffed.⁴²⁴ No-one was holding the PUC as he was not moving anywhere.⁴²⁵
108. Person 4 turned back to look once again where Person 56 was and other call signs were

⁴⁰⁷ T.2626/25-30 (P4).

⁴⁰⁸ T.2798/26-28 (P4).

⁴⁰⁹ T.1150/19-28 (SF).

⁴¹⁰ T.1150/30-39 (SF).

⁴¹¹ T.2626/35-37 (P4).

⁴¹² T.2626/39-40 (P4).

⁴¹³ T.2626/42-43 (P4).

⁴¹⁴ T.2626/46-2627/1 (P4).

⁴¹⁵ T.2798/29-32 (P4).

⁴¹⁶ T.2627/7-14 (P4); T.961/12-16 (MH).

⁴¹⁷ T.2627/22-23 (P4).

⁴¹⁸ T.961/13-17 (MH).

⁴¹⁹ T.1084/19-44 (MR) (marked E on page 4 of Ex R-88); T.963/27 (MH).

⁴²⁰ Person 4 marked the approximate location of the tree with a dot and letter G on page 3 of Ex R-126. See T.2627/19-21 (P4). Hanifa marked the tree with the letter F on page 4 of Ex R-87. See T.961 (MH). Mangul marked page 4 of Ex R-88 with the letter G. See T.1085/20-1086/39 (MR).

⁴²¹ Ex R-13; Ex R-278.

⁴²² T.2627/35-45 (P4).

⁴²³ T.2628/1-2 (P4).

⁴²⁴ T.2628/4-9 (P4).

⁴²⁵ T.2628/12 (P4).

and then a number of shots rang out.⁴²⁶ Two to three rounds, shot by an M4.⁴²⁷ Person 11 and Mr Roberts-Smith were both carrying an M4 on that day.⁴²⁸ Person 4 looked around and Person 11 had his rifle sitting in a firing position in his shoulder.⁴²⁹ The weapon was in a position that it would usually be post firing the weapon.⁴³⁰ At the time Person 11 had his rifle raised, Mr Roberts-Smith was four or five metres to the rear, still located around the tree.⁴³¹ The only reasonable inference is that Person 11 fired the fatal shots into Ali Jan. The SSE photos indicate that he was shot in a tight cluster of four shots around his heart.⁴³²

109. Mohammed Hanifa did not see the shots that killed Ali Jan, although he heard shots after Ali Jan was dragged to the berry tree and subsequently saw that Ali Jan had been shot.⁴³³ Shahzada also heard light firing but he could not see it because of the berry trees.⁴³⁴
110. After turning and seeing Person 11 with his rifle in the firing position, Person 4 turned back and refocused towards where he expected Person 56 to approach from.⁴³⁵

Mr Roberts-Smith falsely reported EKIA 4 was a “spotter”

111. Towards the end of the mission, Person 7 and his patrol were at the Stream 6 HLZ waiting for extraction.⁴³⁶ Person 7 started to hear calls over the radio of “Helos 15 minutes out”, then 10 minutes out, five minutes out, three minutes out and 1 minute out.⁴³⁷ The timing notifications were accompanied by a “cherry/ice” call. An “ice” call meant there was no threat and everything was safe; “cherry” mean there was a possible or certain threat around an HLZ. The call was made by the Apache pilots who were providing situational awareness along with the Heron drone.⁴³⁸ All the calls Person 7 heard that day were “ice”.⁴³⁹
112. About 10 seconds after the “3-minute call”, Person 7 heard a number of shots. He then heard Mr Roberts-Smith come onto the radio and say “Alpha, this is 2-1. That’s one EKIA. We’ve just engaged a spotter”.⁴⁴⁰ At 1109DE, the FE reported one additional EKIA to the watchkeeper.⁴⁴¹ The OPSUM records that EKIA 4 was killed at or about 1110DE.⁴⁴²

Mr Roberts-Smith’s account of the engagement was knowingly false

113. Mr Roberts-Smith’s contemporaneous report that EKIA 4 was a spotter was a lie. He told the same lie to this Court⁴⁴³ as the final step in a series of falsehoods designed to cover-up the murder of Ali Jan. Up to this point in his account the falsehoods all involved denials: no

⁴²⁶ T.2628/14-19 (P4).

⁴²⁷ T.2828/21-24 (P4).

⁴²⁸ T.2628/29-30 (P4).

⁴²⁹ T.2628/32-38 (P4).

⁴³⁰ T.2798/37-39 (P4).

⁴³¹ T.2629/4-9 (P4).

⁴³² Ex R-13; T.503/17; 503/43-44 (BRS).

⁴³³ T.968/15-44, 973/23-37 (MH).

⁴³⁴ T.1150/38-45 (SF).

⁴³⁵ T.2627/46-2629.2 (P4).

⁴³⁶ T.3612/25-26 (P7).

⁴³⁷ T.3613/1-4 (P7).

⁴³⁸ T.3613/1-34 (P7).

⁴³⁹ T.3613/42-43 (P7).

⁴⁴⁰ T.3613/45-3614/5 (P7).

⁴⁴¹ Ex R-10, page 4.

⁴⁴² Ex R-11 OPSUM for Darwan mission (page 4).

⁴⁴³ T.243/30-244/29 (BRS).

Afghan males in the end compound; no interpreter or Person 56 in the end compound; and no Person 47 with an SASR dog in the end compound. At this point, however, Mr Roberts-Smith had to explain positively the dead Afghan in the cornfield. The positive lie he chose does not withstand scrutiny.

114. The **first** falsehood concerns the route Mr Roberts-Smith took to the HLZ. Mr Roberts-Smith said once his patrol received extraction orders, he, Person 11 and Person 4 moved down a track then across the creek line heading for the HLZ.⁴⁴⁴ The route marked by Mr Roberts-Smith⁴⁴⁵ would have taken the patrol (at least initially) in the opposite direction to the HLZ. There were much more direct routes (see, e.g., the route taken by Person 56 when he left the end compound as marked on page 1 of Ex R-175⁴⁴⁶). However, it bypasses the cornfield where the alleged engagement took place. Mr Roberts-Smith claims to have taken the unlikely route to explain how his patrol came to be in the cornfield. This evidence is a recent invention: see paragraph B10 of the Respondents' Closed Court Submissions. Mr Roberts-Smith's inconsistent accounts of this material detail are a key indicator that his account is false.
115. The **second** falsehood concerns the apparent presence of an embankment of 1.5 metres or more on opposite side of the dry riverbed.⁴⁴⁷ Mr Roberts-Smith said you had to "physically climb" it "on your hands and knees to pull yourself up".⁴⁴⁸ Mr Roberts-Smith, of course, knew that the body of EKIA 4 was in fact on the edge of the cornfield (a matter to which other witnesses would be likely to attest, in addition to the fact that the GPS coordinates on the SSE bag placed EKIA 4's body in that location), which raises the obvious issue of how the spotter was not seen from further back in the dry riverbed. The embankment story is Mr Roberts-Smith's explanation for how the patrol got so close to an alleged spotter (just two metres into the cornfield) without seeing him earlier. However, the story of a 1.5 metre (plus) embankment is a lie. It cannot be seen on the overwatch photographs.⁴⁴⁹ Nor was it supported by any other witness.
- (a) Hanifa said at the time Ali Jan died, there no embankment or slope from the creek bed to the field. The area on the edge of the cornfield was flat.⁴⁵⁰
 - (b) Mangul said at the time Ali Jan died, if he stood in the creek bed and wanted to go to the field, he had to go up a distance from his foot to about a hand-width below his knee. Since Ali Jan died, the land near the berry tree on the edge of the cornfield has gone lower by the distance from his elbow to the tip of his fingers.⁴⁵¹
 - (c) Shahzada said at the time Ali Jan died, to get to the fields he had to walk over an embankment but it was not too high (indicating the height was from his elbow to tips

⁴⁴⁴ T.243/35-43 (BRS).

⁴⁴⁵ T.409/17-25; 410/16-30 (BRS); Ex R-2 (page 3) and Ex R-3 (page 2).

⁴⁴⁶ T.4753/8-13 (P56).

⁴⁴⁷ T.410/46-411-3 (BRS).

⁴⁴⁸ T.411/5-10 (BRS).

⁴⁴⁹ See, for example, Ex R-2, page 3.

⁴⁵⁰ T.930/1-932/32; 938/10-32 (MH). Ex R-12 is a montage of three photos of the edge of the cornfield taken in 2019, which show no embankment. Hanifa said between 2012 and 2019, the area has gone down a little bit; he could not say whether it was one or one and a half hand-lengths.

⁴⁵¹ T.1058/42-1061/35 (MR).

of his outstretched fingers).⁴⁵²

- (d) Person 56 said there was no significant embankment. He said “I would say you could continue walking and climb up it as opposed to– I will say that – you know, and step up it as opposed to having to scale something, climb something.” At its highest, it was knee-high.⁴⁵³
- (e) Person 4 said there was an embankment his patrol moved up to get to the HLZ but he did not recall the height.⁴⁵⁴

116. The **third** falsehood concerns the apparent discovery of an ICOM radio during SSE. Mr Roberts-Smith said “on searching the individual, we found an ICOM radio”.⁴⁵⁵ It was found “on the ground...effectively underneath him”.⁴⁵⁶ That account is untrue. The ICOM was a throwdown deployed during SSE, for the reasons identified at paragraphs 129 to 130 below. The evidence is also implausible for the reason set out at paragraphs B11 and B12 of the Respondents' Closed Court Submissions.

117. The **fourth** falsehood was Mr Roberts-Smith's claim that it was “not unlikely” that a spotter could have remained hidden in or around the cornfield for several hours without detection.⁴⁵⁷ Multiple aerial assets, including a Heron drone and the Apache helicopters, scanned the area around the HLZs using all available electronic warfare equipment looking for threats such as spotters.⁴⁵⁸ The Eudoros 1 HLZ (used by Mr Roberts-Smith's patrol) was scanned by those assets twice: before turn 1 and before turn 2.⁴⁵⁹ The Apache's repeatedly affirmed that the areas around the HLZ's were “ice” (meaning no threat).⁴⁶⁰ It is highly unlikely that someone could have remained hidden in the cornfield undetected by one of those scans. Yet on Mr Roberts-Smith's account, this spotter managed to evade detection by any of the FE's electronic warfare assets – twice – in the space of half an hour. Once is highly unlikely. Twice is so implausible it cannot be accepted as a realistic possibility.

118. In addition to the aerial assets, the overwatch position had a clear view of the cornfield in which the spotter was allegedly engaged, as well as the surrounding areas.⁴⁶¹ The functions of the overwatch included keeping eyes on the area in which the mission was conducted, where extraction would take place, and to look out for any enemy combatants or movement, including spotters.⁴⁶² Both sides of the valley had also been cleared by large numbers of soldiers; all of whom would have been looking for squinters and spotters.⁴⁶³ Mr Roberts-Smith said that to his knowledge, no suspicious movements in or around the cornfield were reported.⁴⁶⁴ In the Respondents' submission, the absence of any reporting from the

⁴⁵² T.1147/43 -1148/29 (SF).

⁴⁵³ T.4753/36-46 (P56).

⁴⁵⁴ T.2941/14-36 (P4).

⁴⁵⁵ T.244/4; 245/17; 379/15-20; 414/22-23; 415/8-12 (BRS).

⁴⁵⁶ T.379/15-20; 414/22-23 (BRS).

⁴⁵⁷ T.492/1-3; 495/30-37 (BRS).

⁴⁵⁸ T.495/14-17 (BRS). See also paragraphs B6 to B9 of the Respondents' Closed Court Submissions.

⁴⁵⁹ CCT 22.6.21 p.46/35-44 (BRS); CCT 12.5.22 p.3/14-8/10 (P11). See also paragraphs B6 to B9 of the Respondents' Closed Court Submissions.

⁴⁶⁰ T.3613/42-43 (P7).

⁴⁶¹ T.494/26-38 (BRS).

⁴⁶² T.494/40-495/3 (BRS).

⁴⁶³ T.492/5-15 (BRS).

⁴⁶⁴ T.495/8-9 (BRS).

overwatch compounds the implausibility of Mr Roberts-Smith's account.

119. Senior counsel for Mr Roberts-Smith opened the case with the suggestion that there was no way the cliff kick could have occurred without being seen by the overwatch.⁴⁶⁵ That submission (if maintained) should be rejected. For one thing, neither side called any witness from the overwatch to give evidence about what they saw, or what they were doing at the relevant time. In any event, it is one thing for the overwatch to miss a 1-2 second kick in between turns 1 and 2. It is a wholly different proposition to say that the overwatch failed to detect the spotter over a five-hour period and the Apaches failed to detect him in either the turn 1 or turn 2 scans. The first scenario is explicable. The second is not.

Person 11's account of the engagement was knowingly false

120. Person 11 similarly denied that there were any PUCs in the end compound, that Mr Roberts-Smith kicked a PUC off a cliff, or that he entered an arrangement or understanding with Mr Roberts-Smith to kill the PUC. He too said that EKIA 4 was a spotter engaged on route to the HLZ.⁴⁶⁶ However, the core details of Person 11's account of the engagement were false. They were also irreconcilable with Mr Roberts-Smith's account.
121. The **first** falsehood was that, according to Person 11, the patrol entered the cornfield to clear it because it was a standard operating procedure to clear the immediate vicinity of a cornfield.⁴⁶⁷ This evidence was a lie by Person 11 to explain what he, Person 4 and Mr Roberts-Smith were doing in the cornfield at the time Ali Jan was shot and killed. There was no such SOP. There was no evidence that any other field around any other HLZ was cleared. Mr Roberts-Smith did not refer to an SOP: he said they entered the cornfield as "that just seemed the easiest way".⁴⁶⁸ Mr Roberts-Smith also said that a decision to clear the cornfield was only made *after* the engagement, when the three patrol members split up and walked different routes to the HLZ "just to make sure there was no one else in there".⁴⁶⁹
122. The **second** falsehood is Person 11's evidence that he saw an ICOM in the hand of the alleged spotter.⁴⁷⁰ The impossibility of Person 11 being *able* to see it is addressed as the third falsehood. Even assuming it would have been *possible* to see it, this evidence was a recent invention. Paragraph 27 of Person 11's outline of evidence (which he approved after reading it carefully to ensure it accurately conveyed his recollection of the engagement) clearly intended to convey that the ICOM was only discovered during the SSE process.⁴⁷¹ Person 11 evidently recognised this inconsistency after his first day of evidence. The next morning, he tried to correct paragraph 27 as it could be "misinterpreted".⁴⁷² He then changed position and suggested there was no inconsistency at all.⁴⁷³ The inconsistency and recent invention were obvious. Person 11 fabricated the evidence that he saw an ICOM in the spotter's hand for the first time in his evidence in chief, then compounded that lie by

⁴⁶⁵ T.49/11-12, CCT 8.6.21, p.54/18-26 (BRS opening).

⁴⁶⁶ T.5676/26-41 (P11).

⁴⁶⁷ T.5676/16-18 (P11).

⁴⁶⁸ T.411/23-27 (BRS).

⁴⁶⁹ T.416/1-26, 20-22, 40 (BRS); Ex R-3 page 2.

⁴⁷⁰ T.5676/26-36 (P11).

⁴⁷¹ T.5704/38-47, 5710/32 (P11).

⁴⁷² T.5704/38-47 (P11).

⁴⁷³ T.5712/20-26 (P11).

dishonestly claiming that his outline was just poorly worded.

123. Person 11's evidence concerning the alleged ICOM in the spotter's hand was irreconcilable with Mr Roberts-Smith's evidence. Mr Roberts-Smith repeatedly stated that the ICOM was discovered during the SSE process⁴⁷⁴ and he disavowed the suggestion that the ICOM played a role in his conclusion that the individual was a spotter (it was merely confirmatory).⁴⁷⁵ If Person 11 really did see the spotter with an ICOM in his hand, that was vital intelligence that undoubtedly would have been passed on to Mr Roberts-Smith on the spot. It was not. Mr Roberts-Smith instead made clear that the person was assessed to be a spotter because he was hiding or moving in thick vegetation, rather than being out in the open, as well as "atmospherics" and "intelligence" that meant he was "likely to be a threat".⁴⁷⁶
124. The **third** falsehood was the location of the spotter. Person 11 said he saw the spotter (holding an ICOM) about 15 metres away⁴⁷⁷ through thickly planted crops five to seven feet tall.⁴⁷⁸ As a matter of common sense, it is implausible that Person 11 could have seen a spotter through 15 metres of thickly planted vegetation, let alone a small ICOM in his hand. In any event, the position of the body marked by Person 11 was materially wrong.⁴⁷⁹ It is inconsistent with the GPS coordinates on the SSE bag and in the metadata of the SSE photos, which place the body right next to the berry tree just inside the cornfield near the dry riverbed.⁴⁸⁰ It is also inconsistent with Mr Roberts-Smith's assertion that he engaged the insurgent from two to five metres away⁴⁸¹ and that the insurgent was approximately 2 metres into the cornfield.⁴⁸² According to Mr Roberts-Smith, the spotter "had to" move because otherwise "we would have walked on top of him".⁴⁸³
125. Person 11's evidence concerning the location of the spotter was not a mistake. It was a lie with two purposes. The first was to place the body sufficiently far from the cliff to make it implausible that he and Person 4 would have dragged Ali Jan all that way before shooting him. The second purpose was directed at solving the same problem Mr Roberts-Smith sought to solve through the embankment lie. Both Person 11 and Mr Roberts-Smith were evidently aware of the implausibility of a spotter hiding two metres from the edge of the cornfield for up to five hours and being accidentally stumbled upon by the patrol as they made their way to the HLZ. The objective evidence, however, shows that both solutions to this problem were false. Mr Roberts-Smith's embankment did not exist; while Person 11's account is falsified by the GPS coordinates that he himself recorded on the day.
126. The **fourth** falsehood concerned the movements of the alleged spotter. Initially, Person 11 said that the spotter's movement was "lateral", "left to right or right to left" and moving from a "crouching to standing position".⁴⁸⁴ After giving that evidence, Person 11 evidently realised

⁴⁷⁴ T.244/4; 245/17; 379/15-20; 414/22-23; 415/8-12 (BRS).

⁴⁷⁵ T.415/22-27 (BRS).

⁴⁷⁶ T.244/4-7; CCT 11.6.21, p.5/25-31 (BRS).

⁴⁷⁷ T.5677/20-23 (P11).

⁴⁷⁸ T.5708/6-28 (P11).

⁴⁷⁹ Ex A-228, page 2 (marking D); T.5681/7-8 (P11).

⁴⁸⁰ Ex R-278.

⁴⁸¹ T.412/40-41 (BRS).

⁴⁸² T.499/5-12 (BRS); CCT 15.6.21, p.18/22-29 (BRS).

⁴⁸³ T.496/46-49 (BRS).

⁴⁸⁴ T.5709/28-5710/23 (P11).

there was a major difficulty with it: there are entry wounds on the front of Ali Jan's body located in a tight cluster around his heart.⁴⁸⁵ That means the front of Ali Jan's chest must have been visible to the shooter, and sufficiently 'static' for the shots to appear close together. Accordingly, Person 11 altered his evidence to say he could see the front of the spotter,⁴⁸⁶ and at the precise moment he was shot, Person 11 thinks he was "static".⁴⁸⁷ Both accounts were untrue. Ali Jan was shot in the chest, from close range, after he was kicked off a cliff by Mr Roberts-Smith and then dragged handcuffed into the cornfield.

127. The *fifth* falsehood (or more accurately an implausibility) was Person 11's claim that a spotter could have remained hidden in or around the cornfield for several hours without detection.⁴⁸⁸ Person 11 agreed that the job of the overwatch is to identify movement on target areas, including threats moving within the target area such as spotters.⁴⁸⁹ He also agreed that before an extraction there would be very comprehensive scans of the area performed by both drones and Apaches with "very capable sensors".⁴⁹⁰ Given those admissions, and for the same reasons identified at paragraphs 117 to 118 above and paragraphs B6 to B9 and B11 and B12 of the Respondents' Closed Court Submissions, Person 11's evidence on this point ought not be accepted.

A throwdown was deployed and SSE conducted

128. After Ali Jan was shot, SSE was performed on his body. First, the handcuffs were removed.⁴⁹¹ Person 4 did not remove them, but he does not recall who did.⁴⁹² The only two possible options are Person 11 and Mr Roberts-Smith. Next, Person 11 wrote the GPS coordinates of the body's location on an SSE bag and placed it on Ali Jan's body.⁴⁹³
129. An ICOM radio was then placed on Ali Jan's body. To Person 4's knowledge, the PUC did not have an ICOM radio on his body during the time he had been PUC'd, or kicked off the cliff, or dragged across the river.⁴⁹⁴ The ICOM next to the body was slightly wet, and water had penetrated the screen so it was slightly fogged up.⁴⁹⁵ It was the only wet item on the individual.⁴⁹⁶ Person 4 assumed that it had come from the individual across the river.⁴⁹⁷ Person 4's evidence is supported by the OPSUM. It records two ICOMs found during the mission: one on the squirter killed over the river and one found on EKIA 4 in the cornfield.⁴⁹⁸ Yet only one ICOM was returned to Tarin Kowt.⁴⁹⁹ That is consistent with Person 4's conclusion that an ICOM found on the squirter was deployed as a throwdown on Ali Jan.
130. In any event, irrespective of whether the ICOM came from the squirter or somewhere else,

⁴⁸⁵ Ex R-13, see, e.g. pages 4-6.

⁴⁸⁶ T.5743/1015 (P11).

⁴⁸⁷ T.5743/27-28 (BRS).

⁴⁸⁸ T.5740/1-26 (P11).

⁴⁸⁹ T.5736/40-5737/2 (P11).

⁴⁹⁰ T.5737/24-33 (P11).

⁴⁹¹ T.2630/7-12 (P4).

⁴⁹² T.2630/7-12 (P4).

⁴⁹³ T.5745/34-35 (P11).

⁴⁹⁴ T.2929/34-36 (P4).

⁴⁹⁵ T.2929/38-39 (P4).

⁴⁹⁶ T.2881/29-30 (P4).

⁴⁹⁷ T.2929/41-45; 2882/6-45 (P4).

⁴⁹⁸ Ex R-11 pages 3-4.

⁴⁹⁹ Ex R-11 page 5.

the Court should be comfortably satisfied that the ICOM is a throwdown. Person 4 said to his knowledge the PUC did not have a radio.⁵⁰⁰ That must be correct: any ICOM would have been discovered during the process of being PUC'd. Hanifa said he had never seen Ali Jan with a radio.⁵⁰¹ Mangul said that he did not see Ali Jan carrying a radio on the day, and that Ali Jan would not know how to operate a wireless device.⁵⁰² Shahzada gave evidence that Ali Jan did not have a wireless device, and he had never seen Ali Jan with a radio.⁵⁰³

131. No other search of the body was done. Person 11 gave evidence that a standard SSE would involve lying the body out straight, then starting at the head, searching all the way down.⁵⁰⁴ In this case, however, the SSE photos show Ali Jan's legs still tucked up underneath him. His body was not laid out straight and he was not searched. The reason he was not searched in the cornfield was because he had already been searched and PUC'd in the end compound.
132. Then, Mr Roberts-Smith asked Person 4 to grab the camera and give it over because "we need to take some photos". Person 4 then gave the camera to Person 11 who took photos.⁵⁰⁵ While Person 11 was taking the SSE photos, Person 4 went and looked at the body of the PUC and observed an ICOM radio positioned next to it.⁵⁰⁶ Person 4 was standing there when Person 11 took the photos.⁵⁰⁷ Person 4 was shown the SSE photos (Ex R-13) and identified both the PUC and the ICOM.⁵⁰⁸ It is clear that Person 4 and Person 11 were both there during the SSE photos because two pairs of shoes are visible in the photographs.

The SSE photos show injuries consistent with the Respondents' case

133. The SSE photos reveal four compelling features that support the Respondents' case that Ali Jan was kicked off a cliff then shot at close range in the chest while handcuffed to the rear.⁵⁰⁹
134. *First*, the photos reveal that Ali Jan's front teeth were broken off.⁵¹⁰ That is consistent with Person 4's observation that the PUC's front teeth exploded or were thrown out of his face as he fell down the cliff.⁵¹¹ Person 4 told Person 7, way back in early 2013, that he saw the PUC's head hit a rock and a tooth fly out on the way down the cliff.⁵¹²
135. *Secondly*, the photos reveal a tight cluster of entry wounds around Ali Jan's heart.⁵¹³ Mr Roberts-Smith agreed that the wounds on the chest "appear to be" and were "much more likely" to be entry rather than exit wounds.⁵¹⁴ This is consistent with the evidence that Ali Jan, while standing handcuffed and stationary, was shot by Person 11 from close range in the chest. It is not consistent with Person 11's first account that the spotter was moving

⁵⁰⁰ T.2929/34-36 (P4).

⁵⁰¹ T.965/30-31 (MH).

⁵⁰² T.1088/13-17 (MR).

⁵⁰³ T.1154/41-47 (SF).

⁵⁰⁴ T.5714/35-47 (P11).

⁵⁰⁵ T.2629/14-25 (P4).

⁵⁰⁶ T.2629/27-30 (P4).

⁵⁰⁷ T.2758/5-6 (P4).

⁵⁰⁸ T.2930/14-27 (P4).

⁵⁰⁹ Ex R-13.

⁵¹⁰ Ex R-13 pages 7-9.

⁵¹¹ T.2798/21-24 (P4).

⁵¹² T.3615/25-3616/25 (P4).

⁵¹³ Ex R-13, see, e.g. pages 4-6.

⁵¹⁴ T.503/17, 503/43-44 (BRS).

laterally (side-on) at the time of the engagement. It is also inconsistent with Person 11's second version that the spotter could only be seen at an angle through thick vegetation at 15 metres. As a matter of common sense, it is much more likely that those shots were fired from close range with direct line of sight, rather than through thick vegetation at much longer range.

136. *Thirdly*, the photos reveal a thin strip of clear skin on Ali Jan's otherwise blood-covered left wrist. This is consistent with Person 4's evidence that Ali Jan was handcuffed when shot, and the handcuffs were subsequently removed during the SSE process.⁵¹⁵ There is no other plausible explanation available on the evidence to explain what that thin strip of blood-free skin could be. Neither Mr Roberts-Smith nor Person 11 could offer one.⁵¹⁶
137. *Fourthly*, there is a ragged wound on inside of Ali Jan's left arm in the vicinity of his elbow.⁵¹⁷ According to Mr Roberts-Smith, it was likely caused by "a bullet hitting it and ripping it open. It doesn't have to go through the arm; it can simply go across the top".⁵¹⁸ The Respondents agree. This wound is consistent with Ali Jan having been handcuffed to the rear at the time he was shot. It is consistent with one or more of the bullets that entered his chest exiting and ripping across the surface of the inside of his elbow as it was restrained behind his back.

11:21DE: the SASR extracted from Darwan

138. After finishing SSE, Person 4, Person 11 and Mr Roberts-Smith moved to the HLZ.⁵¹⁹ As they arrived, the big soldier came towards Shahzada and Amir Jan Aka and said "Until our planes come, none of you should move".⁵²⁰ The big soldier spoke in Pashto.⁵²¹ That is consistent with Mr Roberts-Smith's evidence that he could speak basic Pashto phrases (or a simple mis-recollection by Shahzada of a translated instruction).⁵²²
139. Shortly after that, the helicopters came. One "plane" passed Shahzada's land and landed on his son's land, while two "planes" passed by.⁵²³ Mohammed Hanifa saw four "planes" come in; two passed by and one landed less than 50 metres from Ali Jan.⁵²⁴ He observed the dog get into the plane first, then the other soldiers got in.⁵²⁵
140. Shahzada and Hanifa's description of the extraction matches the Australian extraction plan in two respects. *First*, their descriptions match the location of the HLZs. One helicopter landed at Eudoros 1 (on the field in front of where Shahzada was detained and around 50 metres from Ali Jan's body). Two other helicopters landed at Stream 6 (in the dry riverbed in front of compound 40) which required them to "pass by" both Hanifa and Shahzada's

⁵¹⁵ T.2630/7-12 (P4).

⁵¹⁶ T.501/43-502/33 (BRS); T.5749/19-39 (P11).

⁵¹⁷ Ex R-13, page 3.

⁵¹⁸ T.504/34-36 (BRS).

⁵¹⁹ T.2630/33-34 (P4). Person 4 marked the extraction point with a dot and letter H on Ex R-126. See T.2630/36-37 (P4).

⁵²⁰ T.1151/9-16 (SF).

⁵²¹ T.1183/36-1184/1 (SF).

⁵²² T.372/18-23 (BRS).

⁵²³ T.1151/20-36 (SF).

⁵²⁴ T.961/42 -962/1 (MH) (the helicopter landed at "G" on page 4 of Ex R-87).

⁵²⁵ T.962/17-18 (MH).

locations.⁵²⁶ *Secondly*, the Turn 2 helicopters approached from the south.⁵²⁷ That required them to pass by Shahzada's land and Mangul's compound before landing at Eudoros 1 or Stream 6,⁵²⁸ just as Shahzada and Hanifa described.

141. At or about 11:21DE, Mr Roberts-Smith's patrol extracted on the Turn 2 helicopter⁵²⁹ from the Eudoros 1 HLZ.⁵³⁰ Once the helicopters landed, Person 56 married up with the patrol.⁵³¹ The interpreter also travelled back on Mr Roberts-Smith's patrol to Tarin Kowt.⁵³²

The Afghans found Ali Jan's body in the cornfield

142. At about the time the helicopters were leaving, Hanifa went inside Mangul's house and asked Mangul's daughter to untie his hands.⁵³³ Mangul could still see the soldiers on the mountain,⁵³⁴ so when he saw Hanifa he asked, "what are you doing? There are still soldiers. They might fire at you."⁵³⁵ But at that moment, a helicopter landed and took those soldiers who were on the mountain too.⁵³⁶
143. Mangul's evidence on this point is consistent with the Australian forces' extraction plan.⁵³⁷ See, also, paragraph B13 of the Respondents' Closed Court Submissions. It was put to Mangul that he could not have seen the soldiers as the top of the mountain "was over a kilometre away".⁵³⁸ The premise of the question was wrong: from Mangul's compound to the Bottle 3 HLZ is no more than 450m.⁵³⁹ The overwatch photos also show that people were visible from that distance.⁵⁴⁰
144. Mangul then asked his daughter to bring a knife to cut off the wires that Hanifa's hands were tied with.⁵⁴¹ Mangul also asked Hanifa where Ali Jan was. Hanifa said the soldiers kicked him and "he went down to the river, and they dragged him toward the trees."⁵⁴² Hanifa said from there "I could not see him".⁵⁴³ Hanifa did not tell Mangul that he had seen Ali Jan shot.⁵⁴⁴
145. Hanifa then went back outside and saw Mohammed Sha, who was tied up next to the well in Shahzada's house.⁵⁴⁵ After that, Hanifa, his sister and Mangul went to where Ali Jan was.⁵⁴⁶ Hanifa took one path to the riverbed from the guesthouse side.⁵⁴⁷ Mangul went down

⁵²⁶ Ex A-10, tab 43 (a closed court exhibit); Ex R-1, page 2.

⁵²⁷ See paragraph B8 of the Respondents' Closed Court Submissions.

⁵²⁸ See the cardinal points on Ex R-1.

⁵²⁹ Ex R-10 Same time chat for Darwan mission (page 4); Ex R-11 OPSUM for Darwan mission (page 4).

⁵³⁰ T.5685/6-10 (P11); Ex A-227.

⁵³¹ T.2630/38-40 (P4).

⁵³² T.4790/22 (P56).

⁵³³ T.962/17-19 (MH).

⁵³⁴ T.1093/14-20 (MR).

⁵³⁵ T.1083/43-45 (MR).

⁵³⁶ T.1093/14-39 (MR).

⁵³⁷ Ex R-1 and location of Bottle 3.

⁵³⁸ T.1093/36 (MR).

⁵³⁹ See Ex R-1, which has a 1:5000 scale (i.e. each grid square is 100 metres).

⁵⁴⁰ T.232/18-21 (BRS); Ex A-19.

⁵⁴¹ T.1083/45-47 (MR).

⁵⁴² T.1084/8-15 (MR).

⁵⁴³ T.21/45-47 (29/07/2021) (MR).

⁵⁴⁴ T.12/31-35 (29/07/2021) (MR).

⁵⁴⁵ T.962/ 23-37 (MH) (marked "H" on page 4 of Ex R-87).

⁵⁴⁶ T.962/43-44 (MH).

⁵⁴⁷ T.1084/39 (MR).

a different path toward the riverbed, at which point he saw some blood.⁵⁴⁸ Hanifa and his sister walked down a path to the bottom of the cliff⁵⁴⁹ where he too saw drops of blood, like a "line of blood", which he followed to the tree where Ali Jan's body was.⁵⁵⁰ The Court should infer that the blood Mangul and Hanifa saw at the bottom of the cliff was from the injuries Ali Jan sustained as he fell down the cliff. The trail of blood from the base of the cliff to the berry tree was left when Person 4 and Person 11 dragged Ali Jan across the riverbed.

146. As he followed the line of blood across the riverbed, Hanifa saw Shahzada coming from the shed.⁵⁵¹ Mangul also saw Shahzada came from Amir Jan's hut.⁵⁵² Shahzada was walking towards his house to look for Ali Jan.⁵⁵³ Shahzada met up with Hanifa and Hanifa's sister in the river when Hanifa came down from the house.⁵⁵⁴ Mangul walked towards the cornfield and met Hanifa and Hanifa's sister under the berry tree⁵⁵⁵ but could not go further until Hanifa's sister (Shahzada's daughter) left.⁵⁵⁶ Then everybody came together where Ali Jan's body was,⁵⁵⁷ in the cornfield where the berry tree is.⁵⁵⁸
147. Each of the Afghan witnesses gave evidence of injuries and the orientation of Ali Jan's body that are consistent with the SSE photos.⁵⁵⁹ This supports a conclusion that each of them was present in the cornfield with Ali Jan's body in the aftermath of his death:
- (a) Hanifa observed that Ali Jan was lying on his back with one hand behind his back and one on his side.⁵⁶⁰ Hanifa saw that Ali Jan's right jaw had been hit and his tooth was broken. He was shot in his left skull and in his belly area.⁵⁶¹ Hanifa recalled that Ali Jan had dust on his face and his beard.⁵⁶²
 - (b) Mangul saw that one of Ali Jan's hands was behind under his body and one hand was a bit extended.⁵⁶³ He was laying on his back.⁵⁶⁴ He was shot on the right side of his jaw and left skull.⁵⁶⁵ He was shot in the chest area.⁵⁶⁶ There was a lot of dirt on his face.⁵⁶⁷
 - (c) Shahzada observed that Ali Jan was laying on his back.⁵⁶⁸ He had a bullet shot on his right jaw and on his chest.⁵⁶⁹ He had bullets or shards on his arm and some of the

⁵⁴⁸ T.1084/19-44 (MR) (marked E on page 4 of R88).

⁵⁴⁹ Marked "I" on page 4 of Ex R-87.

⁵⁵⁰ T.963/27 (MH).

⁵⁵¹ T.963/33 (MH).

⁵⁵² T.1085/18-35 (MR).

⁵⁵³ T.1152/35 (SF).

⁵⁵⁴ T.1153/1-4 (SF).

⁵⁵⁵ T.1085/5-16 (MR).

⁵⁵⁶ T.1153/7-11 (SF).

⁵⁵⁷ T.1085/20-30 (MR).

⁵⁵⁸ T.1153/10-20 (SF).

⁵⁵⁹ Ex R-13.

⁵⁶⁰ T.963/36-44 (MH).

⁵⁶¹ T.964/22-27 (MH).

⁵⁶² T.963/39-41 (MH).

⁵⁶³ T.1086/47 (MR).

⁵⁶⁴ T.1087/3 (MR).

⁵⁶⁵ T.1087/3-5 (MR).

⁵⁶⁶ T.1087/9-15 (MR).

⁵⁶⁷ T.1087/20 (MR).

⁵⁶⁸ T.1153/25 (SF).

⁵⁶⁹ T.1153/26-27 (SF).

flesh on his arm was gone.⁵⁷⁰ One of his arms was behind his body.⁵⁷¹ There was dust on his face and things in his beard.⁵⁷²

148. Hanifa cleaned the dust off Ali Jan's face and his beard.⁵⁷³ After Ali Jan's face was cleaned, they moved his body under the shade of the berry tree and put a shawl over it.⁵⁷⁴

The identification of Ali Jan

149. Hanifa was shown one SSE photograph of EKIA 4 and recognised the deceased individual as Ali Jan.⁵⁷⁵ He said he did not see either the ICOM or the SSE bag that appear in the photos: they were not there.⁵⁷⁶ Hanifa said Ali Jan was not carrying a radio, he had nothing with him and Hanifa had never seen him with a radio.⁵⁷⁷
150. Mangul was shown two SSE photos of EKIA 4 and recognised Ali Jan in both.⁵⁷⁸ Mangul gave evidence that Ali Jan was not carrying a radio like the one in the photograph, and that he did not know how to work a watch, let alone a wireless device.⁵⁷⁹ Ali Jan only had the clothes on his body.⁵⁸⁰
151. Shahzada was shown an SSE photograph of EKIA 4 and recognised him as Ali Jan.⁵⁸¹ Shahzada was shown page 2 of the NPO joint bundle and gave evidence that the individual was also Ali Jan.⁵⁸² Shahzada gave evidence that Ali Jan did not have a wireless device, and he had never seen Ali Jan with a radio like the one in the photograph.⁵⁸³
152. A point has been raised that the person in the cornfield was not Ali Jan.⁵⁸⁴ That submission should be rejected for two reasons. The first is dealt with in paragraph B14 of the Respondents' Closed Court Submissions. The second reason is that each of Hanifa, Mangul and Shahzada knew Ali Jan well and recognised him both on the day and in the photographs shown to them. Hanifa expressly rejected a question concerning whether EKIA was a man named Amir Jan from Ruyan.⁵⁸⁵ Mangul and Hanifa both gave evidence that Amir Jan from Ruyan was killed in a raid in another village.⁵⁸⁶

The burial of Ali Jan

153. Later on, people came and Ali Jan's body was taken to the graveyard.⁵⁸⁷ Mangul went to the graveyard where he found out that soldiers had killed Haji Nazar Gul and Yaro Mama Faqir

⁵⁷⁰ T.1153/27-29 (SF).

⁵⁷¹ T.1153/37 (SF).

⁵⁷² T.1153/37 (SF).

⁵⁷³ T.963/39-41 (MH).

⁵⁷⁴ T.1087/10-22 (MR).

⁵⁷⁵ T.964/30-45 (MH).

⁵⁷⁶ T.965/14-16 (MH).

⁵⁷⁷ T.964/37-45 (MH).

⁵⁷⁸ T.1088/1-5 (MR).

⁵⁷⁹ T.1088/9-17 (MR).

⁵⁸⁰ T.1088/9-11 (MR).

⁵⁸¹ T.1154/17-26 (SF).

⁵⁸² T.1154/37-42 (SF).

⁵⁸³ T.1154/41-47 (SF).

⁵⁸⁴ T.16/8, 37/4-12 (BRS opening statement).

⁵⁸⁵ T.967/14-23 (MH).

⁵⁸⁶ T.1090/37-1098/8 (MR).

⁵⁸⁷ T.1154/14-15 (SF).

as well.⁵⁸⁸ Hanifa, Mangul and Shahzada identified photographs of the two deceased in the almond room in compound 31 as Haji Nazar Gul and Yaro Mama Faqir, neither of whom were from Darwan and neither of whom were Taliban. Yaro Mama Faqir was the father-in-law of Ali Jan.⁵⁸⁹ Ali Jan, Haji Nazar Gul and Yaro Mama Faqir were buried in the graveyard in Darwan.⁵⁹⁰

154. Hanifa and Mangul said the man killed on the other side of the river was named Mullah Gafur. He was Taliban.⁵⁹¹ Mullah Gafur was not buried in Darwan; he was from the other side of the river.⁵⁹²

The cover-up story: “we killed a spotter moving to the HLZ”

155. On returning to Tarin Kowt,⁵⁹³ Person 4, Person 11 and Person 56 went to the ready room to replenish food, water and ammunition supplies, to be prepared to go out again.⁵⁹⁴ In the ready room, Person 56, Person 11 and Person 4 had a conversation about what had occurred. Person 56 gave unchallenged evidence that either Person 4 or Person 11 said that an individual had been kicked off a cliff and subsequently shot.⁵⁹⁵ Person 4’s recollection was it was Person 11 who spoke. While Person 4 could not recall the exact words used, he said Person 11 “went into a bit more of a description...of what happened at that point”⁵⁹⁶ The unchallenged evidence of Person 56 and Person 4 means that the Court would not accept Person 11’s denial,⁵⁹⁷ and would find that immediately after the mission the cliff kick and murder of Ali Jan was disclosed by Person 11.

156. Mr Roberts-Smith did not go to the ready room: he went to the troop debrief.⁵⁹⁸ Persons 7, 31, 32, 35, 55 and 57 were present.⁵⁹⁹ Person 31 said that in the debrief, Mr Roberts-Smith said the EKIA was a spotter.⁶⁰⁰ Person 7 also said that Mr Robert-Smith said “we killed one spotter”.⁶⁰¹ That information was then inputted into an OPSUM by the operations officer.⁶⁰² The OPSUM records Mr Roberts-Smith’s lie that EKIA 4 was a spotter.⁶⁰³

157. Person 4, Person 56 and Person 11 reunited with Mr Roberts-Smith after the post-op debrief,⁶⁰⁴ back in their patrol accommodation.⁶⁰⁵ Mr Roberts-Smith came back into their patrol room and said, “This is what the story is ... The story is that we engaged a spotter whilst moving to our HLZ.”⁶⁰⁶ Person 4 understood that Mr Roberts-Smith was telling him,

⁵⁸⁸ T.1087/32-34 (MR).

⁵⁸⁹ T.965/33 -966/39 (MH); T.1088/19-1090/18 (MR).

⁵⁹⁰ T.967/25-39 (MH).

⁵⁹¹ T.967/1-6 (MH); T.1107/22-47 (MR).

⁵⁹² T.967/25-39 (MH).

⁵⁹³ T.4754/24-25 (P56).

⁵⁹⁴ T.2631/5-18 (P4); T.4754.25-27 (P56).

⁵⁹⁵ T.4754/29-4755/3 (P56).

⁵⁹⁶ T.2631/20-35 (P4).

⁵⁹⁷ T.5763/39-44 (P11).

⁵⁹⁸ T.2631/22-23 (P4); T.4754/40-43 (P56).

⁵⁹⁹ T.250/1-3 (BRS).

⁶⁰⁰ T.4645/10-15 (P31).

⁶⁰¹ T.3614/27-30 (P7).

⁶⁰² T.250/21-32 (BRS); Ex R-11.

⁶⁰³ Ex R-11, page 4.

⁶⁰⁴ T.2632/9-10 (P4).

⁶⁰⁵ T.2883/45 -2884/4 (P4).

⁶⁰⁶ T.2632/12-27 (P4).

that he should be saying, "This is what occurred in relation to the individual in the photo".⁶⁰⁷

Accounts of the kick cliff spread immediately

158. Virtually straight after the mission, back in the lines at Camp Russell, Mr Roberts-Smith told a group of individuals about him kicking an unarmed Afghan male who was PUC'd off a cliff.⁶⁰⁸ Person 32 was present for the discussion.⁶⁰⁹ Person 4 was standing to the side of Mr Roberts-Smith when he said, words to the effect of, "I kicked the cunt off the cliff."⁶¹⁰
159. Initially, senior counsel for Mr Roberts-Smith put to Person 4 that Person 4 had "just made up" this conversation and was "hallucinating" about it. Person 4 denied those propositions. He said the conversation was something he had always known,⁶¹¹ he was "sure" about it and he was "absolutely" sure he was not confused.⁶¹² It was subsequently put to Person 4 that he may have heard Mr Roberts-Smith telling others about the engagement of the squirter over the river. Person 4 again denied that suggestion.⁶¹³
160. After the mission, someone also drew a picture of a winged penis kicking an individual off a cliff on the whiteboard in the lines at Camp Russell.⁶¹⁴ Although Person 35 had a particular reputation for drawing winged penises,⁶¹⁵ Person 35 denied he was responsible for the picture.⁶¹⁶ Person 35's denial (if accepted) does not inevitably undermine Person 4's evidence on this point. The simple answer is that someone else may have drawn the picture.

Late 2012: Person 4 disclosed the murder of Ali Jan

161. In late 2012, at a function at the Gratwick Club on base, after the squadron had returned from Afghanistan, Person 4 broke down to Person 18 and said words to the effect of, "Something very bad happened on the last job⁶¹⁷...I was doing something. I turned around. I saw one of my teammates have hold of a detainee. I then saw Ben Roberts-Smith kick him off the cliff."⁶¹⁸ Person 4 said Ben Roberts-Smith then told him to go down and sort it out.⁶¹⁹
162. In early 2013, Person 18 spoke to Person 6, Person 7, his team commander, and Person 31 about the cliff kick.⁶²⁰ Person 7 recalled this conversation. He said they were speaking about the Hekmatullah series of missions, and Person 18 told him "Ben Roberts-Smith kicked a man off a cliff."⁶²¹ Initially, Person 7 did not believe it and asked him to repeat what he had said. Person 18 said "well, if you don't believe me, go and ask Person 4".⁶²²
163. Person 7 did just that. He spoke to Person 4 either later that day or the next. Person 7

⁶⁰⁷ T.2884/24-31 (P4).

⁶⁰⁸ T.2792/15-39; 2892/20-29 (P4).

⁶⁰⁹ T.2792/34-39 (P4).

⁶¹⁰ T.2893/1-13 (P4).

⁶¹¹ T.2793/24-40 (P4).

⁶¹² T.2892/33-38 (P4).

⁶¹³ T.2943 (P4).

⁶¹⁴ T.2632/42-2633/3 (P4).

⁶¹⁵ T.2633/5-8 (P4).

⁶¹⁶ T.5289/13-15 (P35).

⁶¹⁷ T.3021/1-11 (P18).

⁶¹⁸ T.3023/22-25 (P18).

⁶¹⁹ T.3023/29-30 (P18).

⁶²⁰ T.3023/39-41; T.3024/18-19 (P18).

⁶²¹ T.3615/4-16 (P7).

⁶²² T.3615/15-23 (P7).

described his conversation with Person 4 as follows:⁶²³

[Person 4 said] RS grabbed one of the PUCs, that he was walking around by – had him by the shoulder, walked him around, walked him to the edge of a cliff, and then he took a couple of paces away. He told me that he didn't know what was going on: "What's – what's this all about?" And then he said that RS then turned around and did a kick and kicked the man in the – in the chest and kicked him off the cliff.

I said to him, "Was this man detained? Was he bound? Were – were his hands bound?" He said, "Yes. They were." And I asked him, "Were they in front or behind his back?" And he said, "They were behind his back." He also told me that he got a wave of – or a wave of panic come across his – across his body, and he saw the man's – the Afghan man's head hit a rock, and a tooth flew out.

164. Person 7 stressed to Person 4 the seriousness of the allegation and asked him a couple of times "is this 100% accurate? Are you telling the truth?" Person 4 replied "yes bro, I am". Person 7 told Person 4 he was going to take this somewhere: the allegation could not just be left. Person 4 just nodded his head.⁶²⁴
165. Person 31 gave unchallenged evidence corroborating Person 7's account of his conversation with Person 4.⁶²⁵ Person 31 said in late 2012 or early 2013, Person 7 told him "he had just heard from Person 4 that Mr Roberts-Smith had words to the effect of 'kicked a – a PUC off the – off the cliff whilst we were on that job'.⁶²⁶ Person 7 said "that the detainee was at the top where the patrol was, and that he was – he was kicked off the cliff."⁶²⁷ In cross-examination, Person 31 made clear Person 7 said it was a cliff, not an embankment.⁶²⁸ That line of questioning was evidently directed at Mr Roberts-Smith's alternative argument that if people were talking about a "cliff kick" in early 2013, they may be speaking about the insurgent killed over the river. However, Person 31 made clear that Person 7 referred to a "PUC" or a "detainee". On no view could that have been the insurgent killed over the river.
166. Having regard to the evidence of Person 18 and Person 7, and the unchallenged evidence of Person 31, the Court should find that by no later than early 2013, Person 4 had disclosed the cliff kick allegation to Person 18 and Person 7, who in turn disclosed it to Person 31.

2013: the murder of Ali Jan was officially reported

167. Person 7 subsequently went to three other sergeants, Person 51, Person 44 and Person 43, with the cliff kick allegation and had a meeting about it. He said "you won't believe what I've just been told. I've just been told that RS has kicked a bloke off a cliff".⁶²⁹ Person 44 then said, "There's a number of incidences from the 2009 trip".⁶³⁰

⁶²³ T.3615/25-3616/25 (P4).

⁶²⁴ T.3616/19-25 (P7).

⁶²⁵ T.4654/45-4655/12 (P31).

⁶²⁶ T.4645/28-30 (P31).

⁶²⁷ T.4673/37-38 (P31).

⁶²⁸ T.4673/13-39 (P31).

⁶²⁹ T.3617/3-11 (P7).

⁶³⁰ T.3617/24-48 (P7).

168. That group of sergeants subsequently went to the RSM, Person 100, to put the allegations forward.⁶³¹ At that meeting, the allegations raised were (a) the cliff kick at Darwan; (b) the awards for Tizak; (c) the bullying of Person 1; and (d) issues from the 2009 deployment.⁶³² The RSM's response was "What are you hoping to get out of this?" Person 7 replied, "It's not what I want to get out of this. It's what needs to be done".⁶³³ Person 100 then wrapped up the meeting.⁶³⁴
169. A different group of soldiers (Person 4, Person 8, Person 18 and Person 32) had a meeting with Person 100 in late 2013. The meeting had been arranged by Person 7. Person 4 spoke about what happened on the Darwan mission and said he watched Mr Roberts-Smith kick a detainee off a cliff.⁶³⁵ The RSM was not very receptive.⁶³⁶ The RSM said that it was out of his hands, it was way above his head, and he honestly did not know what to do with it.⁶³⁷ Person 7 subsequently told Person 31 that he had arranged a meeting with the RSM and members of Mr Roberts-Smith's team. Person 31 understood that part of the discussion was about the cliff kick.⁶³⁸
170. In 2014, Person 7 spoke with Person 4 again about the cliff kick allegation.⁶³⁹ Initially, Person 4 asked to be left alone, but Person 7 told him something needed to be done whether he liked it or not. Person 4 then calmed down and they spoke of the allegation.⁶⁴⁰ Person 7 then reported the allegation to the new RSM, Person 102. Person 7 asked if he would like to meet with the same four soldiers who spoke with Person 100 the previous year, then the RSM arranged to have meetings with those soldiers and Person 10 separately.⁶⁴¹
171. The new RSM then held a meeting with Person 4, Person 8, Person 18 and Person 32.⁶⁴² The RSM had a list of topics which included allegations that something had happened in 2012 rotation, allegations of things that happened in 2009, discrepancies between people in regards to Tizak, and allegations of bullying.⁶⁴³ The RSM went through each topic and asked what those present knew.⁶⁴⁴ In relation to Darwan, Person 4 said his patrol had detained persons on that mission, he turned around and saw Mr Roberts-Smith kick a detainee off a cliff.⁶⁴⁵ Person 4 broke down when he was describing what happened in Darwan.⁶⁴⁶
172. In the second half of 2014, Person 7 had a conversation with Mr Hastie and the Troop Sergeant about Mr Roberts-Smith.⁶⁴⁷ During that conversation, Person 7 said "A PUC had

⁶³¹ T.3672/38-3673/2 (P7).

⁶³² T.3889/24-43; T.3876/35-38 (P7).

⁶³³ T.3618/45-3619/2 (P7).

⁶³⁴ T.3619/4-5 (P7).

⁶³⁵ T.3025/4-13 (P18).

⁶³⁶ T.3025/23-26 (P18).

⁶³⁷ T.3025/26-27 (P18).

⁶³⁸ T.4672/23-44 (P31).

⁶³⁹ T.3619/14-19 (P7).

⁶⁴⁰ T.3619/24-3620/9 (P7).

⁶⁴¹ T.3620/28-3621/23 (P7).

⁶⁴² T.3025/27-30 (P18).

⁶⁴³ T.3026/31-38 (P18).

⁶⁴⁴ T.3026/38-39 (P18).

⁶⁴⁵ T.3026/4-9 (P18).

⁶⁴⁶ T.3026/43-44 (P18).

⁶⁴⁷ T.4244/43-4245/42 (AH).

been kicked off a cliff”.⁶⁴⁸ That was a “fairly well-established rumour” at the time and Mr Hastie had heard it independently.⁶⁴⁹ That evidence was unchallenged.

173. Person 4’s evidence concerning the timing of his initial disclosures was inconsistent with the evidence of Person 7, Person 18, Person 31 and (indirectly) Mr Hastie. On Person 4’s account, he first disclosed the cliff kick to Person 7 in 2016 when Person 7 asked about the mission to Darwan. Person 4 “found that odd, because it was common knowledge.”⁶⁵⁰ Person 4 said he “recalled or retold the story to him” and Person 7 was visibly shocked.⁶⁵¹ Person 4 also said that he had a conversation with Person 18 about the mission to Darwan in 2019. Person 18 reached out and Person 4 went to his home and told him about Darwan.⁶⁵²
174. Person 4 is plainly mistaken on the timing of his initial disclosure. The Court should prefer the evidence of Person 7, Person 18, Person 31 and Mr Hastie. The evidence of Person 7 and Person 18 is also corroborated by unchallenged evidence from Person 31 that Person 4 had disclosed the cliff kick to Person 7 by early 2013. Conversely, Person 7 was not in even in Australia in 2016.⁶⁵³ There is further unchallenged evidence that Person 7 disclosed the cliff kick to Mr Hastie in 2014. On any view, Person 7 knew of the allegation long before Person 4 said the initial disclosure occurred.
175. Person 100’s denial of being informed of a war crime committed by Mr Roberts-Smith in 2013 should not be believed.⁶⁵⁴ Person 100 was plainly unwilling to investigate any allegations of misconduct against Mr Roberts-Smith. He had direct allegations of bullying made to him by Person 10 and Person 1, and he did nothing until (in the case of Person 1) Mr Roberts-Smith himself asked for action to be taken.⁶⁵⁵ He plainly had a motive to lie, having done nothing when he was the first person in a senior position in the Regiment to have allegations of war crimes reported to him. A desire to protect Mr Roberts-Smith, and the Regiment, from scandal provides a complete explanation for his failure to act, and his false evidence to this Court.⁶⁵⁶ He was argumentative,⁶⁵⁷ and plainly unreliable on basic facts (such as the identity of the soldier complaining that Mr Roberts-Smith took credit for one of his EKIAs at Tizak,⁶⁵⁸ the date of the meeting with the corporals,⁶⁵⁹ and who was present at that meeting⁶⁶⁰). It is submitted that his evidence provides no basis for rejecting the evidence, some of it unchallenged, set out above.
176. Person 7’s evidence about reporting the Darwan incident in 2013 was challenged by putting to him that at that time he was only seeking to complain about Mr Roberts-Smith’s Victoria Cross, and he only raised allegations in relation to Darwan when those efforts came to

⁶⁴⁸ T.4245/41-47 (AH).

⁶⁴⁹ T.4245/41-47; 4294/22-30; 4316/34-35 (AH).

⁶⁵⁰ T.2775/23-2777/24; 2792/15-17 (P4).

⁶⁵¹ T.2775/23-2777/24 (P4).

⁶⁵² T.2795/2799 (P4).

⁶⁵³ T.3641/10-14 (P7).

⁶⁵⁴ T.5619/27-34 (P100).

⁶⁵⁵ See T.5615/5-5619/16 (P100).

⁶⁵⁶ See T.5625/9-5626/30, T.5627/36-5628/14 (P100).

⁶⁵⁷ See, e.g., T.5624/27-39 (P100).

⁶⁵⁸ See T.5620/4-19 (P100).

⁶⁵⁹ See T.5626/36-41 (P100).

⁶⁶⁰ See T.5624/41-5625/7 (P100).

nothing.⁶⁶¹ The principal objective matters said to support that theory were the facts that the Darwan allegation was not included in the letter of complaint drafted by Person 6 (and co-signed by Person 7 and others) in 2014,⁶⁶² and no record of the Darwan allegation was made in Mr Masters' notes of his conversations with Person 7. The short answer to that submission is:

- (a) The 2014 complaint letter (Ex A-51) was written by Person 6.⁶⁶³ As Person 7 repeatedly said, he understood that the contents of that document were framed as a response to the particular matters contained in Mr Roberts-Smith's citation (which is supported by the terms of the document itself).⁶⁶⁴ The absence of any reference to the allegation concerning Darwan does not mean that Person 4 and Person 18 had not already told Person 7.
- (b) Mr Masters' notes are his own summary notes. Person 7 was adamant that he told Mr Masters of the allegations.⁶⁶⁵ The fact that Mr Masters did not record that allegation in writing does not prove that Person 7 did not tell him. And it certainly doesn't prove that Person 4 and Person 18 had not told Person 7.

177. Overall, Person 7 gave clear and convincing evidence that the reason he reported the allegations concerning Darwan, and continued to press for them to be investigated, was not out of any malice, ill-will or jealousy towards Mr Roberts-Smith, but rather for the honourable and moral reason that they were serious allegations that needed to be investigated.⁶⁶⁶

C. Credibility of the Respondents' witnesses

178. The evidence of Person 4, Person 56, Mangul, Hanifa and Shahzada is a truthful, accurate and reliable account that is internally consistent, consistent with the objective evidence and consistent with each other. Each of them made concessions where appropriate, including against interest. None had a credible motive to give untruthful evidence. All of them gave evidence helpful to Mr Roberts-Smith: particularly in relation to the killing over the river. To the extent there were minor differences between their accounts, as outlined above, they are explicable by the individual perspective of the witness, or due to ordinary human experience, or due to the passage of time eroding memory of some incidental details. The core of their stories, however, was compellingly consistent and littered with detail that could only be known to people who lived through, observed, and experienced these events.

179. The truth is unmistakable in much of the granular detail. The Afghan witnesses correctly described the number of helicopters, the insertion and extraction sites, the direction from which they came and departed, and the location of the overwatch. They correctly described the scheme of manoeuvre. These details match ADF defence documents.⁶⁶⁷ They gave details about the terrain, the inhabitants, the compounds, the fields and crops, and the complex familial and social relationships between the residents of Darwan that could only

⁶⁶¹ See T.3675/14-36, T.3968/19-29 (P7).

⁶⁶² See, e.g., T.3889/45-3890/37 (P7).

⁶⁶³ T.3671/40-45 (P7).

⁶⁶⁴ See, e.g., T.3674/38-3675/2, T.3923/1-3 (P7).

⁶⁶⁵ T.3667/13-20; 3691/3-5; 3693/6-13; 3697/8-10 (P7).

⁶⁶⁶ T.3642/1-7; 3647/32-40; 3670/26-35; 3675/24-30; 3730/10-13 (P7).

⁶⁶⁷ See paragraphs 17 to 20 and 140 above.

be given by people who lived their whole life there. Mangul and Hanifa correctly described an interpreter and an SASR dog in the last compound. They could not have known that Mr Roberts-Smith had a dog handler attached to his patrol that day. They correctly described Mr Roberts-Smith's height and his wet uniform. All of them accurately described injuries on Ali Jan's body, including the injury to his teeth.

180. Perhaps the most compelling reason of all is the sheer impossibility of collusion between the SASR and Afghan witnesses. On Mr Roberts-Smith's case, Person 4 and Person 56 have given mistaken but honest evidence of an incident where, on 11 September 2012, there were Afghan local nationals in the southern-most compound in Darwan and Mr Roberts-Smith kicked one of them off a cliff. Meanwhile, three illiterate villagers on the other side of the world in rural Darwan, Afghanistan, fabricated a materially identical story of a handcuffed Afghan being kicked off a cliff next to the southern-most compound in Darwan on 11 September 2012, by a tall foreign soldier who was wet from the waist down. Yet there is zero evidence of collusion, contamination or even a connection between these groups of witnesses from different vastly backgrounds and from opposite sides of the world, whose lives have only ever intersected on this one fleeting occasion. The answer for the consistent accounts is a much simpler one. Each of them is telling the truth.
181. We address below the specific credit points raised in relation to each witness (as well as a specific matter relevant to the credit of Person 7 in this context).

Person 4

182. Mr Roberts-Smith's case is not that Person 4 was being deliberately dishonest in his evidence. Instead, the case put was that Person 4 had "come to believe" that the "story" he told to Person 7 is true (i.e. that Mr Roberts-Smith kicked a PUC off a cliff) but he is in fact "delusional" about those events.⁶⁶⁸ It was also put to Person 4 that he has become "obsessed" with Mr Roberts-Smith.⁶⁶⁹ Person 4 emphatically denied both suggestions. In relation to the cliff kick, he said "that is exactly what happened" and "I know it happened". He denied being delusional or obsessed with Mr Roberts Smith.⁶⁷⁰
183. There were five broad challenges to the reliability and accuracy of Person 4's evidence: (a) his mental health; (b) his memory; (c) his alleged suggestibility; (d) his alleged animus towards Mr Roberts-Smith; and (e) the arrangement concerning his Darwan evidence.
184. The *first* challenge concerned Person 4's mental health. It is uncontroversial that Person 4 has at times suffered significant mental health issues and takes medication for those conditions.⁶⁷¹ However, the mere existence of a mental health condition, or that a witness is taking medication, does not undermine the reliability or accuracy of the witness' evidence without more. For one or both of those matters to bear upon the reliability or accuracy of Person 4's evidence, a causal link must be established between the condition or the medication and a factor going to truthfulness, accuracy, or reliability (such a memory loss).

⁶⁶⁸ T.2822/4-22 (P4).

⁶⁶⁹ T.2822/4-22 (P4).

⁶⁷⁰ T.2822/4-22 (P4).

⁶⁷¹ T.2715/18-2729/8 (P4).

185. The situation in this case is both different, in terms of the suggested impact of mental health conditions on a witness' reliability, and more acute, in terms of the lack of an evidentiary basis for the submission, than in *Ford v Inghams*.⁶⁷² It is different, because here it is suggested that Person 4 has come to believe an entirely false version of events, whereas in *Ford v Inghams* the suggested impact related to lack of memory and inconsistencies in his account. It is more acute because, in *Ford v Inghams*, there was expert evidence on at least the general effect of PTSD. In this case, there is no expert evidence *at all* on the nature or symptoms of Person 4's conditions (including any potential effect on his memory such that he would come to believe a wholly false account). Nor is there any expert evidence on the nature of his medications, the side effects, or the potential effect on his memory. In the absence of expert evidence demonstrating any material adverse effect that Person 4's conditions or medication could have on his memory, this challenge fails at the first hurdle.
186. To the extent it is relevant to what is properly a question of expert opinion, Person 4 denied that either his mental health conditions or his medication materially affected his ability to give truthful, accurate or reliable evidence. He denied having told his psychiatrist that he had difficulty recognising what was real, hearing or believing things that were not real, hallucinating, experiencing forgetfulness or being confused.⁶⁷³ He also made clear that he was not taking antipsychotic medication at the time of his evidence.⁶⁷⁴
187. In any event, Person 4 disclosed his knowledge of the cliff kick well before he was diagnosed with any condition or was on any medication. On the Respondents' case, he and Person 11 disclosed it on the same day to Person 56, and shortly afterwards, to Person 18 and Person 7. Even on Person 4's account, he disclosed it by 2016. These very early disclosures dispel any suggestion that the kick cliff is a later figment of Person 4's imagination.
188. The **second** – and related - challenge concerned Person 4's memory.⁶⁷⁵ He candidly accepted that his conditions and medication caused him not to recall minor elements of incidents but firmly rebutted any suggestion that had any broader effect, stating "the major elements I can absolutely recall".⁶⁷⁶ No expert evidence was led to suggest that Person 4's mental health conditions, or his medications, have any effect beyond the "minor elements" suggested by Person 4. There is no reason to reject his evidence on this basis.
189. In cross-examination, senior counsel for Mr Roberts-Smith highlighted the kind of "minor elements" Person 4 might not recall. Initially, he forgot he had been contacted (through his lawyer) by journalist Mark Willacy "unofficially in the last 10 years", despite signing a record of conversation to that effect.⁶⁷⁷ It is hardly surprising that Person 4 did not recall being contacted several years ago by a journalist with whom he had no other involvement. It reflected positively on Person 4's credibility that he immediately and candidly acknowledged having made an error. There was no attempt to deny or minimise it. The memory lapse is *de minimus*. It says nothing about Person 4's ability to recall a significant and traumatic

⁶⁷² See Section II, paragraphs 23-24 above.

⁶⁷³ T.2718/6-30 (P4).

⁶⁷⁴ T.2726/1-47 (P4).

⁶⁷⁵ T.2710/7-8 (P4).

⁶⁷⁶ T.2780/1-22 (P4).

⁶⁷⁷ T.2800/27-2802/2 (P4); Ex A-95.

event such as observing Mr Roberts-Smith kick a handcuffed PUC off a cliff.

190. Another matter Person 4 did not recall correctly was the timing of his disclosure of the kick cliff. It cannot be correct that he first disclosed it to Person 7 in 2016 and Person 18 in 2019. There is unchallenged evidence that Person 7 disclosed the incident to others in 2013 and 2014 (meaning he must have heard it by then).⁶⁷⁸ However, the issue in this respect is limited to one of timing (*when* disclosure was made) not substance (*what* disclosure was made). It is emblematic of the type of “minor element” that Person 4 said he might not recall.
191. Otherwise, Person 4 had no difficulty recalling the major elements of his service in Afghanistan. For example, he gave a detailed and unchallenged account of Tizak. He recalled the mission concerning Objective Depth Charger and was not challenged on that account. He gave a detailed and unchallenged description of the killing of the squirter over the river in Darwan. The lack of challenge to these points undermines Mr Roberts-Smith’s submissions that Person 4’s memory is unreliable. The true position is that Mr Roberts-Smith is willing to accept the reliability of Person 4’s memory when it suits him; and to challenge his memory only when the evidence is adverse.
192. The *third* challenge was that Person 4 is suggestable and has been influenced by the media and discussing Darwan and W108 with others. Person 4 said, for example, that when the articles were first published in 2018 they were a “hot topic” within the unit. However, he said no-one brought it to his attention as such and he did not recall anyone coming to speak to him about it.⁶⁷⁹ He did overhear people speak about it “a few times” but did not recall who was speaking about it. People were not speaking about what took place on the W108 mission; it was more “have you read the paper”.⁶⁸⁰ In our submission, there is no rational basis to conclude that reading these articles, or the limited conversations Person 4 had about them, has in any prompted or assisted his memory or implanted false memories.
193. The same point may be made about a 60 Minutes program concerning Darwan which aired in 2018. Person 4 said he watched part of the program including a re-enactment of the kick cliff.⁶⁸¹ However, Person 4 made clear he can distinguish between what he personally witnessed as opposed to what he has seen on the TV, read in the newspaper, or discussed with other people.⁶⁸² The cross-examiner did not challenge Person 4 on this evidence. He asked, “are you able to distinguish”,⁶⁸³ but it was never put to Person 4 that he could not.
194. In any event, Person 4 disclosed his knowledge of the cliff kick to third persons well before any of the print or television articles went to air. It was disclosed to Person 56 the same day. On the Respondents’ case, he disclosed it shortly afterwards to Person 18 and Person 7. Even on Person 4’s account, he disclosed it to Person 7 by 2016, long before any media ran the story. These early disclosures dispel any suggestion that the kick cliff is a later figment of Person 4’s suggestable imagination that was implanted by the print or television media.

⁶⁷⁸ See paragraphs 165 and 172 above.

⁶⁷⁹ T.2771/35-2772/18 (P4).

⁶⁸⁰ T.2774/5-31 (P4).

⁶⁸¹ T.2806/3-2807/9 (P4).

⁶⁸² T.2807/19-34 (P4).

⁶⁸³ T.2807/19-34 (P4).

195. The **fourth** challenge concerned Person 4's alleged "obsession" with or jealousy of Mr Roberts-Smith. Person 4 was undoubtedly left hurt and disappointed by the delay in officially recognising his role in the battle of Tizak.⁶⁸⁴ He was disappointed that he had to give up another award to receive his Medal for Gallantry.⁶⁸⁵ He was also upset that "that something as outstanding as what both Ben and myself did was politicised".⁶⁸⁶ However, contrary to the suggestions put to Person 4 in cross-examination, it was obvious that these feelings had nothing to do with jealousy of Mr Roberts-Smith.
196. Person 4 flatly rejected any suggestion that he harboured resentment towards Mr Roberts-Smith.⁶⁸⁷ He said he "loved Mr Roberts-Smith as a brother". He said "of course I don't hate him" and "believe me, I'm not jealous of him".⁶⁸⁸ Person 4 said he does not feel he deserved an equal award as Mr Roberts-Smith; he never thought he (Person 4) deserved a Victoria Cross but that he believed Mr Roberts-Smith did.⁶⁸⁹ In short, Person 4 displayed no animus towards Mr Roberts-Smith, let alone a level of animus that would cause him innocently (or otherwise) to fabricate murder allegations against Mr Roberts-Smith.
197. To the contrary, it was evident that Person 4 was upset he had played any role – even an indirect one - in bring allegations against Mr Roberts-Smith into the public domain. Person 4 told Person 56 he felt he had been used.⁶⁹⁰ Person 4 also said he felt manipulated, that people had used his being upset at awards to attack Mr Roberts-Smith, and he felt he had let Mr Roberts-Smith down in respect of conversations with Persons 6 and 7.⁶⁹¹ Those words were an expression of loyalty to Mr Roberts-Smith and regret that he had said anything against Mr Roberts-Smith. They were not the words of a man so wracked with obsession and jealousy that he would fabricate murder allegations against Mr Roberts-Smith.
198. It is also important to bear in mind Mr Roberts-Smith's challenge to the credibility of Person 4. The assertion is that Person 4 has "come to believe" the allegations against Mr Roberts-Smith to be true and that he is "delusional".⁶⁹² There is no expert evidence, or admission from Person 4, or ordinary human experience that would enable the Court to draw any link between alleged jealousy (which was in any event denied) and the innocent formation of a delusional belief that someone else is guilty of murder.
199. The **fifth** challenge concerned the arrangement by which Person 4 gave evidence in the proceedings. The arrangement was set out in a letter from Minter Ellison to Person 4's solicitors dated 7 February 2022.⁶⁹³ While the Respondents accept that the arrangement is potentially relevant to an assessment of Person 4's credibility, properly understood, the arrangement does not diminish the accuracy or reliability of Person 4's account in any way.
200. *First*, the arrangement did not concern the *content* of Person 4's evidence on Darwan in any

⁶⁸⁴ T.2818/42-2819/7 (P4).

⁶⁸⁵ T.2817/14-20; 2818/34-2819/43 (P4).

⁶⁸⁶ T.2814/14-2815/26 (P4).

⁶⁸⁷ T.2817/22-25 (P4).

⁶⁸⁸ T.2820/22-2821/13 (P4).

⁶⁸⁹ T.2814/44-2815/26 (P4).

⁶⁹⁰ T.4785/13-15 (P56).

⁶⁹¹ T.2904/16-2904/12 (P4).

⁶⁹² T.2822/4-22 (P4).

⁶⁹³ Ex A-267.

event. Rather, it was directed at his *willingness* to appear at Court and speak about that mission. That is apparent from the fourth paragraph of the letter, which states “If your client agrees to willingly give evidence at trial in relation to Darwan, we undertake to adopt the following forensic positions...”. There was no suggestion that the arrangement required Person 4’s evidence to support the Respondents. As a result, the arrangement cannot be seen as having incentivised or given Person 4 any motive or a reason, either deliberately or otherwise, to embellish or falsify his evidence concerning Darwan. Instead, the only requirement was that he give evidence willingly on that topic. The undertaking had equal force if Person 4 had come and given evidence that supported Mr Roberts-Smith’s account.

201. *Secondly*, the Respondents did not undertake to avoid questions on W108. The arrangement in fact presupposed that such questions would be asked. It was only once Person 4 persuaded the Court that there were reasonable grounds for an objection under s 128 of the *Evidence Act*, and Person 4 declined to give that evidence willingly, that the Respondents agreed not to ask him to be compelled under s 128(4) of the *Evidence Act*. However, if Person 4 failed to establish a reasonable ground for the objection, or decided to give evidence willingly, the undertaking would not have applied and the Respondents would have been free to ask questions about W108.
202. Perhaps more importantly, irrespective of what the Respondents undertook to do, the arrangement did not constrain Mr Roberts-Smith’s ability to ask questions about W108 in any way (and his senior counsel did so) or to seek to have him compelled to answer. Thus, the arrangement cannot have given Person 4 any comfort that he would not be asked any questions about W108. For this reason, the arrangement is materially different from an incentive such as an immunity or a promise of a favourable sentencing recommendation. In those cases, the beneficiary receives a concrete benefit in return for his or her evidence. Here, the only benefit to Person 4 was that only one party (and not both) was likely to ask about the topic that Person 4 hoped to avoid altogether. That cannot reasonably be construed as a material factor that would cause Person 4 to alter or fabricate evidence against Mr Roberts-Smith.
203. *Thirdly*, Person 4 did not personally know about the letter. He said he “absolutely” did not see it.⁶⁹⁴ Nor was he aware whether an agreement had been confirmed at the time of giving evidence.⁶⁹⁵ He said he knew that Mr Kremer would take an objection when it came to W108, but he was not sure that the Respondents would agree with his submission that he should not be compelled to answer the question.⁶⁹⁶ It cannot be said that Person 4 was improperly influenced to give evidence about Darwan when he was unaware of the Respondents’ position at the time of giving that evidence.
204. *Finally*, the Court should reject any suggestion that Person 4, on account of his mental health conditions and any associated vulnerability, was improperly influenced in any way by the arrangement to give evidence. Person 4 was represented by experienced solicitors and counsel, and all dealings with the Respondents occurred through them. He had

⁶⁹⁴ T.2946/43-44 (P4).

⁶⁹⁵ T.2742-2743 (P4).

⁶⁹⁶ T.2953/20-29 (P4).

psychological and psychiatric medical advice. He had the ability to make an application to set aside his subpoena but elected not to.

Person 56

205. As with Person 4, Mr Roberts-Smith made no suggestion that Person 56 had deliberately given false evidence. Nor was there any suggestion that Person 56 had any personal animus towards Mr Roberts-Smith.⁶⁹⁷ Instead, there were four broad related challenges to the reliability and accuracy of Person 56's evidence: (a) his vulnerability when approached to speak with the Respondents; (b) the arrangement concerning his evidence; (c) alleged suggestibility; and (d) alleged memory issues.
206. The **first** challenge concerned the propriety of the Respondents' approach to Person 56. In cross-examination, Person 56 agreed that he was vulnerable⁶⁹⁸ when approached (through his lawyers) by the Respondents and felt threatened to sign a statement to get the Respondents "off his back" and to prevent the possibility that the Respondents would subpoena him and ask him about Fasil.⁶⁹⁹ The Court should reject any contention that the Respondents acted improperly in their dealings with Person 56. He was at all times represented by experienced counsel and a solicitor. All communications went through his lawyers. They presumably gave him full advice about his options. It was made clear to his lawyer in writing that the Respondents would need to make an application to subpoena Person 56 (indeed, one aspect of the arrangement was that Person 56 agreed not to oppose the application).⁷⁰⁰ When Person 56 subsequently withdrew from the arrangement and tried to set aside his subpoena, he made no suggestion that his dealings with the Respondents were the result of duress, pressure, or threats.⁷⁰¹ Ultimately, and decisively, Person 56 rejected the suggestion that any pressure he felt influenced the reliability or accuracy of the statement he signed, stating "I believe the document that I signed was to the best of my recollection."⁷⁰² Thus, even if Person 56 did feel pressure to speak to the Respondents, there is no basis to conclude that it affected the accuracy or reliability of the statement he gave (or his evidence).
207. The **second** challenge concerned the propriety of the arrangement by which Person 56 initially agreed to give evidence.⁷⁰³ The Court should reject any submission that the arrangement was inappropriate or bore in any way on the credibility of Person 56's evidence.
208. **First**, the arrangement did not concern the *content* of Person 56's evidence on Darwan (or any other topic). It was directed at his *willingness* to speak to the Respondents about Darwan and not opposes an application to call him as a witness.⁷⁰⁴ There was no suggestion that the proposed arrangement required Person 56's evidence to support the Respondents. If anything, the arrangement incentivised Person 56 to downplay his evidence to reduce the

⁶⁹⁷ T.4785/35-4786/10 (P56).

⁶⁹⁸ T.4783/15-39 (P56).

⁶⁹⁹ T.4798/34-41, 4765/40-46 (P56).

⁷⁰⁰ Ex A-187, paragraph 2.

⁷⁰¹ 'Affidavit 2 and Medical Report' filed on behalf of Person 56; T.2525/1-2596/35 (Interlocutory Application hearing regarding Person 56).

⁷⁰² T.4798/34-41 (P56).

⁷⁰³ The arrangement is recorded in Ex A-187.

⁷⁰⁴ Ex A-187, paragraph 2.

likelihood that the Respondents would call him. On no view did the arrangement incentivise Person 56 to embellish or falsify his evidence in a way that favoured the Respondents.

209. *Secondly*, the Respondents did not undertake to avoid questions on Fasil under all circumstances. The Respondents were free to ask questions about Fasil if Person 56 failed to persuade the Court that there were reasonable grounds for an objection under s 128 of the *Evidence Act*. Further, the arrangement did not constrain Mr Roberts-Smith from asking questions about Fasil. Thus, the only possible benefit to Person 56 was that only one party was likely to ask questions about Fasil. That cannot reasonably be construed as a material benefit that would cause Person 56 to alter or fabricate evidence.
210. *Thirdly*, the arrangement was no longer in place when Person 56 gave evidence. One condition of the arrangement was that Person 56 did not oppose an application to call him as a witness.⁷⁰⁵ The arrangement ceased as soon as Person 56 filed an application to set aside the subpoena.⁷⁰⁶ That is why the Respondents sought, unsuccessfully, to compel Person 56 to answer questions on Fasil.⁷⁰⁷ Thus, whatever the impact of the arrangement prior to that point, it had ceased to have any effect by the time Person 56 gave evidence.
211. The *third* challenge was that Person 56 is suggestable and has been influenced by the media and discussing Darwan with others. Person 56 accepted he had discussed the mission with others, other people had discussed their recollections with him, and it was possible his recollection of events may have been influenced by what others told him. He accepted that his recollection of the mission may have been influenced by what others told him or what he read in the media.⁷⁰⁸ However, generalised statements that it was “possible” that is recollection “may” have been influenced are of no assistance. The cross-examination did not suggest, let alone establish, that specific facts such as the presence of fighting aged males in the end compound, or the discussion back in the ready room at Tarin Kowt, were the product of suggestion and therefore unreliable. There is no basis to conclude that these specific facts were prompted, assisted, or implanted by others.
212. The *fourth* challenge was to Person 56’s memory. Person 56 accepted that he had difficulty recalling some aspects of his service in Afghanistan and he accepted that his recollection of specific details of the mission at Darwan may be wrong.⁷⁰⁹ However, as with the submission that Person 56 was suggestable, generalised statements that his memory “may” be wrong are of no assistance. There was no suggestion that any of his memories were *in fact* wrong. No alternative factual scenario was put to him that may have assisted his recollection one way or the other. It was not put to Person 56, for example, that he never went to the end compound and that he remained in another part of the village for over one and a half hours. Person 56 was not asked where he was or what he was doing for this missing hour and a half. It was not put to Person 56 that he did not have the conversation he described in the ready room at Tarin Kowt. There was no expert evidence led to suggest that Person 56’s memory is any worse than the average person seeking to recall events from 10 years ago.

⁷⁰⁵ Ex A-187, paragraph 2.

⁷⁰⁶ Ex A-187, paragraph 2.

⁷⁰⁷ T.4760/27-33 (P56).

⁷⁰⁸ T.4797/35-39 (P56).

⁷⁰⁹ T.4784/1-22 (P56).

There is no reason to reject his evidence on this basis.

Mangul Rahmi

213. The overarching challenge put to Mangul was threefold: (a) “you’ve made up everything you’ve said about events on that day”;⁷¹⁰ (b) neither Mangul nor his family were “present in the group of compounds at the time the soldiers got there that day”;⁷¹¹ and (c) the man Mangul “saw in the cornfield was not Ali Jan”.⁷¹² Consistent with the overarching challenge, it was put to Mangul that he did not see an interpreter,⁷¹³ he did not see a big soldier and he did not see a dog that day.⁷¹⁴ Based on these challenges, Mr Roberts-Smith’s case appears to be that: (1) Mangul gave false evidence that he was at home during the raid; and (2) while Mangul did see a body in the cornfield, it was not Ali Jan and Mangul has fabricated his evidence on that point. Both challenges should be rejected, for the following reasons.
214. *First*, Mangul’s evidence that he was present at his compound on the day is corroborated by three witnesses: Hanifa, Shahzada and Person 56. It makes sense that he was there. It was his compound (a proposition that was not challenged). It is logical he went home during a raid. There is no record of him being detained in any other part of the village or his fields. Nor is there any basis in the evidence to suggest he was somewhere other than Darwan that day (indeed, that appears not to be Mr Roberts-Smith’s case given the suggestion that Mangul positively saw someone other than Ali Jan in the cornfield).⁷¹⁵
215. *Secondly*, Mangul’s evidence contained details that reasonably could only have been observed by a person present on the day. Mangul correctly identified the number and landing areas of the turn 1 Blackhawk helicopters.⁷¹⁶ He correctly observed soldiers in the location of the overwatch.⁷¹⁷ He correctly identified that a dog was with Mr Roberts-Smith’s patrol that day.⁷¹⁸ When it was suggested he may have seen dogs on other occasions, Mangul gave an unassailable response: “Of course I may have seen the dogs before, but this one I remember very well because it bit me”.⁷¹⁹ He correctly identified that there was an interpreter in the end compound.⁷²⁰ He correctly identified that there was “big soldier” in the end compound.⁷²¹ He correctly identified aspects of the turn 2 extraction, notably, the overwatch was picked up last.⁷²² He described injuries on Ali Jan’s body that were consistent with the SSE photographs.⁷²³ He correctly identified the location of the body.⁷²⁴ There is no evidentiary basis to suggest, let alone conclude, that Mangul somehow acquired knowledge of a range of objectively true facts and wove an otherwise false narrative around them.

⁷¹⁰ T.1130/24-25 (MR).

⁷¹¹ T.1130/43-44 (MR).

⁷¹² T.1130/30 (MR).

⁷¹³ T.1109/8-15 (MR).

⁷¹⁴ CCT 29.7.21, p.18/40-41 (MR).

⁷¹⁵ T.1130/30 (MR).

⁷¹⁶ See paragraph 20.

⁷¹⁷ See paragraph 29.

⁷¹⁸ See paragraph 30.

⁷¹⁹ CCT 29.07.21, p.19/5-9 (MR).

⁷²⁰ See paragraph 76

⁷²¹ See paragraph 80.

⁷²² See paragraph 143.

⁷²³ See paragraph 147.

⁷²⁴ See paragraph 106.

216. *Thirdly*, Mangul made the limits of his evidence clear. He made it plain that he was inside his compound and did not see the cliff kick or the shooting of Ali Jan. That not to understate the significance of his evidence: it is crucial given Mr Roberts-Smith and Person 11's claim that there were no fighting aged men in the end compound. But the conservative nature of his evidence militates against any suggestion of fabrication.
217. *Fourthly*, Mangul made appropriate concessions about both his own state of mind and matters that assisted Mr Roberts-Smith. He candidly acknowledged that he hated the foreign soldiers.⁷²⁵ Nevertheless, he readily acknowledged the legitimacy of the engagement over the river and that Mullah Gafur was Taliban.⁷²⁶ There was no suggestion that all Australians were bad, all Afghans were good, or all engagements were illegitimate. The frankly outrageous proposition that Muslims believe themselves entitled to lie to infidels was rejected by Magul with a simple: "No, I haven't seen anything like that. One should not tell a lie".⁷²⁷
218. *Fifthly*, there is no evidence of any collusion between Mangul, Hanifa and Shahzada (let alone with Person 4 or Person 56). Mangul candidly acknowledged that villagers in a gathering may have talked about the raids.⁷²⁸ That is unsurprising. However, he denied that he and Hanifa had discussed the fact that Hanifa saw a big soldier that day.⁷²⁹ The Court has no reason to disbelieve his evidence on this point.
219. *Sixthly*, no financial or other motive has been identified. Mangul has had no contact with the Afghan Independent Human Rights Commission and has made no claim for compensation in respect of events in Darwan.⁷³⁰ Mangul made clear that Dr Sharif (the Respondents' Afghan intermediary) paid only his food, transport and accommodation.⁷³¹ It was also Mangul's intention, if possible, to return to Darwan after giving evidence.⁷³² Thus, there is no basis to conclude that money, compensation, or relocation provided any incentive to lie or embellish.
220. One further matter is dealt with in paragraph B20 of the Respondents' Closed Court Submissions.

Mohammed Hanifa

221. Similar to Mangul, the overarching challenge put to Hanifa was that everything he said about the events "is a fabrication"; he did not recall what Ali Jan looked like; he never saw any soldiers at Mangul's compound; he never saw a dog on the day of the raid; he never saw an interpreter in the end compound; and in fact, "neither you nor any members of your family were in the southern compounds on that day".⁷³³ Hanifa denied all of those propositions.⁷³⁴

⁷²⁵ T.1109/35-38 (MR).

⁷²⁶ T.1107/35-47 (MR).

⁷²⁷ T.1103/40-1104/12 (MR).

⁷²⁸ T.1104/41-1105/21 (MR).

⁷²⁹ T.1131/20-30 (MR).

⁷³⁰ T.1119/19-27 (MR).

⁷³¹ T.1120/45-1121/26; T.1124/19-36 (MR).

⁷³² T.1021/31 (MH).

⁷³³ T.1047/38-1038/36 (MH).

⁷³⁴ T.1047/38-1038/36 (MH).

The Court should reject them too, for the following reasons.

222. *First*, Hanifa's evidence that he was present at Mangul's compound is corroborated by four witnesses: Mangul, Shahzada, Person 56 and (on the Respondents' case) Person 4. His explanation for being at Mangul's compound was logical and consistent with Mangul's. It makes sense that he went to the closest compound with Ali Jan once their attempt to leave the village failed. There is no record of him being detained in any other part of the village or his fields. And as with Mangul, there is no basis in the evidence to suggest he was somewhere other than Darwan on that day.
223. *Secondly*, as with Mangul, Hanifa's evidence contained details that reasonably could only have been observed by a person present on the day. He correctly identified the number and formation of the turn 1 helicopters.⁷³⁵ He correctly identified the location of the overwatch team (on a mountain on the east side of the village).⁷³⁶ He correctly described the arrival of the turn 2 helicopters.⁷³⁷ Curiously, it was put to Hanifa that his evidence about seeing four more helicopters arrive, after the sun had risen, was "not true".⁷³⁸ His evidence, however, was consistent with the operational documents and SAS witnesses that the troop inserted with two turns and that four Blackhawk helicopters landed on each turn.⁷³⁹ He correctly described the SASR and Commando scheme of manoeuvre.⁷⁴⁰ He correctly described seeing a black dog in the end compound.⁷⁴¹ He correctly described seeing a big soldier who was wet up to his chest area.⁷⁴² He correctly described the presence of an interpreter in the end compound.⁷⁴³ He identified that two soldiers dragged Ali Jan to the cornfield, consistent with Person 4.⁷⁴⁴ He correctly identified the location of the body.⁷⁴⁵ He correctly described aspects of the FE's helicopter extraction plan.⁷⁴⁶
224. *Thirdly*, Hanifa was careful to distinguish between things he saw, versus things he heard. One example was where he said he heard, but did not see, what equipment Mullah Gafur had when he was killed over the river.⁷⁴⁷ He did not know that the "tall soldier" had swum the river to kill Mullah Gafur; he simply knew that it was a soldier.⁷⁴⁸ So it cannot be suggested that he has picked up this information in the village and repeated it.
225. *Fourthly*, no financial or similar motive was identified. Hanifa made clear that he had only been paid for his food and for transportation. Other than that, no money had been paid.⁷⁴⁹ Hanifa also denied he had spoken with or sought compensation from the Afghan Independent Human Rights Commission.⁷⁵⁰ Mangul confirmed that Hanifa had not made a

⁷³⁵ See paragraph 17.

⁷³⁶ See paragraph 29.

⁷³⁷ See paragraph 31.

⁷³⁸ T.992/24-25 (MH).

⁷³⁹ Ex R-11; T.3609/8-10; 3609/34-35 (P7); see also, Ex R-29, pages 26 and 35.

⁷⁴⁰ See paragraph 49.

⁷⁴¹ See paragraph 59.

⁷⁴² See paragraph 77.

⁷⁴³ See paragraph 79.

⁷⁴⁴ See paragraph 105.

⁷⁴⁵ See paragraph 106.

⁷⁴⁶ See paragraph 140.

⁷⁴⁷ T.1003/10-11 (MH).

⁷⁴⁸ T.1003/39-43 (MH).

⁷⁴⁹ T.1021/31 (MH).

⁷⁵⁰ T.1019/28-37 (MH).

claim for compensation.⁷⁵¹

226. *Fifthly*, Hanifa was challenged about Mohammed Sha's presence in Darwan during the raid and it was repeatedly suggested Hanifa was lying because Mohammed Sha was detained in Tarin Kowt at the time.⁷⁵²
227. *Sixthly*, Hanifa acknowledged having spoken with other people about the raids.⁷⁵³ However, there was no basis to think that his evidence had been relevantly contaminated in any way. There is certainly no plausible suggestion that his account had been harmonised in any way with the accounts of either Person 4 or Person 56.
228. *Seventhly*, like Mangul, Hanifa made appropriate concessions about his own state of mind and matters that assisted Mr Roberts-Smith. He agreed that he did not like Australian soldiers, regarded them as infidel, and called those killed by them martyrs.⁷⁵⁴ He agreed that Mullah Gafur was a member of the Taliban.⁷⁵⁵ But he harboured no sympathy for the Taliban (or indeed, any side of the conflict that had wracked his country) saying simply that he was "the public".⁷⁵⁶ He was an honest witness.
229. Two further matters are dealt with in paragraphs B15 to B19 of the Respondents' Closed Court Submissions.

Shahzada Fatih

230. As with Mangul and Hanifa, the overarching challenge to Shahzada's evidence was that his account of the day was "a complete fabrication".⁷⁵⁷ That challenge should be rejected for the following reasons.
231. *First*, as with both Hanifa and Mangul, Shahzada's evidence contained numerous details that reasonably could only have been observed by a person present on the day. He correctly identified the number and landing areas of the turn 1 Blackhawk helicopters.⁷⁵⁸ He correctly identified the location of the overwatch team.⁷⁵⁹ He correctly identified the presence of a tall soldier and an interpreter present during the clearance of the southern compounds.⁷⁶⁰
232. *Secondly*, Shahzada was challenged on his ability to see the location of the cliff kick from Amir Jan Aka's hut. There were two aspects to this challenge. The first concerned the line of sight from the hut to Mangul's compound. Shahzada said he was sitting on the closest side of the hut, the hut wall was open and there was a gap in the trees through which he could see Mangul's compound.⁷⁶¹ The gaps he described are evident on the overwatch photographs taken on the day. There is no reason to doubt his evidence on this basis.
233. The second aspect of the challenge concerned Shahzada's eyesight. Shahzada

⁷⁵¹ T.1119/29-32 (MR).

⁷⁵² T.1008/25-39, CCT 27.7.21, p.4-5 (MH).

⁷⁵³ T.1033/43-45 (MH).

⁷⁵⁴ T.1005/1-30 (MH).

⁷⁵⁵ T.1033/32-37 (MH).

⁷⁵⁶ T.1006/25-26 (MH).

⁷⁵⁷ T.1177/26-27 (SF).

⁷⁵⁸ See paragraph 20.

⁷⁵⁹ See paragraph 29.

⁷⁶⁰ See paragraph 50.

⁷⁶¹ T.1163/25-1169/25 (SF).

acknowledged that his eyesight “is not good” (present tense).⁷⁶² He later appeared to agree that his eyesight was not good nine years ago either,⁷⁶³ but then confirmed that his eyesight was not weak.⁷⁶⁴ The challenge to Shahzada’s eyesight was also put on an erroneous basis (that the distance was 250-300 metres from the hut to Mangul’s compound).⁷⁶⁵ The scale on Ex R-1 shows that the distance from the hut to Mangul’s compound was in fact no more than 100 metres. The Court could not draw any adverse inference based on that evidence.

234. *Thirdly*, Shahzada denied that he had spoken to Hanifa and Mangul about the events of the day or that he had spoken with Mangul and Hanifa about it “on many occasions”.⁷⁶⁶ There is no basis for a submission to the contrary.
235. *Fourthly*, Shahzada made clear that he had only been paid by Dr Sharif for his food, for accommodation, for transportation and medical expenses. He felt no obligation to Dr Sharif.⁷⁶⁷ Thus, there is no basis to conclude that money provided any incentive to lie.

D. Credibility of Mr Roberts-Smith’s witnesses

Mr Roberts-Smith

236. As outlined at paragraph 4, Mr Roberts-Smith’s account involves a sequence of individually unlikely events. For the reasons outlined above, those events are not only unlikely; they are in fact untrue. Person 56 and the interpreter were not sent away prior to the last compound. Person 56 did not go missing for an hour and a half. Person 47 was not sent away prior to the last compound. Fighting aged males were found in the end compound.
237. Compounding those lies is the sheer implausibility of Mr Roberts-Smith’s account that a spotter could have evaded detection for 5 hours in the cornfield, his inconsistent accounts of the route to the cornfield, his story of the non-existent embankment, and his unsuccessful attempt to provide an inconsistent possible explanation for the source of the cliff kick story (using his foot to push the body of the insurgent killed over the river). Collectively, the lies, the implausibilities, the inconsistencies and the inconsistent alternative version points to one conclusion: Mr Roberts-Smith’s account is false.
238. Three additional matters further reduce any weight to be placed on Mr Roberts-Smith’s evidence concerning Darwan:
- (a) Mr Robert-Smith has colluded with Person 11 in relation to their denial of the true events at Darwan. They are close friends. They have spoken together regularly. Mr Roberts-Smith has visited Person 11 at significant moments including the night before Person 11’s second IGADF interview, the night after Person 11’s second IGADF interview, and in the aftermath of his own IGADF interview.⁷⁶⁸ No weight can be placed on Mr Roberts-Smith’s evidence in those circumstances. Nor can it be used to corroborate, or be corroborated by, the evidence of Person 11.

⁷⁶² T.1144/21 (SF).

⁷⁶³ 1166/25-30 (SF).

⁷⁶⁴ T.1181/104 (SF).

⁷⁶⁵ T.1164/41-43 (SF).

⁷⁶⁶ T.1178/38-1179/12 (SF).

⁷⁶⁷ T.1021/31 (MH).

⁷⁶⁸ See Section XIII.

- (b) Mr Robert-Smith has financial, reputational, and personal motives to lie. Anything other than a denial would likely be an admission of murder.
- (c) Mr Roberts-Smith has arranged for Person 11 to be provided with a material financial benefit in the form of payment of his legal fees in relation to the IGADF inquiry.⁷⁶⁹ While the Respondents do not put it as highly as suggesting that Mr Roberts-Smith is paying Person 11 to give false evidence, it is an arrangement calculated to incentivise Person 11 to remain aligned with Mr Roberts-Smith. The highly unusual nature of the arrangement, and Mr Roberts-Smith's attempts to conceal it from the Respondents,⁷⁷⁰ indicate that the Court should approach both Mr Roberts-Smith's and Person 11's evidence on Darwan with particular caution.

Person 11

239. The analysis of Person 11's credibility is similar Mr Roberts-Smith's. The same collection of lies and implausibilities identified at paragraphs 236 and 237 apply equally to Person 11. His account of the engagement was particularly implausible, including the 15-metre distance of the spotter through thick vegetation, the inconsistent versions on whether the spotter had an ICOM in his hand, the placement of the body in the wrong location, and the explanation of what the patrol was doing in the cornfield in the first place. His whole account of the engagement unravels when one has regard to the correct location of the body: the engagement simply could not have occurred as described by Person 11.

240. The three matters identified at paragraph 238 also apply equally to Person 11:

- (a) He has colluded extensively with Mr Roberts-Smith since 2017 concerning the alleged cliff kick.⁷⁷¹ They are "good friends" and have been for a very long time.⁷⁷² They speak, on and off, every one to two weeks.⁷⁷³ He knowingly lied about the extent of his contact with Mr Roberts-Smith at the time of his first IGADF interview.⁷⁷⁴ The nature and extent of the collusion means no weight can be placed on Person 11's evidence. Nor can it be used to corroborate, or be corroborated by, the evidence of Person 11.
- (b) He is an interested witness⁷⁷⁵ who has a motive to give evidence that exculpates himself. In that respect he shares the same motive to lie as Mr Roberts-Smith.
- (c) He has also received a material financial benefit arranged by Mr Roberts-Smith, by way of payment of his legal fees in the amount of \$125,000, in connection with an investigation of an alleged murder of which they are co-accused.⁷⁷⁶ He has an interest in giving evidence favourable to Mr Roberts-Smith to maintain that financial benefit into the future against the possibility that he will one day require legal representation in criminal proceedings concerning the alleged murder of Ali Jan.

⁷⁶⁹ See Section XIII.

⁷⁷⁰ See Section XIII.

⁷⁷¹ See Section XIII.

⁷⁷² T.5646/23-24 (P11).

⁷⁷³ T.5646/26-27 (P11).

⁷⁷⁴ T.5765/16-5768/14 (P11); CCT 12.5.22, p.6/1 -13/39 (P11).

⁷⁷⁵ T.5792/10-44 (P11).

⁷⁷⁶ T.5779/14-5781/31 (P11); Ex R-252; Ex R-253.

241. Each of these matters should result in Person 11's evidence being approached with extreme caution and given no weight unless corroborated by evidence other than Mr Roberts-Smith.

E. Conclusion

242. For the reasons identified above, the Court should find that the Respondents have established the matters at paragraphs [102] to [117] of the Third Further Amended Defence.

243. The Court should infer in all the circumstances that Mr Roberts-Smith intended to kill Ali Jan, or acted with reckless indifference to his life, by kicking him off the edge of a cliff. The Court should also find that the subsequent shooting of Ali Jan in the cornfield was the result of an understanding or arrangement between Person 11 and Mr Roberts-Smith, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement can be inferred from all the facts and circumstances set out in this section of the submissions and identified at paragraph [108] of the Third Further Amended Defence. The Court should infer Mr Roberts-Smith's intention to kill Ali Jan from his presence at the scene of the shooting, his awareness that Ali Jan (as a PUC) was *hors de combat* at the time of the shooting, his knowledge that an ICOM was photographed next to Ali Jan's body to make it appear that Ali Jan was a spotter killed legitimately, and his subsequent conduct in disseminating a false story that Ali Jan was a spotter when in truth he was a PUC at the time he was killed.

244. In the premises, Mr Roberts-Smith breached Common Article 3 of the Geneva Conventions in that his conduct constituted violence, cruel treatment, and murder. Alternatively, Mr Roberts Smith was complicit in and responsible for, the murder of Ali Jan by Person 11.

245. Accordingly, the Court should find that the Respondents have established that each of Imputations 1, 2 and 3 are substantially true.

SECTION VII: CHINARTU – 12 OCTOBER 2012**A. Introduction**

1. On 12 October 2012, G-Troop was tasked with a kill/capture mission targeting a high-value target, Objective Stolen Idea. The mission was to Chinartu, in the Uruzgan province.¹
2. Mr Roberts-Smith's patrol, Gothic 2, always under-strength, was short another man: Person 56 had an ankle injury, and was unable to participate.² In order to bring the patrol up to full strength two members of the Nordic patrol, Person 14 and Person 27, were assigned to Gothic 2, and joined Mr Roberts-Smith, Person 4 and Person 11.³
3. There were two EKIA on the mission. The Respondents' case is that one of those EKIA was a PUC under interrogation, who was shot by a member of the Wakunish, the Afghan Partner Force operating with the SAS, at the direction of Mr Roberts-Smith. Moments before he was shot, a significant cache of weapons was located in that man's compound by Person 14 (who then witnessed the execution). It is that discovery which appears to have provoked the murder.
4. The murder happened only minutes before extraction, giving rise to a difficulty in explaining how it occurred after all compounds and the surrounding area had long since been secured. The solution was to insert a false account into the OPSUM, bringing the time of the engagement forward by an hour and a half, and asserting that it occurred during the initial assault of a compound.
5. The Commander of the Wakunish on 12 October 2012 was Person 12. He was the man to whom Mr Roberts-Smith issued the instruction to shoot the PUC. In the hope of delivering a knock-out blow to this allegation, and the credibility of Person 14 in the process, an extraordinary amount time and resources was devoted by Mr Roberts-Smith in these proceedings in an attempt to prove that Person 12 was not, and could not have been, present on the mission on 12 October 2012. The result, however, was to expose a coordinated and deliberate lie, which has irretrievably destroyed the credit of Mr Roberts-Smith and several of his most important witnesses. In the circumstances, the effort devoted to proving that Person 12 was not present on 12 October 2012 can only be interpreted as demonstrating a consciousness of guilt on the part of Mr Roberts-Smith.
6. The relevant paragraphs in the Particulars of Truth are [118]-[122]. They are relied upon in relation to the substantial truth of Imputations 2 and 3.

B. Proposed factual findings***0750DE to 1329DE: Pre-mission targeting and the flight in***

7. From about 0750DE on the morning of 12 October 2012, FE-Alpha was tracking a mid-level insurgent area commander, codenamed Objective Stolen Idea.⁴ The target had moved several times, and FE-Alpha was waiting for him to "present in a more targetable loc[ation]"

¹ Ex R-192, tab 3; T.1430/46-1431/1 (P14).

² T.462/3-13 (BRS); T. 4755/34-46 (P56).

³ Ex A-10, supplementary tab 8 (a closed court exhibit) and CCT 2.5.22/16-30 (P27); T.462/15-23 (BRS); T.1430/25-44; 1650/1-5 (P14); T.5409/40-5410/4 (P27).

⁴ Ex R-36 (page 1, update as at 1114DE); Ex R-192, tab 3, page 5.

before committing to launch”.⁵

8. At 1159DE FE-Alpha was “committed and preparing for launch ... against OBJ STOLEN IDEA based on last VRI”.⁶ See paragraph C1 of the Respondents’ Closed Court submissions in relation to the piece of equipment to which the acronym VRI (Very Reliable Intelligence) refers.⁷ For present purposes, however, it is sufficient to note that “VRI” was often used as a metonym for the objective to which it related (either an individual or a compound).⁸
9. There were a significant number of Wakunish partner-force members participating in the mission on 12 October 2012,⁹ including in two patrols on turn 1. The first of those partner force patrols was commanded by Person 31, the second was commanded by Person 35.¹⁰ As to the composition of those teams, see paragraph C2 of the Respondents’ Closed Court submissions.
10. For the mission to kill/capture Objective Stolen Idea on 12 October 2012, Mr Roberts-Smith’s patrol was tasked primarily with providing a cordon/cut-off and also to act as a reserve assault element.¹¹ Person 14 explained that in the context of this mission, the role of the cordon was to act as both an inner and outer cordon, meaning that the “inner cordon stops movement coming out of the VRI – the high value target area” and the “outer cordon stops movement coming into your mission area”.¹²
11. Turn 1 helicopters departed Tarin Kowt at 1317DE.¹³ Person 14 was seated at the back of the helicopter that Mr Roberts-Smith’s patrol was on, next to Person 27. Mr Roberts-Smith was in front of them, and Person 4 and Person 11 were in front of Mr Roberts-Smith, closest to the door.¹⁴
12. As the helicopters were coming in to land and the members of the patrol were postured ready to get out, Mr Roberts-Smith turned around and shouted something. The inside of a Blackhawk helicopter is very loud,¹⁵ and Person 14 said it sounded like he said: “Fuck the cordon, we will head for the VRI”.¹⁶ Person 14 turned to Person 27 and asked “Is that what he said? Did he say, ‘Fuck the cordon’?”. Person 27 shrugged his shoulders and nodded his head indicating that he did not know.¹⁷ Mr Roberts-Smith agreed that he “shouted something to whoever was sitting next to [him] on the helicopter”, but he couldn’t remember who that was.¹⁸ His evidence was he said something about needing to move the cordon

⁵ Ex R-36 (page 1, update as at 1114DE).

⁶ Ex R-36 (page 2, update as at 1159DE).

⁷ T.1748/7-14 (P14).

⁸ See, e.g., the SSE bag shown in Ex R-105 (an NPO document); Ex A-10, tab 46 (a closed court exhibit); CCT 23.6.21, p.29/33-44 (BRS); T.1749/11-12 (P14); T.5336/26-40 (P35).

⁹ There were 16 partner force members (including 3 interpreters), and 28 coalition force members: see Ex R-36 (page 2, update as at 1210DE).

¹⁰ See Ex A-10, supplementary tab 8 (a closed court exhibit); CCT 5.4.22 p.14/47-15/9 (P31); CCT 27.4.22 p.6/1 (P35).

¹¹ T.463.36-43 (BRS); T.1431/6-19 (P14).

¹² T.1431/9-14 (P14).

¹³ Ex R-36 (page 2, update as at 1317DE).

¹⁴ T.1431/38-40; T.1650/46-1651/41; T.1742/6-13 (P14).

¹⁵ T.1650/35-36 (P14).

¹⁶ T.1431/39; T.1651/44; T.1742/42 (P14).

¹⁷ T.1431/21-42 (P14).

¹⁸ CCT 23.6.21, p.32/12-15 (BRS).

position closer to the compound of interest, having been informed of a squirter.¹⁹

13. The difference between those accounts may not be great. On the evidence of both, Mr Roberts-Smith was issuing a last-minute order changing the location to which his patrol was to move. The differences between them may be a function of the noise in the helicopter or varying recollections of detail after a decade. The challenge to Person 14's evidence on the basis that the use of the term "VRI" made no sense can, however, be confidently rejected. Person 14's evidence that it was "troop talk" to use VRI in that sense is corroborated, for example, by the writing on the SSE bag in Ex R-105 (an NPO Document), which identifies the compound in which that body was located as the "VRI Compound".²⁰
14. The turn 1 helicopters landed on the target area at 1329DE.²¹

1329DE to approx. 1410DE: compound clearances and an EKIA

15. Immediately upon landing, Mr Roberts-Smith's patrol ran in single file in the direction of the main compound of interest.²² Person 14 was last, with Person 27 in front of him. The patrol ran straight past a large compound, inside of which Person 14 observed three to four fighting aged males deep in a room with an open door.²³ He trained his weapon and called out to Person 27 to come to support him, which he did. Person 14 called them out in Pashtun and they came out compliantly. Person 14 and Person 27 then gave them a quick pat down and went through the PUC procedure, save that they were not handcuffed. The PUCs were then moved in a PUC train towards the predesignated TQ/VRI area.²⁴ On the way to the TQ area, Person 14 came across an Australian soldier and an Afghan interpreter, Person 13. Person 14 asked the Australian soldier to take the PUCs to the TQ area, which he did. Person 14 did not recall if Person 27 went with the PUCs or just took a position out of sight of Person 14. Person 14 remained with Person 13, and chatted with him.²⁵
16. The location where the helicopter landed, the compound within which Person 14 located the fighting aged males, and the location where Person 14 met Person 13 were marked on Ex R-102 (a closed court exhibit) as A, B and C respectively.²⁶
17. Meanwhile, other elements of the Troop were involved in the search for the objective and in clearing compounds of interest.
18. As Mr Roberts-Smith's patrol neared the target area, an individual attempted to flee the scene and was pursued by Person 11 and another SAS operator with a military working dog.²⁷ In the course of that pursuit, at about 1353DE, the military working dog was wounded while moving through thick vegetation.²⁸ Person 11 detained the squirter, and then remained with the military working dog and its handler until it was evacuated (at

¹⁹ T.464/1-12 (BRS).

²⁰ T.1749/11-12; CCT 10.2.2022, p.25/19 (P14). See also Ex A-10, tab 46 (a closed court exhibit); CCT 23.6.21, p.29/33-44 (BRS); T.5336/26-40 (P35).

²¹ Ex R-36 (page 2, update as at 1329DE); Ex R-192, tab 3, page 2.

²² T.1431/43-1432/14 (P14); T.464/14-16; 40-43 (BRS).

²³ T.1432/12-22 (P14).

²⁴ T.1432/14-1433/19; CCT 4.2.22, p.4/18-20; T.1654/12-1657/3 (P14).

²⁵ T.1433/21-45; 1434/27-44; CCT 4.2.22, p.4/30-32; T.1658/21-46 (P14).

²⁶ See CCT 4.2.22, p.4/27-33 (P14)

²⁷ T.5686/42-44 (P11).

²⁸ See Ex R-192, tab 3, page 2. See also Ex R-36 (page 2, update as at 1358DE); T.5686/44-46 (P11).

approximately 1419DE).²⁹

19. Person 35 and 32 agreed that their patrol, including the Wakunish attached to it, did not have any engagements during the clearance of compounds.³⁰
20. At about 1408DE the ground force commander advised that the objective compound was secure and that “wider area clearance and SSE [was] ongoing”.³¹
21. One of the SAS patrols did have an engagement during the clearance. As they were preparing to leave, Mr Roberts-Smith walked past a compound in which an insurgent had been engaged with a hand grenade. He had a conversation with Person 57, who explained that his patrol had had that engagement.³² That engagement is recorded in the OPSUM as having occurred at approximately 1410DE.³³ Consistently with that, the Same Time Chat for the mission records, at 1414DE, a report of “1 x EKIA”.³⁴

Approx. 1410DE to approx. 1530DE: SSE and Tactical Questioning

22. Following the clearance of the compounds, there was a lengthy period (over an hour) within which SSE and tactical questioning took place. There is no suggestion of any contact or engagements during this period.
23. While Person 14 was chatting with Person 13, Person 14 received a call on the troop radio asking for him to go to the TQ room, which he did. Person 14 marked the TQ room with the letter D on Ex R-102 (a closed court exhibit).³⁵ When Person 14 arrived in the room he saw multiple PUCs and multiple Australian soldiers, including Mr Roberts-Smith who looked like he was leading the conduct of the TQ.³⁶ When he walked in, Mr Roberts-Smith said to him “Do you know this person?” Person 14 replied that he did, and Mr Roberts-Smith asked him where he had found him. Person 14 replied “Back where we were supposed to be”. Person 14 then walked back to where he had been previously, although Person 13 was now gone.³⁷ He remained sitting in that position for about 10 to 15 minutes.³⁸
24. Person 14 heard a radio call to say that the first turn had left Tarin Kowt and he understood that they were to start collapsing in from their positions and move to their extraction points.³⁹ The same time chat records that extraction was requested, with the earliest possible wheels up, at 1512DE.⁴⁰ The same time chat contains a report at 1534DE saying that the helicopters had left Tarin Kowt.⁴¹
25. Person 14 went back to the TQ room to marry up with Mr Roberts-Smith, but did not find him there. He was directed to another location up a hill. Person 14 walked up a hill to a

²⁹ T.5687/1-10 (P11). Ex R-36 (page 4, update as at 1419DE).

³⁰ T.5209/15; 5335/13-15 (P35); T.5922/1-12 (P32).

³¹ Ex R-36 (page 3, update as at 1408DE); Ex R-192, tab 3, page 3.

³² T.465/17-21 (BRS).

³³ Ex R-192, tab 3, page 3.

³⁴ Ex R-36 (page 3, update as at 1414DE).

³⁵ CCT 4.2.22, p.4/32-34 (P14).

³⁶ T.1434/43-1435/5; T.1659/33-1663/24 (P14).

³⁷ T.1435/11-19 (P14).

³⁸ T.1435/21-23 (P14).

³⁹ T.1435/24-27 (P14).

⁴⁰ Ex R-36 (page 4, update as at 1512DE).

⁴¹ Ex R-36 (page 4, update as at 1534DE).

compound about 100 metres away.⁴² He marked that compound with an E on Ex R-102 (a closed court exhibit).⁴³

26. The OPSUM recorded that at approximately 1530DE the clearance, SSE and KLE (Key Leadership Engagement) were complete.⁴⁴ At that same time, it was reported that there would be PUCs being brought back to Tarin Kowt, with numbers still to be confirmed, but estimated to be three or four.⁴⁵

Approx. 1530DE to 1551DE: execution of the PUC and extraction

27. When Person 14 arrived at the compound up the hill to which he had been directed, he walked into the outdoor area of a compound within the perimeter wall. He saw Person 32 leaning up against a cut-out window which was to the left of the door and looking inside the compound. Person 14 walked up to him and stood on his left. He said to him “What’s going on here?” and Person 32 replied “They’re just questioning this bloke”.⁴⁶ Person 34 and another person, both combat engineers, were also in the courtyard.⁴⁷
28. Person 14 looked inside the compound room and saw Mr Roberts-Smith, Person 12, Person 13, about four partner force members, Person 11 and an Afghan male.⁴⁸
29. Person 14 described the Afghan male as “slender, middle-aged, had a – had a beard, had – had white robe –traditional robe, Afghan robe, and he was holding his – his grey waist jacket in his right hand.” He said that the man was facing towards him with his right hand closest to him.⁴⁹
30. Person 14 recalled that Mr Roberts-Smith was behind the Afghan man. Person 13 was directly in front of Person 14 at the window with his back to Person 14 looking at the Afghan man and Mr Roberts-Smith. Person 11 was in the corner of the compound and Person 12 and the partner force were to Person 14’s right.⁵⁰
31. Person 14 stated that he then turned around and leaned back on the window, looking out at the perimeter wall of the compound. He noticed a discolouration on the internal side of the perimeter wall, like it had been recently plastered with mud. He thought that it was a cache. Person 14 walked up to it and gave it two kicks, and it crumbled and disintegrated. The weapons cache contained white and pink rice bags with bullets, binoculars, RPG warheads with boosters and two AK variant rifles. Person 14 started pulling it out but then stepped back when the combat engineers came over and started inspecting the cache.⁵¹
32. Person 14 then returned to the window and looked back into it. He noticed that the mood in the room had changed. Person 14 heard Mr Roberts-Smith say to Person 13 “Tell him [pointing to Person 12] to shoot him or I will.” Person 13 looked at Mr Roberts-Smith as if to

⁴² T.1435/29-38 (P14).

⁴³ CCT 4.2.22, p.4/35-37 (P14).

⁴⁴ Ex R-192, tab 3, page 3.

⁴⁵ Ex R-36 (page 4, update as at 1530DE).

⁴⁶ T.1438/38-1439/14; 1440/31-39 (P14).

⁴⁷ T.1439/27-39 (P14).

⁴⁸ T.1439/15-27; 1439/41-1440/2 (P14).

⁴⁹ T.1440/4-13; 1756/35-1757/24 (P14).

⁵⁰ T.1440/16-29 (P14).

⁵¹ T.1440/42-1441/20; 1665/29-1666/16; 1667/18-1668/8; 1754/1-28 (P14).

say “What?” Mr Roberts-Smith then repeated “Tell him to shoot him or I will”. Person 13 then said something to Person 12 in an Afghan dialect which was not Pashtun. There was then an exchange between Person 12 and Person 13, and then Person 12 turned to his soldiers and there was a small discussion between them. One of the NDS soldiers who had a balaclava or recon wrap up around his face then stepped out of the group of soldiers, trained his suppressed M4 on the Afghan man, and shot him with five to eight rounds into the centre mass of the Afghan man (that is, his torso/chest). The man dropped. At least another two rounds were then fired into his head and neck area.⁵²

33. See paragraph C3 of the Respondents’ Closed Court Submissions.
34. Person 14 identified the man on page 1 of Ex R-101 (an NPO Document) as the man he saw shot in the compound.⁵³ He said that he first saw that photograph in 2012, immediately after the mission.⁵⁴ Save for that photograph, no SSE material was produced in relation to this engagement.
35. At 1539DE, the same time chat reported “1 x (additional) EKIA”.⁵⁵
36. Person 14 stated that, at the time of the execution, the troop was close to extraction.⁵⁶ That is consistent with the same time chat which records that wheels up at the objective for Tarin Kowt occurred at 1551DE.⁵⁷
37. Person 14 moved out of the compound and back down towards the VRI compound area in order to prepare for extraction. When he went down to that area he saw the Troop Sergeant, Person 26. He said Person 26 wasn’t happy and said “What happened to the fucking PUC?” and something like “The PUC count has already gone in and the helos are coming in”.⁵⁸
38. The OPSUM records that, contrary to the estimated PUC count of three to four recorded in the same time chat at 1530DE, only two detainees were taken back to Tarin Kowt.⁵⁹

Was a PUC executed shortly before extraction?

39. Mr Roberts-Smith, Person 11, and Person 32 all denied Person 14’s account of what happened in the compound shortly before extraction. Person 35 and Person 27 were not suggested to have been present at the point in time when the execution took place. In any event, Person 27 in effect had no memory of the mission one way or another, and may effectively be put to one side.⁶⁰ The issues that arise in relation to which version should be accepted are as follows:
 - (a) *First*, does the OPSUM falsely record the timing and circumstances of the second

⁵² T.1441/19-1443/15 (P14).

⁵³ T.1445/35-39 (P14).

⁵⁴ T.1762/45-1763/10; CCT 10.2.22, p.9/41-10/27 (P14).

⁵⁵ Ex R-36 (page 4, update as at 1539DE).

⁵⁶ T.1443/17-25 (P14).

⁵⁷ Ex R36 (page 4, update as at 1551DE).

⁵⁸ T.1443/25-1444/3 (P14).

⁵⁹ Ex R-36 (page 4, update as at 1530DE). See also Ex A10, tab 51 (a closed court exhibit) and CCT 23.6.21 36/23-26 (BRS). It may be inferred that the 1530DE entry in Ex R-36 followed the request recorded in that document at 1506DE.

⁶⁰ T.5384/37-45 (P27). He accepted he was there, including because there was no entry in his “gym diary” that day: T.5409/36-5410/4 (P27).

EKIA of the mission?

- (b) *Secondly*, was Person 12 present on the mission?
- (c) *Thirdly*, are there any reasons to disbelieve the account given by Person 14?
- (d) *Fourthly*, other considerations relevant to the credit of the relevant witnesses.

The OPSUM reporting

40. The OPSUM describes two engagements:⁶¹
- (a) The first, at approximately 1405DE in which an NDS-Wakunish member engaged an insurgent with small arms fire during the clearance of a compound after conducting a call-out; and
 - (b) The second, at approximately 1410DE in which FE-A engaged an insurgent with small arms fire and a fragmentation grenade during the clearance of a compound after conducting a call-out.
41. Having regard to the visible injuries on the EKIA on page 2 of Ex R-101 (an NPO Document), it may be inferred that this EKIA relates to the second engagement described in the OPSUM. That person was engaged by Person 57's team (who had been the lead planner for the mission),⁶² and according to the OPSUM was identified by a local national as a name match for the objective of the mission.
42. There is no suggestion that Person 57's patrol's engagement occurred in circumstances other than those recorded in the OPSUM. It is also consistent with Mr Roberts-Smith's account of what Person 57 told him on the ground, as they moved to extract. In those circumstances, it must be the case that the EKIA reported on the same time chat at 1414DE was that of Person 57's patrol.
43. The following circumstances indicate, however, that the other engagement cannot have occurred as recorded in the OPSUM.
44. *First*, it is implausible that there was an engagement at the *time* reported in the OPSUM:
- (a) The same time chat only records the second EKIA as having been reported at 1539DE. That is more than an hour and a half after the asserted engagement and after the objective compound was rendered secure. It is nearly half an hour after the earliest possible extraction was requested (at 1512DE). It was nearly 10 minutes after final arrangements regarding the number of PUCs to be taken off target were being made (at 1530DE).
 - (b) Mr Roberts-Smith was unable to identify any plausible reason why, in the circumstances of that mission, an engagement would not be called in, or reported, for a period of over an hour and a half.⁶³ This is in contrast to Mr Roberts-Smith's evidence that, as a general procedure, EKIA's would either be reported immediately, or at the

⁶¹ Ex R192, tab 3, pages 2-3.

⁶² T.465/14-21 (BRS); T.1649/6-18 (P14).

⁶³ T.466/34-43, CCT 23/6/2021, p.36/1-37/7 (BRS).

time that the immediate threat or task had passed.⁶⁴

- (c) The ground force commander would have spoken to each of the patrol commanders before calling for extraction, to ensure that they were not in contact and were ready to extract, to ascertain how many PUCs would be taken off target, and other similar matters.⁶⁵ The fact that extraction had been called, and estimates of PUCs had been given, strongly implies that the ground force commander had been in contact with all patrol commanders, and that any EKIAs to that point in time would have been reported.
45. *Secondly*, the circumstances of the engagement reported in the OPSUM are implausible. The NDS member who had the engagement that day was in Person 35's patrol (see paragraph C3 of the Respondents' Closed Court Submissions). Person 35 and Person 32 agreed that their patrol did not have any engagement during the clearance of a compound,⁶⁶ that is, in the circumstances described in the OPSUM.
46. In these circumstances it may be inferred that the report of the engagement in the OPSUM is false, and was provided in an attempt to cover up the true circumstances of the engagement by the NDS member.

Was Person 12 present?

47. Person 14 had a distinct memory of Person 12 being present on this mission. There is no reason to doubt his identification of Person 12 as the person present at the execution. Person 14 knew who Person 12 was based on socialising with the NDS,⁶⁷ and indeed Person 12 was the only commander of the NDS who Person 14 met in 2012.⁶⁸ He was also able to correctly identify Person 12 as the person standing up in Ex R-41 (a closed court exhibit).⁶⁹
48. The evidence of Mr Roberts-Smith and witnesses called by him to try to prove that Person 12 either could not have been, or simply was not, present on 12 October 2012 was not only unpersuasive, it was calculated to mislead the Court.
49. To the extent that Mr Roberts-Smith will submit that Person 12 *could not* have been present on 12 October 2012, that submission should be rejected:
- (a) Person 31, who was a patrol commander in E-troop with responsibility for mentoring the Wakunish partner force,⁷⁰ described that there was an A Team of Wakunish soldiers who were selected to be on base living with the Australians, together with an officer who was located on the base with them to manage the Wakunish soldiers.⁷¹ There was just one officer located on the base at any given point in time, with two officers rotating through those positions during rotation XVIII.⁷² Person 31 recalled that the first officer during Rotation XVIII was Person 123, and the second officer was

⁶⁴ T.380/09-17 (BRS). See also T.1406/7-9 (P14)

⁶⁵ CCT 23.6.21, p.35/20-47 (BRS).

⁶⁶ CCT 2.5.22, p.24/1-34 (P35); T.5922/10-12 (P32).

⁶⁷ T.1645/9-34 (P14).

⁶⁸ T.1646/11 (P14).

⁶⁹ CCT 4.2.22, p.5/5-17 (P14).

⁷⁰ T.4638/20-32 (P31).

⁷¹ T.4638/45-4639/44 (P31).

⁷² T.4640/1-7 (P31); T.5245/23-25 (P35).

Person 12.⁷³

- (b) That evidence, combined with the extensive photographic and documentary record summarised in paragraphs C4 to C8 of the Respondents' Closed Court Submissions demonstrates conclusively that Person 12 was the only NDS officer operating with FE-Alpha from 21 September 2012 until the end of the rotation and into 2013.
- (c) The evidence of witnesses who contended that Person 12 had been the first NDS officer, who was removed on 31 July 2012 for, or in connection with, shooting at a dog and injuring an Australian soldier, was deliberately false (for the reasons set out below).

50. To the extent that Mr Roberts-Smith will submit that Person 12 *was not* present on the mission, that submission must also fail. The sole support for that submission is the content of the helicopter manifest for 12 October 2012.⁷⁴ But, for the reasons set out above, and in paragraphs C9 to C12 of the Respondents' Closed Court Submissions, the accuracy of that document insofar as it suggests that the NDS officer present on 12 October 2012 was Person 123 cannot be accepted. There was only ever one Commander of the NDS operating with FE-Alpha at any given point in time, and on 12 October 2012 it was Person 12. Moreover, there is all of the documentary and photographic evidence summarised in the Respondents' Closed Court Submissions (and, in particular, the video taken on 12 October 2012 which is Ex R-172 (a closed court exhibit) puts the matter beyond doubt).

A co-ordinated attempt to mislead the Court

- 51. It is indisputable that Person 12 was not involved in an incident on 31 July 2012 when a member of the NDS partner force shot at a dog and the bullet ricocheted and injured Person 57. Nor was he removed from the force element on or around that day due to his involvement in that incident, or at all. So much was effectively conceded by Mr Roberts-Smith in opening when it was said by Mr Roberts-Smith's Senior Counsel that "the reason why [Person 12] wasn't there as expressed in my client's outline and some of the other outlines needs modification".⁷⁵ Mr Roberts-Smith's also gave evidence in chief that he accepted that "Someone was stood down, but unfortunately, as it turned out through the reporting, it was not Person 12",⁷⁶ and in cross-examination Mr Roberts-Smith agreed that it was Person 12 who was stood down.⁷⁷ To the extent there remains any dispute about this, see paragraphs C13 to C14 of the Respondents' Closed Court Submissions.
- 52. Notwithstanding that apparent concession made in opening, Mr Roberts-Smith and four of his witnesses (Person 27, Person 32, Person 35, and Person 39) have at various times and to varying degrees perpetuated the lie that Person 12 was responsible for shooting the dog and was removed on 31 July 2012. The fact that each of Mr Roberts-Smith and these witnesses were either prepared to come to Court to give false evidence about this matter, or did in fact come to Court to give false evidence about this matter, is devastating to the

⁷³ T.4640/9-32 (P31).

⁷⁴ CCT 23.6.21, p.21/31-42 (BRS). Ex A10, supplementary tab 8 (a closed court exhibit).

⁷⁵ T.39/28-30.

⁷⁶ T.253/1-254/8 (BRS).

⁷⁷ T.512/22-29 (BRS).

credibility of Mr Roberts-Smith and each of those witnesses, such that their evidence cannot be accepted on any matter in contest.

53. Before analysing each witnesses' involvement in perpetuating the lie, it is important to reflect on the import of the evidence and the significance of the lie. The lie was first perpetuated by each witness in their respective outline of evidence filed on 12 July 2019.⁷⁸ It was perpetuated in response to allegations in the Respondents' Defence and outlines of evidence to the effect that Person 12 was present at Darwan⁷⁹ and at Chinartu when Mr Roberts-Smith is alleged to have given a direction to Person 12 shoot a PUC.⁸⁰ The consequence of the lie being persisted with and accepted by the Court would have inevitably been that the Respondents' case would fail in relation to those two murders (as then pleaded), given how integral Person 12's presence was/is to the Respondents' case. It would also have likely had a significant effect on the credibility of Person 14, a key witness in relation to both W108 and Chinartu, and accordingly have potentially damaged the Respondents' case in relation to W108 also. Thus, the lie was a very significant one, which if persisted with and accepted could well have dishonestly altered the outcome of the case.

Mr Roberts-Smith

54. In his outline of evidence Mr Roberts-Smith stated that he "had previously been informed on or about 31 July 2012 at a command group meeting that Person 12 had been stood down and replaced as Commander of the NDS soldiers after he shot at a mongrel dog and shrapnel wounded an Australian patrol commander".⁸¹ Mr Roberts-Smith stated that he read his outline of evidence carefully before it was finalised, satisfied himself that he believed it to be correct and understood that it was important that the document was completely truthful.⁸²
55. Mr Roberts-Smith expanded on his outline in verified answers to interrogatories where he stated that to the best of his recollection Person 31 had "informed the command group, in substance, that there had been an incident on a mission involving Person 12 attempting to shoot a stray dog and, in the process, wounding Person 57. Person 31 noted that Person 12 had been stood down as Commander of the NDS as a result of the incident."⁸³
56. Mr Roberts-Smith's outline and verified answers to interrogatories were on any view dishonest, to the extent that they sought to indicate that he had an actual recollection of the fact that Person 12 was mentioned at the meeting as the person who had been stood down. Under cross-examination Mr Roberts-Smith stated that he had never heard of Person 12 in his life and "didn't know him from a bar of soap".⁸⁴ He indicated that he had no recollection one way or the other whether the person who had been stood down was Person 12, and that at the time that he composed his outline of evidence his evidence was based on what

⁷⁸ See Ex R-14 (BRS); Ex R-268 (P27); Ex R-273 (P32); Ex R-270 (P35); Ex R-274 (P39).

⁷⁹ See [108] of the Defence filed on 16 October 2018 which sets out the Respondents' case in this regard as at the date of service of the outlines.

⁸⁰ T.253/42-254/8; 512/43-513/2 (BRS).

⁸¹ Ex R-14, [161].

⁸² T.510/29-44 (BRS).

⁸³ Ex R-15.

⁸⁴ T.512/18-20 (BRS).

he had been told by Person 35 and Person 68.⁸⁵

57. Mr Roberts-Smith's evidence as to his conversations with Persons 35 and Person 68 is curious, and revealing. He said that before he served his outline of evidence he had a telephone call with Person 35 during which he said "Do you remember the incident where Person 57 was engaged?" and when Person 35 said that he did, Mr Roberts-Smith asked him "Do you know which one it was?" His initial question to Person 68 was also directed to who was stood down for shooting Person 57.⁸⁶ If Mr Roberts-Smith's enquiry was triggered by the allegations in the Defence and the Respondents' outlines, the more logical question to ask would have been "Who is Person 12?" There was nothing in the Respondents' allegations to connect Person 12 with the dog shooting incident, and no rational reason why Mr Roberts-Smith's enquiry would be so directed. Mr Roberts-Smith's evidence as to the conversation is revealing of the dishonest purpose of the inquiry to begin with.
58. Mr Roberts-Smith persisted in his dishonest account notwithstanding that Person 57, the person injured in the incident, told him "no, I don't think it was that person".⁸⁷ He abandoned his false evidence only when documents were produced under subpoena,⁸⁸ at which time he must have known this his evidence was untenable.
59. Ultimately, Mr Roberts-Smith's evidence was that he had no recollection one way or the other whether Person 12 was on the mission or not, but believed he was not based upon the helicopter manifest. For the reasons set out above, and in the Respondents' Closed Court Submissions, that belief must be erroneous.

Person 27

60. Under cross-examination Person 27 indicated that:
- (a) he never had direct knowledge of the NDS partner force member who shot a dog and injured Person 57;
 - (b) he was not at the incident;
 - (c) he had never met Person 12;
 - (d) nobody told him in 2012 the name of the NDS partner force member who shot the dog and injured Person 57; and
 - (e) nobody told him in 2012 that the NDS partner force member who shot the dog and injured Person 57 was a Commander.⁸⁹
61. Notwithstanding that lack of knowledge, Person 27 had previously approved an outline of evidence which stated:

I recall that early in our deployment, in about late July/early August 2012, the Commander of the ANA, Commander Person 12, was removed from participating in missions with the SASR after he shoot at a dog and the bullet ricocheted hitting

⁸⁵ T.513/36-41; 517/44-518/36; 520/12-521/8 (BRS).

⁸⁶ T.515/9-27 (BRS).

⁸⁷ T.514/26-34 (BRS).

⁸⁸ T.512/28-29; 522/44-46; 523/22-31 (BRS).

⁸⁹ T.5373/23-26; 5385/45-5386/2; 5414/10-20; 5432/16-28 (P27).

another Patrol Commander (Person 57) in the leg.⁹⁰

62. Person 27 said that Person 12's name and the fact that he was a commander was first raised with him by Mr Roberts-Smith's solicitor, Monica Allen, either in a teleconference with her on 25 June 2019 or by it being included in a draft outline of evidence provided to him by email on 27 June 2019.⁹¹ He said that he wanted to check the identity of the person who shot the dog with Person 57,⁹² however in the interim he allowed an outline to be filed containing the above passage.⁹³
63. Person 27 said that after he spoke to Person 57 and ascertained that it was not Person 12 who shot the dog, he spoke to Mr Roberts-Smith and told him it wasn't Person 12, and that Person 57 had offered for Mr Roberts-Smith to call him.⁹⁴ No steps were taken by Person 27, or Mr Roberts-Smith, to correct Person 27's outline of evidence.
64. Further, it is readily apparent that if Person 57 had told him that it was Person 12 who had shot the dog, Person 27 was prepared to give evidence about that – purporting to have direct knowledge and a memory of the incident. On any view this would have been false evidence, as Person 27 accepted.⁹⁵ Person 27 said that he "just wanted to ascertain the name of the person to help out Ben. Get his – get my witness statement correct in his defence".⁹⁶ The fact that Person 27 was prepared to give this false evidence to assist his good friend⁹⁷ tends very strongly against Person 27 being a witness who can be accepted unless his evidence is against his (or Mr Roberts-Smith's) interests.

Person 35

65. In 2012, Person 35 was part of E-troop, which comprised six operators and a small troop headquarters. E-troop's role was to partner with the NDS partner force. Person 35 was initially Person 31's 2IC, but once the patrol partnered with the NDS it split into two patrols and Person 35 was a patrol commander.⁹⁸ His role involved mentoring and training the partner force, partnering with them on missions, and assessing individual members of the partner force.⁹⁹ Person 35 agreed that he knew the officer of the NDS at any given point in time (and that there was only one at any point in time), and that he could never have confused Person 12 and Person 123.¹⁰⁰ He said that he went on missions with Person 12, and he made an assessment of Person 12.¹⁰¹ He also agreed that he never would have got mixed up about whether an officer was actually an ordinary NDS member, and vice versa.¹⁰²
66. Against that background, it is remarkable that Person 35 approved an outline of evidence

⁹⁰ Ex R-238, [31]; Ex R-239, [29]. The filed version (Ex R-268, [30]) referred to "NDS" as opposed to "ANA" however it does not appear this change was made with Person 27's input (T.5431/11-16 (P27)).

⁹¹ T.5414/22-27; 5416/9-28; 5423/18-29; 5424/32-5425/30 (P27); Ex R-236 and Ex R-237. See also [32] of Ex R-237 where "APF" ([32] in Ex R-236) was amended to "ANA" by Ms Allen (T.5427/31-33 (P27)).

⁹² T.5373/17-19; 5416/8-15; 5428/44-46; 5429/27-31 (P27).

⁹³ Ex R-239; T.5430/33-36; 5431/7-9 (P27).

⁹⁴ T.5416/45-5417/13 (P27).

⁹⁵ T.5432/30-32 (P27).

⁹⁶ T.5432/40-41 (P27).

⁹⁷ T.5371/1-5 (P27).

⁹⁸ T.5142/26-5143/21 (P35).

⁹⁹ T.5247/4-16 (P35).

¹⁰⁰ T.5245/23-25; 5248/39-46; 5250/36-43 (P35).

¹⁰¹ T.5156/37-47 (P35).

¹⁰² T.5251/1-8 (P35).

which purported to give his detailed firsthand observation of the mission on 31 July 2012, during which mission he contended he saw Person 12 shoot a dog, and of his involvement in Person 12 being replaced as the NDS commander.¹⁰³ Person 35 adhered to that version in his evidence in chief, and identified the officer who he contended replaced Person 12 as Person 123.¹⁰⁴

67. Person 35 initially adhered to his evidence through cross-examination, repeatedly asserting that his memory was that Person 12 shot the dog. This was despite being shown many documents which contradicted his account, including photographs of Person 123 with metadata that were inconsistent with his account.¹⁰⁵ Person 35 sought to avoid the obvious conclusion that he was wrong by:
- (a) Not accepting that it was Person 12 depicted in the following photographs: page 2 of Ex R-34, R-41, R-42, R-168, R-169, R-170, R-171, R-172 and R-212 (all closed court exhibits);¹⁰⁶ and
 - (b) Not accepting the accuracy of documents produced by the Department of Defence on subpoena, namely Ex A-10, tab 66 and Ex R-34 (both closed court exhibits).¹⁰⁷
68. As to the first matter, it is telling that Person 35 ultimately (that is, after he conceded he was wrong) recognised Person 12 as the person depicted in Ex R-231 (a closed court exhibit).¹⁰⁸ That person is clearly the same person as the person in the photographs which are Ex R-34 (at both pages 2 and 3), R-35, R-41, R-42, R-168, R-169, R-170, R-171, R-172, R-212 and R-221.
69. As to the second matter, Person 35 was not able to clearly explain his conspiracy theory in relation to the authenticity of the documents, or when, how or why they had been altered.¹⁰⁹ The suggestion that the documents had been fabricated by Person 6 is risible.
70. It was only after being shown other documents to which Person 35 could have no explanation, namely Ex R-222 and Ex R-223 (both closed court exhibits), that he ultimately accepted the inevitable that he was wrong.¹¹⁰ At that point he accepted that the only available explanations for his evidence were that he was either misremembering or lying.¹¹¹
71. Despite his protestations to the contrary, misrecollection cannot be an explanation for Person 35's evidence. For that to be the case, his false account would involve the following false memories:
- (a) *First*, a false memory that Person 12 (a commander) was present on 31 July 2012 and

¹⁰³ Ex R-270, [49]-[51]; T.5266/6-20 (P35).

¹⁰⁴ T.5145/15-5147/8 (P35).

¹⁰⁵ Person 35 was shown Ex A-10, tab 66; Ex R-34, R-35, R-41, R-42, R-167, R-168, R-169, R-170, R-171, R-172, R-212, R-213; R-215; R-217; R-218; R-219; R-221, R-222, R-223, R-224, R-225 and R-226 (all closed court exhibits).

¹⁰⁶ CCT 28.4.22, p.15/17-21; 16/44-45; 37/20-39/13; 45/21-46/40; 50/7-38 (P35).

¹⁰⁷ CCT 28.4.22, p.17/29-32; 18/26-35; 23/8-17; 42/15-18 (P35). As to the provenance of the documents, see Ex R-281.

¹⁰⁸ CCT 2.5.21, p.18/39-40 (P35).

¹⁰⁹ CCT 28.4.22, p.23/26-24/4 (P35).

¹¹⁰ CCT 28.4.22, p.47/23-49/47; T.5254/1-21 (P35).

¹¹¹ CCT 28.4.22, p.48/27-28 (P35).

shot at a dog, thereby injuring Person 57;

- (b) *Secondly*, a false memory that it was not Person 124 (who was a soldier, and not a Commander) who shot the dog;
- (c) *Thirdly*, a false memory that it was a commander who was removed on 31 July 2012, and not a soldier;
- (d) *Fourthly*, a false memory that Person 12 was replaced by Person 123 as a result of the dog-shooting incident;
- (e) *Fifthly*, false memories of Person 12 being the NDS Commander before 31 July 2012; and
- (f) *Sixthly*, false memories of Person 123 being the NDS Commander after 21 September 2012.

72. It is inconceivable that Person 35, with his role of close and daily contact with the NDS partner force, could have honestly misremembered so many details. The only explanation for Person 35's false evidence is that it was a deliberate lie designed to assist Mr Roberts-Smith.
73. Further, both Person 35 and Mr Roberts-Smith agree that they spoke about this issue at about the time they prepared their outlines of evidence. The overwhelming conclusion is that in that conversation they colluded to each include this false account in their respective evidence.

Person 32

74. Person 32 was also a member of E-troop in 2012. After the patrol was split in two, he became the 21C of Person 35's patrol.¹¹² Person 32 agreed that the work of his patrol was in essence solely devoted to the training and mentoring of the NDS partner force, and accompanying them on operations. He said that they worked closely with them almost every day.¹¹³
75. Person 32 agreed that there were two NDS officers attached to his patrol in 2012, at different times.¹¹⁴ He said that he was able to distinguish physically between the two men, and they looked different: "quite a lot of difference".¹¹⁵ He agreed that it would not be possible for him to misremember who the first commander was.¹¹⁶
76. Person 32 approved an outline of evidence that asserted that Person 12 was the NDS Commander assigned when the troop first arrived in Afghanistan, and that he was stood down as Commander of the NDS around the end of July 2012 following a mission in which Person 12 fired at a dog and shrapnel hit an Australian patrol commander.¹¹⁷ Person 32 gave similar evidence in his evidence in chief. He stated that he did not observe the

¹¹² T.5858/29-5859/11 (P32).

¹¹³ T.5888/5-9 (P32). See also CCT 16.5.22, p8.12-38 (P32).

¹¹⁴ T.5871/18-24 (P32).

¹¹⁵ T.5885/26-34 (P32).

¹¹⁶ CCT 16.5.22, p.19/27-30 (P32).

¹¹⁷ Ex R-273, [18]-[19]; T.5891/9-12 (P32).

shooting, but was told about it “pretty much” when they got back from the mission.¹¹⁸

77. Like Person 35 initial evidence, Person 32’s evidence involves a number of significant false memories:
- (a) *First*, a false memory of first meeting Person 123 midway through the rotation;¹¹⁹
 - (b) *Secondly*, false memories of Person 12 being on missions, participating in training exercises and socialising with the force element before 31 July 2012;¹²⁰
 - (c) *Thirdly*, a particular false memory of Person 12 being present in a planning meeting with Person 6 in the Wakunish office prior to 31 July 2012;¹²¹
 - (d) *Fourthly*, a false memory of being informed upon returning from the mission on 31 July 2012 that “the boss” of the Wakunish, who he understood to be Person 12, fired his weapon and hit an Australian force member;¹²²
 - (e) *Fifthly*, a false memory of the NDS Commanders changing on about 31 July 2012;¹²³
 - (f) *Sixthly*, a false memory of Person 12 being replaced by Person 123;¹²⁴
 - (g) *Seventhly*, mixing up the order in which Person 12 and Person 123 were the NDS commanders during the rotation.¹²⁵
78. Person 32 recognised Person 12 on page 2 of Ex R-34, and said that the person in each of the photographs which are Ex R-41, R-42, R-168, R-169, R-170 and R-171 (all closed court exhibits) looked similar to Person 12.¹²⁶ He said that Person 12 had “Asiatic features” and that he could not recall any other partner force member who the photographs look like more than Person 12.¹²⁷ He also said that the man in the photograph which is Ex R-255 looked similar to Person 123, and recognised Person 123 in the photographs which are Ex R-217 and R-219 (all closed court exhibits).¹²⁸ Each of the photographs of Person 123 were taken prior to 31 July 2012, and each of the photographs of Person 12 were taken after that date. For Person 32’s recollection to be correct, it would be necessary for the objective data in the metadata of the photos to be wrong.
79. Further, Person 32 agreed that for his recollection to be correct, a significant number of entries in Ex R-34 and Ex R-35 would be wrong. He was not able to offer any explanation for why these documents would be wrong.¹²⁹
80. Despite being shown extensive documents inconsistent with his recollection, including the documents referred to in the preceding paragraph and Ex R-222 and R-224 (closed court

¹¹⁸ T.5872/39-5873/42 (P32).

¹¹⁹ T.5883/45-5884/5 (P32).

¹²⁰ T.5884/21-29 (P32).

¹²¹ T.5884/36-5885/16 (P32).

¹²² T.5886/20-5887/33 (P32). See also CCT 16.5.22, p.4/30 (P32).

¹²³ T.5890/8-10 (P32).

¹²⁴ T.5886/32 (P32).

¹²⁵ T.5889/31-38 (P32).

¹²⁶ CCT 16.5.22, p.3/30-47; 4/32-5/18; 21/26-22/21 (P32).

¹²⁷ CCT 16.5.22, p.6/3; 21/35-39; 22/42-47 (P32).

¹²⁸ CCT 16.5.22, p.17/34-18/14; 20/4-18 (P32).

¹²⁹ CCT 16.5.22, p.12/11-14/43; 23/36-24/35 (P32).

exhibits), Person 32 refused to concede that he was mistaken in his evidence.¹³⁰ The only explanation for that is because he recognised that it was implausible that he had misremembered so many significant matters. The only realistic options for Person 32 were to admit he had lied, or to stick to his lie. Incredibly, he stuck to his lie. The result is that he has proven himself a dishonest witness whose evidence cannot be accepted on any issue, save to the extent it is adverse to Mr Roberts-Smith's interests.

Person 39

81. Person 39 was the Squadron Chief of Operations during 2012.¹³¹ He approved an outline of evidence which purported to recount his recollection that “on or about 31 July 2012, Person 12 was removed from command of the NDS due to an incident on a mission when Person 12 acted dangerously and a Patrol Commander ended up with shrapnel in his leg” (emphasis added), and recounted a report from either Person 6 or Person 31 in a ‘Sync Brief’ that Person 12 had been removed from command. The outline also indicated a recollection that due to Person 12’s removal there was a short period when the force element was unable to undertake any missions because Person 12 had not been replaced, and said that after a week or so, Person 12 was replaced by a much younger and less experienced NDS soldier.¹³²
82. Person 39’s evidence in Court changed in at least three very material respects:
- (a) *First*, he no longer contended that Person 12 was removed because he himself acted dangerously (which implied that Person 12 was the one who had fired his weapon resulting in the Patrol Commander being injured). Rather, he said that “Person 6 wouldn’t have been able to tell or he didn’t tell us whether it was Person 12 that shot that or whether it was Person 12 that ordered that to happen”.¹³³ He contended for the first time that it was one of the partner force who shot the dog, and Person 12 was removed from command responsibility over that incident.¹³⁴
 - (b) *Secondly*, he purported to have a clear recollection that it was Person 6 who informed him of the issue at the Sync Brief, despite previously not being sure if it was Person 6 or Person 31;¹³⁵ and
 - (c) *Thirdly*, for the first time he said that Person 12 was replaced by “one of the junior guys that was already in there”.¹³⁶
83. These changes to Person 39’s evidence represent a blatant attempt to incorporate into the lie features that retained Person 12 being stood down (and hence not with the force element on 12 October 2012), but were not as obviously inconsistent with at least some of the objective material. This change to the lie is significant because it reflects a recognition that it would be untenable to suggest, as each witness previously had, that Person 12 was the person who shot the dog, and that Person 123 was not operating with the force element prior

¹³⁰ CCT 16.5.22, p.24/37-25/24 (P32).

¹³¹ T.6083/1-2 (P39).

¹³² Ex R-274, [13], [15]-[17]; T6096/32-6097/1 (P39).

¹³³ T.6095/37-40 (P39).

¹³⁴ T.6103/14-23; 6104/22-24 (P39).

¹³⁵ T.6085/17-20; 6086/15-17; 6095/11-16; 6096/25-26 (P39).

¹³⁶ T.6093/38-41 (P39).

to 31 July 2012 (it is notable that Person 32 maintained each of these lies).

84. The difficulty with Person 39's evidence however remains that on the contemporaneous evidence it is clear that Person 12 was not the NDS Commander on 31 July 2012, was not stood down on 31 July 2012, and that he did not rotate in as the NDS commander until 21 September 2012. Further, each of Person 35 and Person 32, who operated closely with the partner force, accept that there was only ever one commander at a time. Person 39's evidence that Person 123 was already operating with the force element is untenable. Moreover, his evidence that there was a period in which the force element was unable to operate is inconsistent with Person 35's evidence that he does not recall a pause as "that's probably not something you would pause operations for",¹³⁷ and the weekly report for the period.¹³⁸
85. Person 39's evidence was a desperate attempt to salvage the lie and amounts to a dishonest recreation which should be rejected.

Conclusion in relation to the Person 12 lie

86. Having regard to all of the evidence, the overwhelming conclusion is that Mr Roberts-Smith and Person 35, at about the time of preparation of their outlines of evidence, colluded to bring forward a false account of the dog shooting incident in order to provide a perceived unassailable explanation as to why Person 12 could not have been present at Darwan and Chinartu, in order to defeat the Respondents' case about these missions, and to significantly damage Person 14's credibility (and accordingly the Respondents' case in relation to W108).
87. Person 27 was incorporated into that plan to bring forward false evidence when Mr Roberts-Smith's solicitor, Ms Allen, either suggested the false evidence to Person 27 in conference or included it in his outline, and he indicated that he was willing to approve an outline in those terms (but wished to check whether the underlying fact, albeit not his indicated evidence, was true).
88. The evidence does not directly reveal how Person 32 and Person 39 came to be part of the plan. The most compelling inference is that it was as a result of discussions with one or more of Mr Roberts-Smith, Person 35 or through the preparation of their outlines of evidence with Ms Allen.
89. Whilst each witness had a different tolerance for how far they were prepared to go to advance the lie, the fact that they were each prepared to propagate it in the first place, including on oath (save for Person 27), and maintained the lie or continued until such time as they considered it to be untenable, is devastating for each witness' credibility. As a result of their involvement in propagating this lie, the evidence each of these witnesses cannot be accepted on any matter in dispute in the proceedings.

Person 14's account

90. Person 14's credit as a witness has been addressed above in Section IV relating to W108 (paragraph 186). There was nothing in his account in relation to Chinartu that gives rise to

¹³⁷ T.5246/27-30 (P35).

¹³⁸ CCT 23.5.22 p.12/31-13/31; Ex R-263 (a closed court exhibit).

any concern about his honesty or reliability. In particular:

- (a) A significant feature telling against the fabrication of Person 14's account is the fact that the only SAS witnesses to the execution he described were both very close to Mr Roberts-Smith: Person 11 and Person 32. He must have known that neither of those men could be counted on to support a false allegation against Mr Roberts-Smith.
- (b) Person 14 showed that he was not willing simply to agree to a proposition that might support his evidence unless it actually accorded with his memory. He was shown Ex R-100, which are photos of a cache discovered very close to the time of extraction on 12 October 2012. Person 14 did not think that that cache was the cache that he discovered although it looked "very similar".¹³⁹ He said that he has never seen photos of the items that were in the cache and he doesn't believe there are photographs of it.¹⁴⁰ Resolution of that issue is ultimately unimportant: what is significant, though, is the genuine attempt that Person 14 was clearly making to ensure that his evidence was always honest and accurate.
- (c) Person 14 was attacked on many points of detail in his evidence about this mission (ranging from the radio usage he recalled and its consistency with protocol, to whether PUCs were handcuffed before being moved to the TQ compound, to how he knew where the TQ compound was, to whether he would have kicked at a wall that he suspected concealed a cache).¹⁴¹ His responses to each of those challenges was considered and plausible. There is simply no reason to doubt the accuracy of his account.
- (d) Mr Roberts-Smith and Person 14 had coffee together in Canberra in October 2018 after the Respondents filed their Defence (see Section XIII, paragraphs 96 to 98). During the meeting, Mr Roberts-Smith showed Person 14 the paragraph in the Defence relating to Chinartu.¹⁴² Person 14 told Mr Roberts-Smith that the allegation in the Respondents' Defence was accurate and was consistent with how he remembered the mission.¹⁴³ Even while sitting across the table from the person against whom he is alleging murder, with no one else present, Person 14 is unwavering in his conviction and his memory is consistent.

Mr Roberts-Smith's witnesses

91. Each of Mr Roberts-Smith, Person 11 and Person 32 had an obvious motive to lie about having witnessed the execution on 12 October 2012. More detailed submissions on the credit of those witnesses have been made elsewhere, but at the very least it should be recalled that:
 - (a) Mr Roberts-Smith has an obvious motive to lie. To do anything other than deny Person 14's evidence would be to admit murder. His involvement in developing and pursuing the Person 12 lie speaks to the lengths he is willing to go to in order to

¹³⁹ T.1444/17-45 (P14).

¹⁴⁰ T.1669/11-16 (P14).

¹⁴¹ See, e.g., T.1744-1756 (P14).

¹⁴² Ex A35; T1448/11-15 (P14)

¹⁴³ Ex A35; T658/37-39 (BRS); T1148/29 (P14)

mislead the Court.

- (b) Person 11 is one of Mr Roberts-Smith's closest friends, who is himself criminally concerned in another murder with Mr Roberts-Smith (i.e., Darwan). He has received, and has an interest in continuing to receive, a material financial benefit arranged by Mr Robert-Smith (i.e., payment of his legal fees).
- (c) Person 32 is another close friend of Mr Roberts-Smith. His loyalty to Mr Roberts-Smith was shown by his involvement in the perpetuation of the Person 12 lie, and his refusal to abandon it even under oath, and when confronted with irrefutable evidence of its falsity.

C. Conclusion

- 92. For the reasons set out above, the Respondents submit that the Court should find that the Respondents have established the matters set out at paragraphs [118] to [122] of the Particulars of Truth of the Third Further Amended Defence.
- 93. By giving the instruction to Person 12 to have one of his men kill the PUC, which instruction was acted upon, Mr Roberts-Smith breached Common Article 3 of the Geneva Conventions in that he was complicit in and responsible for the murder of that PUC.
- 94. Such a finding would alone be sufficient to sustain a finding that each of Imputations 2 and 3 are substantially true.

SECTION VIII: FASIL - 5 NOVEMBER 2012**A. Introduction**

1. The last mission of Rotation XVIII took place on 5 November 2012 to a village named Fasil. It is on that last mission that the Respondents allege Mr Roberts-Smith committed the last murder the subject of these proceedings.
2. Mr Roberts-Smith's patrol killed two individuals that day. Their bodies were photographed in the same room of a compound cleared by that patrol. The first body is that of a young Afghan male who was murdered by Mr Roberts-Smith after being found inside a Hilux vehicle with three adult males that was stopped on the outskirts of the village. The other death does not form part of the allegations in these proceedings. Person 56's callsign appears on the SSE bag of that other body, but he refused to give evidence on the Fasil mission by exercising his privilege against self-incrimination (and he was not compelled to do so).
3. The relevant paragraphs in the Particulars of Truth are [123]-[129]. They are relied upon in relation to the substantial truth of Imputations 2 and 3.
4. The key witness in relation to this allegation is Person 16. He was the troop medic in 2012, having been posted to the SASR in 2011.¹ Person 16 was part of the tactical headquarters element for rotation XVIII.² There was no attack made on Person 16's honesty or motives. The only theory put as to why Person 16's evidence should not be accepted was that through a process as unlikely as it was unsupported by any evidence, Person 16 had come innocently to "imagine" what he recalled about the mission on 5 November 2012. Even then, significant aspects of his evidence, including evidence highly damaging to Mr Roberts-Smith's case, were not challenged. To the extent his memory was challenged, he demonstrated an impressive recall of key details of the mission.
5. Perhaps most impressively, Person 16's evidence was entirely consistent with a damning contemporary photographic and documentary record.

B. Proposed factual findings***0913DE: the SASR inserted into Fasil***

6. At 0902DE on 5 November 2012, turn 1 of the SASR's last mission of Rotation XVIII departed Tarin Kowt for Fasil.³ They were targeting Objective Sole Inheritance.⁴
7. Mr Roberts-Smith's patrol inserted as part of turn 1. It was comprised of Person 4 (21C), Person 56,⁵ Person 11,⁶ and Person 79.⁷ They travelled in the same helicopter as elements of tactical headquarters, including the troop Bravo (Person 26), the troop medic (Person 16),

¹ T.1810/15-16 (P16); CCT 11.2.22, p.2/32-33 (P16).

² T.1810/24-28 (P16).

³ Ex R-192, tab 7 (an NPO Document, page 2).

⁴ Ex R-192, tab 7 (an NPO Document).

⁵ Person 56 objected to answering questions about the mission to Fasil on the grounds that he might incriminate himself (T.4756/8-9). That objection was upheld, Person 56 was unwilling to give the evidence unless compelled to do so, and the Court did not require the witness to give the evidence (T.4760/1-46).

⁶ Person 11 claimed to have no recollection of the mission to Fasil: see T.5691/41-43; CCT 10.5.22, p.4/40-5/23; T.5820/17-5822/21.

⁷ T.470/15-33 (BRS).

and an engineer (Person 34).⁸

8. Turn 1 was wheels down at the objective at 0913DE.⁹ Mr Roberts-Smith's patrol was designated as the reserve assault team, which meant it remained in the air providing aerial fire support while the other turn 1 teams landed. Nevertheless, they landed reasonably soon after the other helicopters. Mr Roberts-Smith said that his helicopter remained in the air for a couple of minutes, or five minutes at the most.¹⁰

Approx 0920DE: a Hilux vehicle is interdicted

9. Once the reserve assault team helicopter landed, Mr Roberts-Smith's patrol immediately went to join up with the rest of the assault force that had landed shortly before.¹¹
10. Person 16 and Person 34 took up a position on either side of a road leading into the village providing outer cordon security.¹² While in that position, shortly after disembarking, a Toyota Hilux vehicle approached the cordon.¹³ Facing outwards (and towards the incoming vehicle), Person 16 was standing on the right-hand side of the road and Person 34 was standing on the left-hand side of the road. The Hilux was approaching the area of operations and moving towards the compounds.¹⁴ Person 16 and Person 34 intercepted the Hilux by raising their rifles and using hand signals, and the vehicle stopped.¹⁵ Person 16 recalled this being between 5 and 10 minutes after they landed.¹⁶ That is consistent with the OPSUM which records that the vehicle was interdicted at approximately 0920DE.¹⁷
11. In his evidence, Mr Roberts-Smith said that the vehicle had already been stopped before their helicopter landed.¹⁸ That evidence is inconsistent with Mr Roberts-Smith's evidence about how long his helicopter remained in the air after the rest of turn 1 was wheels down, and the timing of the interdiction recorded in the OPSUM. In any event, Person 16's evidence about the interdiction of the Hilux was not challenged, and it was not put to him that the Hilux had already been stopped before they landed. Indeed, it was impossible for that to have occurred when the interdiction team was on the same helicopter as Mr Roberts-Smith. In those circumstances, the Court would not disbelieve Person 16.

0920DE to no later than 1000DE: vehicle occupants are PUC'd and handed off

12. Having stopped the vehicle, Person 16 and Person 34 gestured for the occupants to get out of the car, and four males then came out, two on each side of the car.¹⁹ Person 16 and Person 34 both gestured for them to lift up their robes so that they could be searched for person borne IEDs, and they complied.²⁰

⁸ Ex R-192, tab 6; T254/42 (BRS); T.1812/45-1813/27 (P16).

⁹ Ex R-192, tab 7 (an NPO Document). See also Ex A-10, supplementary tab 11 (a closed court exhibit).

¹⁰ CCT 22.6.21, p.63/11-17 (BRS).

¹¹ CCT 15.6.21, p.38/33-41 (BRS).

¹² T.1813/36-1814/4 (P16).

¹³ T.1813/32-34 (P16).

¹⁴ T.1813/32-1814/4; 1817/14-17; 1845/14-15; 1853/30-36 (P16).

¹⁵ T.1845/37-45; 1846/15-28 (P16).

¹⁶ T.1817/14-17 (P16).

¹⁷ Ex R-192, tab 7 (an NPO Document). See also Ex A-10, supplementary tab 11 (a closed court exhibit).

¹⁸ CCT 15.6.21, T.40/5-7; T.471/26-31; 474/38-46 (BRS).

¹⁹ Ex R-192, tab 7 (an NPO Document); T.1846/1-9; 1848/6-37; 1849/1-10 (P16).

²⁰ T.1814/6-26; 1846/30-1847/21; 1848/46-47 (P16).

13. Using hand gestures, Person 16 then directed two of the males, who were on the right side of the vehicle, to the side of a wall of a nearby compound so he could clear them. Person 16 said that he patted them down and once he determined that they were not carrying any weapons, he placed them in handcuffs behind their back.²¹ He could not recall who was covering him while he did that, but someone would have been.²²
14. Person 16 did not observe what happened with the other two men while he was searching his two, as his focus was on the two men he was dealing with.²³ He was not sure if they were searched by Person 34 or by someone else.²⁴
15. Person 16 described the two men he detained as follows:²⁵
- So one was a middle aged Afghan male wearing a traditional robes, thick-set, full beard, appeared very staunch. The second person was a younger Afghan male. I made him out to be late teens, a bit taller than me,²⁶ not – not a full beard, a little bit chubby, and shaking with – in terror.*
16. In cross-examination Person 16 expanded on his description of the two individuals that he searched:
- (a) He described the middle-aged man as being “anywhere from maybe 40 to mid-50s”, with black hair and “very stocky”. He said he appeared “very tense and rigid”, “very disgruntled”, and said he could “feel his hatred towards me”.²⁷
- (b) He said that the younger male was also wearing “traditional robes” and “the little hat they wear” and had a “patchy sort of not full-faced beard”. He said that he “wouldn’t say he was fat, but he was carrying – he was a little bit chubby. Baby-faced looking young – young, man, and he was extremely nervous. Trembling in fear. And looked – looked absolutely terrified.” He estimated that he was in his late teens but said it is difficult to put an age on him.²⁸
17. It is apparent that at some point, and most likely around the time they were searched, the four individuals who were found in the car had a piece of tape placed on the back of their robes with various annotations written on them:
- (a) Ex R-104 is a collection of photographs of three men taken on 5 November 2012 at the base at Tarin Kowt. The three adult occupants of the Hilux were detained by FE-A and taken back to Tarin Kowt which is where they were photographed.²⁹ The practice was, however, to put tape on a PUC at the time they were detained (to record the circumstances of their detention).³⁰
- (b) Each of the three men has a piece of tape stuck to the back of his clothing with

²¹ T.1814/30-44 (P16).

²² T.1851/20-39 (P16).

²³ T.1814/30-1815/3; 1849/1-1850/22, 1855/30-1856/14 (P16).

²⁴ T.1855/30-1856/11 (P16).

²⁵ T.1815/5-10 (P16). See also T.1851/41-1852/39 (P16).

²⁶ Person 16 said he is about 172cm tall: T.1854/41 (P16).

²⁷ T.18512/41-1852/39 (P16).

²⁸ T.1853/38-1855/7 (P16).

²⁹ Ex R-192, tab 7, pages 2, 5, and 7.

³⁰ CCT 22.6.2021, p.61/28-44 (BRS).

notations that included the following:

- (i) “GB-[number]”: “GB” stands for “Gothic Bravo”, which was the callsign of the Troop Sergeant of G-Troop, Person 26. The number after the dash indicates the order in which an individual PUC was detained by Person 26 on that day. In other words, GB-1 indicated the first PUC detained by Person 26 and so forth.³¹
 - (ii) “Veh Rd”: That was shorthand for “Vehicle Road”, which indicated the place at which the individual was detained. It indicated, in other words, that the individual had been found in a vehicle, travelling on the road.³²
 - (c) The tape on one of the men, designated “GB-4”, also included the notation “Driver”, which indicated that he was the driver of the vehicle.³³
 - (d) Although Ex R-104 only contains photographs of three individuals, the inference that each of the individuals detained from the Hilux had a piece of tape applied to the back of their clothing is irresistible in circumstances where the three individuals photographed in Ex R-104 are identified as GB-1, GB-3, and GB-4. The fourth (unphotographed) individual would have been designated GB-2. It is plain that GB-2 was the adolescent found in the car.³⁴
18. It is thus likely that at or around the time when Person 16 and the other SAS operator were searching the four individuals who emerged from the Hilux, Person 26 applied the tape to the clothing of each of them.
19. Either during or after the search of the individuals found in the vehicle, Person 34 searched the vehicle itself and found IED componentry.³⁵ The OPSUM records that the vehicle contained two RPG warheads (deconstructed) which were assessed as prepared for use as an IED.³⁶ The fact that IED componentry had been found in the Hilux was communicated over the troop radio.³⁷ Mr Roberts-Smith said he was aware on the day that something had been found in the car.³⁸
20. A short time later, Mr Roberts-Smith and members of his patrol, at the very least Person 11, came over and collected the two males that Person 16 had placed under control.³⁹ Person 16 handed the two individuals he had PUC'd to Mr Roberts-Smith's patrol,⁴⁰ who walked them to another compound.⁴¹ He recalled that the compound was (from the perspective of standing on the road looking towards the compound that he walked to) off the right.⁴² When they were walked off they still had their hands handcuffed behind their backs.⁴³ Person 16's assumption was that Mr Roberts-Smith's patrol was going to question

³¹ CCT 22.6.21, p.64/37-38 (BRS); T.1818/14-25 (P16).

³² CCT 22.6.21, p.64/40/42 (BRS); T.1818/14-21 (P16).

³³ CCT 22.6.21, p.64/44-65/3 (BRS); T.1818/14-17 (P16).

³⁴ CCT 22.6.21, p.66/22-24 (BRS).

³⁵ T.1815/34-35 (P16). See also Ex R-192, tab 7 (an NPO Document).

³⁶ Ex R-192, tab 7.

³⁷ T.1815/37-39 (P16).

³⁸ T.475.6-9 (BRS).

³⁹ T.1815/44-1816/16 (P16).

⁴⁰ T.1858/1-19 (P16).

⁴¹ T.1816/21-24 (P16).

⁴² T.1866/37-1867/3 (P16).

⁴³ T.1856/36-40 (P16).

the PUCs.⁴⁴

21. Mr Roberts-Smith denied that any PUCs were passed to his patrol on the Fasil mission.⁴⁵ Person 16 was never challenged, however, on his evidence that he passed PUCs taken from the Hilux to Mr Roberts-Smith's patrol. The cross-examination involved an extensive testing of Person 16's memory of the circumstances of the interdiction of the vehicle, the search of its occupants, and the handing off of the PUCs to Mr Roberts-Smith's patrol and them walking off to another compound.⁴⁶ But it was never put to him that he did not hand off two PUCs to Mr Roberts-Smith's patrol. It was put to Person 16 that his memory of the mission to Fasil was not "complete", but it was never put to him that what he could remember about handing off PUCs to Mr Roberts-Smith's patrol was false.⁴⁷ He was cross-examined about additional detail of the handing over of the PUCs to Mr Roberts-Smith's patrol that was found in his testimony compared to the outline of his evidence.⁴⁸ But it was not suggested that any of that additional detail, or the information contained in his outline, was wrong.
22. There was a line of cross-examination which appeared to be directed to the proposition that because Mr Roberts-Smith's patrol was engaged in assaulting compounds, they would not have been responsible for handling PUCs.⁴⁹ But the matter was addressed only at the level of general practice, and Person 16 disputed the accuracy of the general proposition, saying that it "varied". It was never put to him that Mr Roberts-Smith's patrol did not take the two PUCs he said he handed to them. The Court should not accept Mr Roberts-Smith's evidence in circumstances where no proper challenge was made to Person 16's evidence, and the general questioning of Person 16's memory raised no doubt about his reliability at all.
23. After handing off the PUCs to Mr Roberts-Smith's patrol, Person 16 then relocated to another compound (that is, different to the one he had seen the PUCs from the Hilux taken to) where there were PUCs present and the majority of the patrol, including Person 57, Person 86 (the Alpha), and Person 53.⁵⁰ That compound was where the bulk of the tactical questioning was happening.⁵¹ He did not see the PUCs that had been found in the Hilux in that compound.⁵² Person 16 said there was not a lot to do so he found some shade and rested up before making his way around the courtyard seeing if anyone needed help.⁵³

All PUCs were photographed, except for the adolescent

24. As part of the handling of PUCs on the ground that day, as was standard practice,

⁴⁴ T.1816/21-27; 1866/37-1867/9 (P16).

⁴⁵ T.255/1-6, CCT 22.6.21, p.53/19-41 (BRS).

⁴⁶ See, e.g., T.1845-1858; T.1866-1867 (P16). The attack on Person 16's memory included a significant focus on the fact that the date that was originally identified as the date of the Fasil mission was 21 October 2012, not 5 November 2012 (see, e.g., T.1844/1-20; T.1878/12-28; T.1886/24-37). That challenge, with respect, went nowhere. Person 16 made clear in those passages that what he remembered was that the mission was the last mission. There is no dispute that the mission to Fasil was both the last mission, and that it took place on 5 November 2012.

⁴⁷ T.1867/11-33 (P16).

⁴⁸ T.1879/16-1880/5 (P16).

⁴⁹ T.1869/29-1870/2 (P16).

⁵⁰ T.1816/29-44, T.1858/21-1862/38 (P16).

⁵¹ T.1816/29-32 (P16).

⁵² T.1816/46-1817/1 (P16).

⁵³ T.1817/3-5; 1858/23-1863/37; 1866/5-35 (P16).

photographs were taken on the ground of each PUC who was not returned to Tarin Kowt. Individuals who were returned to Tarin Kowt were photographed there. Ex R-184 (a closed court exhibit) contains every photograph of a living PUC/fighting aged male (including adolescents) produced by the Department of Defence in response to category 11(d) of the subpoena dated 26 March 2021, which called for all SSE images relating to the mission near Fasil on or around 5 November 2012. Those photographs include photographs taken at Tarin Kowt, and also photographs of males taken on target.

25. There is no photograph produced by the Department of Defence depicting an Afghan male with the designation “GB-2”. The most probable inference is that no photograph was ever taken (not that one existed but simply was not produced).

About 0945E to 1029DE: Gothic 2 clears a compound and executes the adolescent

26. Mr Roberts-Smith said that “later in the mission”, after the troop headquarters had occupied the compound that would become the PUC holding area, his patrol continued to clear compounds.⁵⁴ He said that his patrol made explosive entry to a compound about three compounds away from the PUC handling compound (which was the compound to which Person 16 had moved).⁵⁵
27. Around the time that he handed off the PUCs to Mr Roberts-Smith’s patrol, Person 16 heard a radio call saying “we’re going to blow in a wall”.⁵⁶ He could not recall whether it was made before or after he handed the PUCs off to Mr Roberts-Smith.⁵⁷
28. It is submitted that it is more likely that explosive entry had been made to the compound shortly *before* Mr Roberts-Smith’s patrol collected the PUCs from Person 16. Having made explosive entry, Mr Roberts-Smith then went and collected the PUCs. That timing is consistent with the OPSUM which records that explosive entry was made to a compound at approximately 0945DE.⁵⁸
29. By 1000DE a radio call had been made reporting one EKIA.⁵⁹ By 1029DE a second radio call had been made reporting an additional two EKIA.⁶⁰ It is uncontroversial that there were only two EKIA’s on the mission to Fasil. The radio calls that had been made suggesting that there were a total of three were clarified later in the day, when, at 1458DE, the same time chat records that the “initial indication from force element is double handling of EKIA count. Total is two”.⁶¹
30. Person 16 recalled hearing a radio call, made by Mr Robert-Smith himself, reporting “two EKIA”.⁶² He thought that call was made about 15 or 20 minutes after Mr Roberts-Smith’s patrol had taken the two PUCs from Person 16.⁶³

⁵⁴ T.471/42-44 (BRS).

⁵⁵ T.471/42-46 (BRS).

⁵⁶ T.1865/41-44, 1868/30-41 (P16).

⁵⁷ T.1868/3-34 (P16).

⁵⁸ Ex R-192, tab 7, page 3. See also CCT 22.6.21, p.70/40-41 (BRS).

⁵⁹ CCT 22.6.21, p.68/40-44; CCT 23.6.21, p.52/22-34 (BRS).

⁶⁰ CCT 22.6.21, p.69/12-18; CCT 23.6.21, p.52/34-53/5 (BRS).

⁶¹ CCT 22.6.21, p.69/41-45 (BRS).

⁶² T.1817/7-12, p.1867/18-21 (P16).

⁶³ T.1817/7-12; 1867/18-1868/28 (P16).

31. The Respondents' case is that within the compound to which Mr Roberts-Smith's patrol made explosive entry at around 0945DE, one Afghan male was killed before 1000DE, and a second was killed before 1029DE. The adolescent that Person 16 PUC'd from the Hilux was one of those Afghan males. The SSE bag on the body of the adolescent bears Mr Roberts-Smith's call sign. During SSE, an AK47 was placed on the body to make the engagement look legitimate.⁶⁴
32. Mr Roberts-Smith's account is that two engagements occurred after making entry to the compound. He claimed to be unable to remember much about the circumstances of the engagements, but said "the team made entry into those buildings and on making entry, the engagements happened".⁶⁵ He accepted that the SSE records suggested that they occurred in the same room.⁶⁶
33. We turn to the resolution of the conflict between those two cases in the next section.

The adolescent PUC was murdered

34. There are seven matters that demonstrate that Mr Roberts-Smith's account is a falsehood designed to conceal the murder of the adolescent PUC.
35. *First*, and most powerfully, Person 16 confidently identified the deceased body in Ex R-105 (an NPO Document) as the adolescent that he PUC'd from the Hilux and passed on to Mr Roberts-Smith. Person 16 said that the person in those photographs "looks very much like the young ... man that I detained",⁶⁷ and that he was "highly confident"⁶⁸ that it was him. He was able to point out specific features of the person in the photograph that accorded with his memory of the PUC.⁶⁹

The main ones would be the beard that's not well formed. He has the same size and statute as the young male. He looks like he's carrying a little bit of weight on his belly. He has a youngish looking face.

36. It was put to Person 16 that his memory of the individual he PUC'd from the Hilux had been influenced by the fact he had seen the photographs in Ex R-105 (it may be noted that it was never expressly put to Person 16 that the person in Ex R-105 was *not* the person that Person 16 PUC'd). Person 16 candidly acknowledged that he could "see where [the cross-examiner was] coming from", but said that "the more I think about it, the more I'm confident that this was the person that was in the Toyota Hilux".⁷⁰ He nonetheless appropriately acknowledged that "there's always a slight possibility" that the person in Ex R-105 may not be the person that he PUC'd.⁷¹

⁶⁴ See Person 56's evidence at T.4761/32-4762/3 as to the use of throwdowns generally. Person 56 objected to answering a question about whether he or any other member of Mr Roberts-Smith's patrol carried throwdowns on missions in 2012 and was not compelled to answer the question (T.4762/5-34). See also Person 19's evidence about a discussion in pre-deployment training about the use of throwdowns at T.2320/9-17 and 2363/11-2364/2; and Person 4's evidence at T.2636/24-33 and 2641/22-33 about a similar discussion.

⁶⁵ T.472/25-26 (BRS).

⁶⁶ CCT 22.6.21, p.68/17-18 (BRS).

⁶⁷ T.1874/43-46 (P16). See also T.1819/9-14 (P16).

⁶⁸ T.1875/9 (P16). See also T.1875/16-17 (P16).

⁶⁹ T.1875/20-23 (P16).

⁷⁰ T.1875/34-40 (P16).

⁷¹ T.1875/42-43 (P16).

37. In that exchange, Person 16 revealed himself to be anything but a dogmatic witness. He recognised that potential for his memory to have been infected by seeing the photograph, but having reflected carefully with that possibility in mind, he was more and more confident that it was the same person. His evidence of identification thus showed self-awareness of the potential for infection, and a conscious effort to retrieve his own memory unaided by the photograph. In those circumstances, his identification of the person in Ex R-105 with the person he PUC'd from the Hilux was impressive.
38. The honesty and reliability of Person 16's identification evidence is reinforced by the fact that he was *not* willing to say that he recalled the three other individuals who were PUC'd from the Hilux when he was shown their photographs (Ex R-104).⁷² It is unsurprising that Person 16 would recall the adolescent male but not the other three PUCs. The age of the adolescent and "how terrified he appeared" is what "stood out" to Person 16.⁷³
39. *Secondly*, the only plausible explanation on the evidence for the absence of any photograph of the adolescent who was PUC'd from the Hilux is that he was unlawfully murdered. For the reasons set out in paragraphs 17 and 18 above, the adolescent who came out of the Hilux was PUC'd, and would have had a piece of tape placed on the back of his clothing, identifying him as PUC GB-2. Having been PUC'd, but not returned to Tarin Kowt, the adolescent should have been photographed on the ground. Mr Roberts-Smith agreed that it was typical that all PUCs would be photographed and agreed that it would have been standard procedure for the fourth occupant of the Hilux to be photographed if he was not being brought back to Tarin Kowt.⁷⁴ The photographs which appear on pages 85 to 111 of Ex R-184 (a closed court exhibit) depict fighting aged males who appear to have been photographed on the ground at Fasil. There were 27 fighting aged males photographed on target. In light of Mr Roberts-Smith recollection of there being about 10 to 20 PUCs on the mission, the Court can be comfortably satisfied that all fighting aged males were photographed.⁷⁵ It follows that PUC GB-2 would have been photographed, if he had been handled by the PUC handling team on that day. However, there is no photograph amongst Ex R-184 of any PUC with a marking "GB-2".⁷⁶ In these circumstances it may be inferred that no photograph was taken and the adolescent was not dealt with by the PUC handling team after his initial detention at Fasil.
40. *Thirdly*, the fact that two radio calls were made from Mr Roberts-Smith's patrol reporting EKIA's (the first reporting only one, the second reporting two) is inconsistent with the engagement as described by Mr Roberts-Smith. On Mr Roberts-Smith's account, both insurgents would have been killed in the same room, and in any event, at or about the same time. Mr Roberts-Smith agreed that both calls were likely made by members of his patrol.⁷⁷ In light of Person 16's evidence about the radio call he heard, it is likely that the second call

⁷² T.1817/31-1818/7 (P16).

⁷³ T.1815/25 (P16)

⁷⁴ CCT 22.6.21, p.61/36-37; 66/26-32 (BRS).

⁷⁵ T.475/11-15 (BRS).

⁷⁶ See also Person 16's evidence that he has seen a number of photos of young Afghan males in preparing to give evidence, and that is partly why he said he could not identify anyone else who looks like the young man (CCT 11.2.2022, p.20/46-21/11).

⁷⁷ CCT 22.6.21, T.69/9-33 (BRS).

was made by Mr Roberts-Smith. Mr Roberts-Smith also agreed that it is very unlikely that anyone would have radioed in an EKIA that had not happened, and that it is unlikely that someone would report one EKIA not two if two occurred in the same room.⁷⁸ The compelling inference from this is that the two killings occurred at different times. If that is correct, the circumstances of the engagements set out in the OPSUM, and in Mr Roberts-Smith's evidence, must be incorrect.

41. *Fourthly*, Mr Roberts-Smith's false denial of having taken custody of two PUCs from Person 16, especially in circumstances where Person 16 was not challenged on his evidence in that regard, can only be seen as a lie told to conceal the fact that he had murdered the young adolescent.
42. *Fifthly*, the explicit inclusion in the OPSUM of the statement that "the adolescent male was released" can only be explained as an attempt to provide an innocent cover-story for his murder.⁷⁹ All PUCs are "released" if that they are not taken back to Tarin Kowt, and that unremarkable fact would never ordinarily be reported in post-mission reporting.⁸⁰ No reference was made in the Fasil OPSUM to the fact that any other PUC had been released.
43. *Sixthly*, the owner of the compound where Mr Roberts-Smith's patrol killed two people was paid US\$600 for structural damage to the compound and damage to belongs.⁸¹ This payment is inconsistent with the circumstances of the engagement set out in the OPSUM, and with Mr Roberts-Smith's evidence that military equipment was found in the compound.⁸² It is inconceivable that a compound owner who was harbouring insurgents and storing military equipment would be compensated for damage incurred engaging targets who were inside displaying hostile intent.
44. *Seventhly*, shortly after the mission, Mr Roberts-Smith admitted to Person 16 that he had executed the adolescent, in terms which are consistent with the photographic evidence. Person 16's evidence was that a day or two after the Fasil mission, he crossed paths with Mr Roberts-Smith in the hallway of their accommodation within Camp Russell, and they had a conversation in the following terms:⁸³

P16: What happened to that young fellow that was shaking like a leaf?

BRS: I shot that cunt in the head. [Person 15] told me not to kill anyone on the last job, so I pulled out my nine-mill, shot the cunt in the side of the head, blew his brains out, and it was the most beautiful thing I've ever seen.

45. Mr Roberts-Smith's description of how he killed the adolescent is consistent with the injury shown in Ex R-105 (an NPO Document).
46. It was put to Person 16 that he had "imagined" that conversation.⁸⁴ It was clear that it was not being suggested that Person 16 had deliberately manufactured his evidence about the

⁷⁸ CCT 22.6.21, T.70/16-25 (BRS).

⁷⁹ Ex R-192, tab 7, page 2.

⁸⁰ CCT 22.6.21, p.66/34-42 (BRS).

⁸¹ Ex R-192, tab 7 (an NPO Document).

⁸² T.473/14-16 (BRS).

⁸³ T.1823/39-16 (P16). See also T.1881/1-1885/42 (P16).

⁸⁴ T.1882/22-44, T.1885/39 (P16).

conversation; the suggestion was that he had somehow come innocently to have a false memory of it. There is no plausible explanation for how any such innocent mis-recollection or imagining might have occurred. It could not be a product of malice or spite: the cross-examination had earlier established that Person 16 was not a member of the “against” camp with respect to Mr Roberts-Smith within the SASR, and indeed that Person 16 admired some of Mr Roberts-Smith’s qualities.⁸⁵ It could not be a product of suggestion by some other person. Nor was it established that Person 16 had any mental health conditions that might have explained it. Person 16 was candid in his evidence about the effect of his military service on his mental health,⁸⁶ but he firmly rejected the suggestion that he “thought that this occurred with Mr Roberts-Smith on 5 November because [he had] had nightmares about Afghanistan”.⁸⁷ Overall, Person 16 presented as a person who had significant insight into his mental health, factors contributing to it, and its impact upon him. There could not be any plausible suggestion that this conversation, that plainly had a significant impact on Person 16 at the time,⁸⁸ was anything other than a genuine recollection.

47. This conversation reinforces the identification evidence of Person 16 described above. Any suggestion that Person 16’s memory of the appearance of the young PUC that he detained from the Hiliux might have been affected by seeing the photographs in Ex R-105 must be dispelled by the fact that Mr Roberts-Smith admitted to Person 16 that he killed that adolescent. There was no suggestion by Mr Roberts-Smith that his comment was in the nature of a bad joke, done to lead Person 16 to think that something awful had happened, with the result that Person 16 had suspiciously “filled in the gaps” and come to imagine his PUC had been murdered. Mr Roberts-Smith denied emphatically making the statement at all. Indeed, in opening his case, his counsel said that to suggest Mr Roberts-Smith would say that is “beyond ridiculous” and that it was the “sort of thing that would be said by an ostentatious psychopath.”⁸⁹ If Person 16 is accepted as to this conversation, there is no available interpretation other than Mr Roberts-Smith was admitting to murder.

C. Conclusion

48. For the foregoing reason, the Court should find that the Respondents have established the matters at paragraphs [123] to [129] of the Particulars of Truth of the Third Further Amended Defence. By shooting the person shown in Ex R-105, who was a PUC taken from the Hilux vehicle interdicted on the outskirts of the village, and who remained a PUC at all relevant times after having been transferred to the control of his patrol, Mr Roberts-Smith murdered him and thus breached Common Article 3 of the Geneva Conventions. Such a finding would alone be sufficient to sustain a finding that each of Imputations 2 and 3 are substantially true.

⁸⁵ T.1831/8-11 (P16).

⁸⁶ See, e.g., T.1840 (P16).

⁸⁷ T.1901/18-20 (P16).

⁸⁸ T.1824/15-16 (P16).

⁸⁹ T.51/39-41. See also the evidence of Person 7 who said that in July 2012 he heard Mr Roberts-Smith say “Before this trip is over, I’m going to choke a man to death with [my] bare hands. I’m going to look him in the eye, and I’m going to watch the life drain out of his eyes”: T.3602/26-28 (P7), and the evidence of Person 2 who said that in 2006 shortly after the Chora mission Mr Roberts-Smith said to him “I just want to kill cunts. I don’t give a fuck. I just want to kill cunts”: T.2493/34-41 (P2).

SECTION IX: UNLAWFUL ASSAULTS ON PUCS**A. Introduction**

1. Imputations 10, 11 and 14 each involve unlawful assaults committed either by Mr Roberts-Smith or with his authorisation. The Respondents contend that each of those imputations is substantially true.
2. Imputation 10 relates to an incident which took place on 15 March 2010 during a mission to the village of Deh Rafshan, which is discussed below.
3. In relation to the substantial truth of Imputation 11, the Respondents have pleaded reliance upon Mr Roberts-Smith's authorisation of the following:
 - (a) the killing of EKIA 56 by Person 4 on 12 April 2009 (W108);
 - (b) the killing of Ali Jan by Person 11 on 11 September 2012 (Darwan); and
 - (c) the killing of an Afghan male by a member of the partner force on 12 October 2012 (Chinartu).
4. Each of these matters are addressed above. If the Court is satisfied of any of those matters, it would inevitably follow that Imputation 11 is substantially true. Whilst the imputation refers to the conduct occurring in 2012 this could not on any view be considered a material part of the imputation, and conduct which occurred in 2009 would be capable of establishing the substantial truth of the imputation.¹
5. The material sting of Imputation 11 is the authorisation of an "assault" of an unarmed Afghan who was in custody and posed no threat. In each instance relied upon, for the reasons set out above, the Afghan male was unarmed, in custody, and posing no threat. The question then is whether proof that someone was killed by being shot establishes the substantial truth of an allegation of "assault". Clearly, murder is significantly more serious than a mere violent attack. The Respondents submit that proving this conduct does prove the substantial truth of the allegation, and the imputation.
6. In relation to the substantial truth of Imputation 14, the Respondents have pleaded reliance upon Mr Roberts-Smith's conduct in relation to the following:
 - (a) the killing of EKIA 57 on 12 April 2009 (W108);
 - (b) the assault of an Afghan male on 15 March 2010, which is discussed below;
 - (c) the assault of an Afghan male in late August to early September 2012, which is discussed below; and
 - (d) kicking Ali Jan off the cliff on 11 September 2012 (Darwan).
7. If the Court is satisfied that Mr Roberts-Smith kicked Ali Jan off the cliff in Darwan, as discussed above, this alone would be sufficient to establish the substantial truth of imputation 14.

¹ *Sutherland v Stopes* [1925] AC 47.

8. Further, as with imputation 11, the Respondents submit that the year is an immaterial aspect of the imputation, and that proof of murder is sufficient to establish an assault, such that if the Court is satisfied that Mr Roberts-Smith killed EKIA 57 at W108, this also would be sufficient to establish the substantial truth of the imputation.
9. It is thus the assaults which occurred on 15 March 2010, and in late August/early September 2012, that are discussed in this section. The relevant Particulars of Truth are [56]-[63] and [86]-[92] respectively of the Third Further Amended Defence. The key witness in relation to both of those incidents is Person 7. For the reasons set out below, Person 7 should be regarded as a witness of credit.

Use of force protocol

10. At all times when Mr Roberts-Smith was deployed to Afghanistan he understood that it was never permissible to assault a PUC, regardless of whatever role that PUC might have played in hostilities up until that point, and regardless of whatever it might be feared they would do in hostilities if freed. Mr Roberts-Smith understood that to be the effect of both the Geneva Conventions and the ROE.²
11. It was a standard operating procedure that all fighting aged males on a target would be PUC'd.³ Mr Roberts-Smith said that he understood the ROE to permit him to apply whatever force was necessary to effect the arrest of a PUC, or to enforce compliance by the PUC with whatever directions of commands had been given to them.⁴ He considered that this included punching the PUC if they were fighting back.⁵ He said that whether it would otherwise be permissible to punch a PUC would depend on the situation.⁶

B. Assault of an unarmed Afghan male on 15 March 2010

12. On or around 15 March 2010, FE-A inserted by helicopter into the village of Deh Rafshan, just north of the Tarin Kowt township.⁷ Upon landing, Person 7's patrol moved to the target compound, where it was believed that a medium-value Taliban leader was located.⁸ Person 7 entered the courtyard of the compound, and noticed that all of the individuals in that courtyard had been detained.⁹ Person 7 identified the courtyard as that shown in Ex R-82 (a closed court exhibit).¹⁰ Person 7, accompanied by Person 8, then proceeded into rooms adjoining the courtyard, and started a clearance.¹¹
13. Person 7 and Person 8 entered a rectangular room with a carpeted floor, which Person 7 identified as that shown in the last photo of Ex R-82.¹² He said the room looked like a dining room, but without a table: there were chai cups on the floor, and a cooker at the back of the

² T.355/17-27 (BRS).

³ T.368/30-31;41-44 (BRS).

⁴ T.371/36-38; 372/8-10 (BRS).

⁵ T.371/40-42 (BRS).

⁶ T.371/44-46 (BRS).

⁷ T.3595/37-40 (P7).

⁸ T.3596/1-9 (P7).

⁹ T.3596/7-11 (P7).

¹⁰ CCT 16.3.22, T.3/3-8; Ex R-82 (a closed court exhibit).

¹¹ T.3596/11-12 (P7).

¹² T.3596/15-18 (P7); CCT 16.3.22, T.2/32-34; Ex R-82 (a closed court exhibit).

room.¹³ At the back of the room there was a single Afghan male sitting with his legs crossed.¹⁴ Person 7 recognised the man as being the man shown in photographs within Ex R-82.¹⁵ Person 7 assessed that the individual did not pose a threat.¹⁶ Together with Person 8 he approached the man in an attempt to detain him.¹⁷

14. As Person 7 and Person 8 approached, the individual rolled onto his right side into a foetal position and made a whimpering noise.¹⁸ Person 7 considered that the individual was extremely scared and fearful.¹⁹ He tried to sit the individual up, but the individual was in such a tense and stiff position that Person 7 could not.²⁰ Person 7 then let go of the individual, so as to give him a minute to relax, and so that the individual could see that Person 7 and Person 8 were not a threat.²¹ The individual remained in the foetal position.²² During this interaction, Person 8 was standing next to Person 7, observing the situation.²³ Person 7 said to Person 8 words to the effect of "Jeez, this bloke; he's shitting himself. We will give him a minute and then we will attempt to detain him again. Hopefully – see if he settles down."²⁴
15. At that point, Mr Roberts-Smith walked into the room, past Person 7 and Person 8 without saying a word, and got down on a knee next to the individual.²⁵ Mr Roberts-Smith was wearing his helmet, body armour, Kevlar gloves and had his rifle.²⁶ Mr Roberts-Smith then gave "about three to four quick-fire punches into the side of the Afghan's head", and then drove his knee twice to the Afghan's chest/stomach area.²⁷
16. Person 7 said to Mr Roberts-Smith words to the effect of "Whoa, whoa, whoa. What are you doing? We're looking after this. Get out of here."²⁸ Mr Roberts-Smith then stood up and walked out of the room.²⁹
17. After the assault, the man wasn't in a good way, so Person 7 and Person 8 left him alone and gave him a brief period of time to calm down.³⁰ Person 8 then picked the individual up, and placed him in a standing position. The individual was handcuffed, and moved into the area where the other detainees were held.³¹ Person 7 noticed that the individual had significant swelling to the left side of his face and around his nose.³² The injuries suffered

¹³ T.3596/18-19 (P7); CCT 16.3.22, T.2/36-39; Ex R-82 (a closed court exhibit).

¹⁴ T.3596/19-21 (P7).

¹⁵ CCT 16.3.22, T.3/10-19; Ex R-82 (a closed court exhibit).

¹⁶ T.3596/21-30 (P7).

¹⁷ T.3596/34-35 (P7).

¹⁸ T.3596/35-37; 41 (P7).

¹⁹ T.3596/38; 3597/2-3 (P7).

²⁰ T.3596/40-43 (P7).

²¹ T.3597/6-9 (P7).

²² T.2597/14-15 (P7).

²³ T.3596/45; 3597/11-12 (P7).

²⁴ T.3597/17-22 (P7).

²⁵ T.3597/24-26 (P7).

²⁶ T.3598/2-4 (P7).

²⁷ T.3597/26-28; 3598/16-18 (P7).

²⁸ T.3597/31-32 (P7).

²⁹ T.3597/34-35 (P7).

³⁰ T.3597/38-39 (P7).

³¹ T.3597/40-46 (P7).

³² T.3598/11-18 (P7).

by the detainee can be seen in Ex R-82.³³ These photographs provide strong corroboration for Person 7's evidence.

18. Person 7 did not see the individual in person again, although Person 7 did understand from post-mission reporting that the individual was taken back to Tarin Kowt.³⁴
19. It was suggested to Person 7 both (a) that he had fabricated his evidence about this assault in 2018 "in order to feed information to Mr Masters", and (b) that it was apparent that he had fabricated that evidence because there was no reference to the assaults in Mr Master's notes.³⁵ The incoherence in that line of questioning reveals the absence of any substantial reason to doubt Person 7's evidence. It was also put to Person 7 that he did not report the incident because it never happened. Person 7 persuasively rejected that proposition by pointing out that he did not report it because he felt that what he (a Sergeant/senior NCO) said to Mr Roberts-Smith (a Corporal/junior NCO) at the time was sufficient.³⁶
20. Mr Roberts-Smith's evidence was that he did not recall the incident, but both denied the allegation and that Person 7 said to him the words set out above.³⁷ Mr Roberts-Smith's evidence about his understanding of the ROE needs to be understood in that context. In other words, while Mr Roberts-Smith gave evidence that it was permitted to use "pressure points on the body, a closed-fist strike, elbows, kicks"³⁸, and ultimately appears to suggest that it would be permissible to use lethal force to effect an arrest,³⁹ he did not (and could not) suggest that any such use of force in relation to the individual in question in this incident was justified by reference to the conduct of the local national.
21. Person 7's reaction on the day is sufficient to establish that Mr Roberts-Smith's actions were out of the ordinary and not acceptable. He confirmed in his evidence that he considered that it was not acceptable behaviour.⁴⁰ There could not be any serious suggestion that the use of force described by Person 7 to effect the arrest of an unarmed man who was posing no threat and displaying no hostile intent was within the ROE. That is particularly so in circumstances where there were already two trained operators attending to the situation. Mr Roberts-Smith's conduct was on any view outside of the ROE and constituted an unlawful assault.

C. Assault of an unarmed Afghan male in August/September 2012

22. On a date between 29 August 2012 and 11 September 2012, FE-A went on a mission to the west of Tarin Kowt, close to the border between Uruzgan and Helmand Provinces, searching for Hekmatullah.⁴¹ Upon arriving at the target, the two patrols commanded by Mr Roberts-Smith and Person 7 commenced clearing compounds.⁴² There were about 50 compounds

³³ Ex R-82 (a closed court exhibit).

³⁴ T.3598/20-34 (P7).

³⁵ T.3820/29-3821/29 (P7). Ex A-142.

³⁶ T.3910/39-44 (P7).

³⁷ T.183/4-5; 25-42; CCT 25.6.21, T.14/1-2; 10-33 (BRS).

³⁸ T.183/16-23 (BRS). See also CCT 25.6.21, T.14/4-8 (BRS).

³⁹ T.184/1-9 (BRS).

⁴⁰ T.3669/16-17; 20-23 (P7).

⁴¹ T.3606/22-34 (P7).

⁴² T.3607/5-8 (P7).

in the village, and there was a significant number of fighting aged males.⁴³ Once it became apparent that there would be a lot of PUCs by the time the clearance was finished, Mr Roberts-Smith's patrol were tasked with being the PUC handling patrol.⁴⁴

23. Once the clearance had been completed, Person 7 left his patrol in order to try to find where the Troop Sergeant was.⁴⁵ Person 7 went to the main PUC holding area, where he noticed approximately 15 to 20 seated PUCs in what he described as a relaxation area.⁴⁶ Mr Roberts-Smith and members of his patrol were also there.⁴⁷ As Person 7 walked around the corner he saw that Mr Roberts-Smith was holding an Afghan male by the shirt and punched him up against the wall four times, in what Person 7 described as a 'football punch'.⁴⁸ Person 7 also noticed another male PUC squatting in the holding area, who had his arms around a little girl who was about three or four years old.⁴⁹ The girl was crying while looking at the PUC that Mr Roberts-Smith was punching.⁵⁰
24. As Person 7 approached the scene, Mr Roberts-Smith let go of the PUC that he had been holding and that man walked over to where the other PUC was with the little girl, at which time the other man released the little girl from his arms and she ran to the PUC who Mr Roberts-Smith had been assaulting. He picked her up and then squatted down next to the other man on the ground, and the little girl started to calm down.⁵¹
25. Person 7 walked up to Mr Roberts-Smith and a conversation to the following effect took place:⁵²

P7: "What's going on here, RS?"

BRS: "He's a fucking bad cunt"

P7: "Okay. What's going on"

BRS: "When I was questioning him I asked him if that was his daughter. He said 'Yes', and then I asked him what her name was. He hesitated."

P7: "Yes, and?"

BRS: "Well, I've got two daughters and I know what their names are."

P7: "RS, you ragged on this bloke, you've just gone and asked him what this girl's name is, of course he's going to be – you know, why do you think he's hesitating?"

26. Person 7 then shook his head and walked off.⁵³

⁴³ T.3606/45-47 (P7).

⁴⁴ T.3607/8-10 (P7).

⁴⁵ T.3607/20-22 (P7).

⁴⁶ T.3607/22-26 (P7).

⁴⁷ T.3607/28-29 (P7).

⁴⁸ T.3607/31-37 (P7).

⁴⁹ T.3607/40-42 (P7).

⁵⁰ T.3607/42-43 (P7).

⁵¹ T.3608/8-16 (P7).

⁵² T.3608/20-38 (P7).

⁵³ T.3608/28-29 (P7).

27. Mr Roberts-Smith denied that this incident took place.⁵⁴
28. It was again suggested to Person 7 that he had fabricated his evidence about this incident.⁵⁵ The basis of that suggestion was because there was no mention of it in the letter of complaint in relation to Mr Roberts-Smith's Citation for Distinguished Service.⁵⁶ Person 7 rejected this assertion, and said that the letter drafted by Person 6 was based on what was written in the citation.⁵⁷ That topic has been addressed above.

D Credibility of Person 7

29. Person 7 was cross-examined over the course of five days during which his honesty, motives, moral courage, and courage as a soldier were attacked. He remained composed, consistent, and honest throughout. He made appropriate concessions. He candidly acknowledged his view that Mr Roberts-Smith did not deserve his Victoria Cross. And he strongly defended his efforts to have the allegations against Mr Roberts-Smith investigated.
30. There were three broad attacks made to Person 7's credit.
31. The *first* concerned his alleged hatred towards Mr Roberts-Smith.⁵⁸ It was put to Person 7 that he "wanted to do all [he] could do to bring [Mr Roberts-Smith] down".⁵⁹ Person 7 denied being "consumed by hatred" towards Mr Roberts-Smith⁶⁰ and said "I do not hate RS whatsoever",⁶¹ but he candidly admitted that he dislikes Mr Roberts-Smith.⁶² His honesty is to his credit. That said, there is not credible suggestion that Person 7's "dislike" towards Mr Roberts-Smith has motivated him to give false evidence in this case. For each incident about which Person 7 gave evidence (except for the alleged assault in July/August 2012), Person 7's evidence is corroborated by other evidence. In relation to Person 4's disclosure about Darwan, Person 7's evidence is corroborated by Person 18,⁶³ Person 31,⁶⁴ Mr Hastie⁶⁵ and (in all material respects other than timing) Person 4.⁶⁶ In respect of the alleged mock execution at Lancelin, Person 7's evidence is corroborated by Persons 10, 19 and 31.⁶⁷ In relation to his evidence about the bullying of Person 1, Person 7's evidence is supported by a contemporaneous statement.⁶⁸ In relation to the alleged assault of an unarmed Afghan in 2010, Person 7's evidence is corroborated by the photographs taken on the day.⁶⁹ Tellingly, Person 7 did not claim to be an eyewitness to any of the alleged murders committed by Mr Roberts-Smith. His only direct murder-related evidence was to corroborate a contemporaneous disclosure by Person 4. That is hardly consistent with a desire to do

⁵⁴ T.231/1-35; T.831/1-29 (BRS).

⁵⁵ T.3999/41-42; 4001/12-13 (P7).

⁵⁶ T.3999/44 (P7); Ex A-51.

⁵⁷ T.3999/45-46; 4001/12-4002/6 (P7).

⁵⁸ T.3670/23-24; 3768/34; 3947/3-32.

⁵⁹ T.3688/12-15 (P7).

⁶⁰ T.3670/23-24 (P7).

⁶¹ T.3640/16 (P7).

⁶² T.3640/13-14 (P7).

⁶³ T.3023/39-41; T.3024/18-19 (P18).

⁶⁴ T.4654/45-4655/12 (P31).

⁶⁵ T.4244/43-4245/42 (AH).

⁶⁶ T.2775/23-2777/24 (P4).

⁶⁷ See Section V, paragraphs 24-28above.

⁶⁸ Ex R-143.

⁶⁹ Ex R-83.

"everything possible" to bring down Mr Roberts-Smith.

32. The **second** challenge related to Person 7's supposed jealousy of Mr Roberts-Smith's Victoria Cross.⁷⁰ Person 7 acknowledged that he told people within the SASR that Mr Roberts-Smith should not have received the VC.⁷¹ However, it was clear from Person 7's evidence that this was an honestly held belief rather than jealousy or resentment. Person 7 gave detailed evidence about his concerns with the awarding of the VC.⁷² His opinion is based on his own experiences from being at Tizak in 2010, from going back to Tizak in 2012,⁷³ and from disclosures made to him by the only two eyewitnesses to the action for which Mr Roberts-Smith was awarded the VC: Person 4 and Person 32.⁷⁴ It cannot be suggested that Person 7's attitude is one of person jealousy about individuals being given well-earned credit. He acknowledged the bravery of all soldiers who fought at Tizak, including Mr Roberts-Smith. He said that "every single one of those blokes" in Person 5's patrol was "extremely brave".⁷⁵ Person 7 credited Person 5's "brilliant piece of leadership" and his "terrific act of bravery" at Tizak.⁷⁶ He also said that Person 4 and Person 32 deserved more credit for their actions at Tizak.⁷⁷ In addition, Person 7 toured the country with Mr Roberts-Smith – at his invitation - to help promote Mr Roberts-Smith's VC in 2011.⁷⁸ The Court should not accept any suggestion that jealousy has motivated Person 7 to fabricate evidence.
33. The **third** attack on Person 7's credit related to his interactions with the media. The relevance of the line of questioning remains opaque. It appears to have been directed at establishing animus and a willingness to breach Defence policy to undermine Mr Roberts-Smith. There are three responses to that. *First*, Person 7's contact with Mr Masters was sanctioned and approved by Defence and Defence Media.⁷⁹ Everything that Person 7 spoke to Mr Masters about was in accordance with Defence Regulations.⁸⁰ *Secondly*, Person 7 candidly acknowledged his contact with both Mr Masters and Mr McKenzie. He did not seek to conceal it or shy away from it. That is to his credit. *Thirdly*, Person 7's decision to speak to Mr McKenzie and to feature on Sixty Minutes was not a decision he took lightly. When asked, he initially said "no".⁸¹ However, there were "a lot of reasons that built up" that caused him to change his mind:⁸²
- (a) He observed that a lot of people had their lives adversely affected by Mr Roberts-Smith over the previous 10-12 years.⁸³ When pressed on this during cross-examination, he said those people included Persons 1, 2, 3, 4, 8, 10, 18, 19, 40, 43,

⁷⁰ T.3722/10-11 (P7).

⁷¹ T.3680/1-10 (P7).

⁷² See for example, T.3638/29-34; T.3767.43; 3954/36-47; 3955/1-6; 3961/5-3962/15; 3957/18-29; T.3964/33-3965/14 (P7).

⁷³ T.3773/12-18; T.3949/43-45 (P7).

⁷⁴ T.3951/33-35 (P7).

⁷⁵ T.3966/31-33 (P7).

⁷⁶ T.3966/23-27 (P7).

⁷⁷ T.3951/9-20 (P7).

⁷⁸ T.3880/8-13 (P7).

⁷⁹ T.3625 (P7).

⁸⁰ T.3626/25-27 (P7).

⁸¹ T.3628/5-11 (P7).

⁸² T.3628/19-21 (P7).

⁸³ T.3628/22-24 (P7).

56 and 66.⁸⁴

- (b) He was aware that as early as 2017, Mr Roberts-Smith was conducting "an aggressive intimidation and threatening campaign of witnesses,"⁸⁵ including against Person 31,⁸⁶ Person 14,⁸⁷ Person 18 and Person 6.⁸⁸
 - (c) Person 7 was seeking to counter an "aggressive PR campaign" being waged, in which Mr Roberts-Smith was "disparaging soldiers who were speaking out and speaking up as part of a certain – If I can say – inquiries or investigation."⁸⁹ Person 7 sought to be a "voice from within" the Regiment in support of those inquiries and investigations.⁹⁰
 - (d) Person 7 believed that the allegation that Mr Roberts-Smith kicked a PUC off a cliff was so serious that it needed to be heard.⁹¹ He appeared on Sixty Minutes because he believed that the allegation needed to be taken seriously by the Australian public.⁹²
34. Person 7 undertook a professional risk in speaking out about the allegation because he "did not seek or was not given any approval" to do so.⁹³ In his words, "I was told about an allegation of an egregious nature. I am not walking away from that."⁹⁴ He gave powerful evidence about the "burden" he carried after being informed of the allegation that Mr Roberts-Smith kicked a PUC off a cliff at Darwan⁹⁵ and his "responsibility" to ensure that the allegation was properly heard and taken seriously.⁹⁶ It is greatly to his credit that he fought for serious allegations of misconduct to be investigated, even when it was contentious and unpopular to do so. But at the end of the day, whatever the manner Person 7's actions in speaking about allegations concerning Mr Roberts-Smith are characterised, they do not reflect adversely on his credit. In relation to his evidence of what he had personally seen and heard, he was nothing other than a careful and honest witness.

E. Conclusion

- 35. Having regard to all of the evidence, particularly the corroboration provided by the photographs in Ex R-83, the Court should find that on 15 March 2010 Mr Roberts-Smith assaulted an unarmed Afghan male who posed no threat. On the basis of Person 7's evidence the Court should also find that Mr Roberts-Smith assaulted an unarmed Afghan male who posed no threat in late August/early September 2012.
- 36. In these circumstances, and on the basis set out above, the Court should find that the Respondents have established that each of imputations 10, 11 and 14 are substantially true.

⁸⁴ T.3647/5-19 (P7).

⁸⁵ T.3628/24-25 (P7).

⁸⁶ T.3628/33 (P7).

⁸⁷ T.3629/14-15 (P7).

⁸⁸ T.3629/20-21 (P7).

⁸⁹ T.3630/11-15 (P7).

⁹⁰ T.3630/23 (P7).

⁹¹ T.2681/27-28 (P7).

⁹² T.36989/5-15 (P7).

⁹³ T.3630/25-26 (P7).

⁹⁴ T.3730/10-11 (P7).

⁹⁵ T.3647/34 (P7).

⁹⁶ T.3674/30 (P7).

SECTION X: CHORA PASS AND THE BULLYING OF PERSON 1**A. Introduction**

1. In 2006, Mr Roberts-Smith served in a patrol with Person 1 during pre-deployment training and the first few weeks of Rotation III in Afghanistan. On 2 June 2006, Person 1 was present during a mission to Chora Pass and saw an unarmed Afghan male who was subsequently killed by Mr Roberts-Smith and Sgt Matthew Locke. That engagement was falsely reported as having involved an armed ACM. Mr Roberts-Smith had never liked Person 1, and his conduct after the Chora Valley mission escalated into an unrelenting campaign of bullying. Person 1's mistakes in the early days of his first deployment neither explain nor justify the years of bullying to which Person 1 was subjected by Mr Roberts-Smith.
2. The relevant Particulars of Truth are [17]-[36]. They are relied upon in relation to the substantial truth of Imputation 13.

B. Proposed factual findings***Bullying during pre-deployment training***

3. Person 1 joined the ADF in September 2000 as a reservist.¹ He undertook training with the reserves, and then joined the regular army full-time, deploying to East Timor in late 2002 to mid-2003.² In March 2004, Person 1 successfully undertook selection for the SASR.³ Person 1 was then posted to I Troop within 3 Squadron.⁴ His patrol consisted of Person 33 (Patrol Commander), Sgt Matthew Locke (2IC), Person 36, Person 2 and Mr Roberts-Smith.⁵
4. I Troop undertook pre-deployment training for Rotation III at the Lancelin Training Area.⁶ As part of training, the troop conducted vehicle-mounted exercises,⁷ during which time Mr Roberts-Smith slapped Person 1 across the back of the head after Person 1 drove over a large bump.⁸ This happened two or three times during the pre-deployment training at Lancelin.⁹ Mr Roberts-Smith denied ever hitting Person 1;¹⁰ this evidence should be rejected for the reasons we outline at the end of this section. Towards the end of the pre-deployment training, Mr Roberts-Smith and Sgt Locke pulled Person 1 aside. Mr Roberts-Smith told Person 1 that he did not believe that Person 1 had the required skills or ability to deploy to Afghanistan with the task group, and that he wanted Person 1 removed.¹¹
5. Person 33 held a markedly different view to Mr Roberts-Smith. During pre-deployment training, Person 33 recorded in writing that Person 1's development was positive.¹² Person 1's other attributes were marked as either 'good' or 'very good'. Person 33 said

¹ T.2151/27-29 (P1).

² T.2151/31-43 (P1).

³ T.2151/44-T.2152/1 (P1).

⁴ T.2152/8 (P1).

⁵ T.2153/4-22 (P1).

⁶ T.2155/17 (P1).

⁷ T.2155/20-24 (P1).

⁸ T.2155/30-35 (P1).

⁹ T.2155/37-38 (P1).

¹⁰ T.734/29-735/1 (BRS).

¹¹ T.2156/13-31 (P1).

¹² Ex R-121, Tab 1.

"[Person 1's] experience is limited, not his fault, but his enthusiasm makes up for this. I was happy to see that during this activity that any points brought to his attention were quickly grasped."

6. In early May 2006, I Troop (including Person 1 and Mr Roberts-Smith) deployed to Afghanistan.¹³ This was Person 1's first deployment to Afghanistan with the SAS.¹⁴

Engagement of an unarmed Afghan male at Chora Pass

7. In late May 2006, Person 33's patrol was tasked to conduct clandestine surveillance operations above the Chora Pass.¹⁵ The patrol was supplemented by Person 23 (JTAC).¹⁶ Person 36 was not present for this mission.¹⁷ Person 33's patrol was dropped-off at the base of the 'Khoran Ghar' mountain which they climbed on foot.¹⁸ Upon reaching the top of the mountain, the lay-up position (**LUP**) was set up on a small, flat section of ground on the peak of the mountain.¹⁹ The LUP was the location where the troop would conduct non-operational tasks, such as cooking, sleeping or communicating with the base.²⁰ The observation post (**OP**) itself overlooked the Chora Pass.²¹ Person 1 and Person 2 gave evidence that a person sitting in the LUP could not see the OP (or vice versa).²²
8. On the morning of the second day of the mission (being 2 June 2006), Person 1 and Person 2 were manning the OP,²³ while the other members of the patrol were positioned at the LUP.²⁴ At approximately 0911DE, Person 1 and Person 2 noticed an individual below the OP.²⁵ Person 1 and Person 2's recollection of the circumstances by which they noticed the individual is materially consistent. Person 1 recalled hearing some 'yelling' in the direction of the Chora valley, and when scanning the area below the OP, saw an individual.²⁶ Person 1 recalled Person 2 asking Person 1 to use a pair of laser range finding binoculars to determine the distance between the OP and the individual.²⁷ Person 1 recalled that the binoculars indicated that the individual was approximately 75 to 80m from the OP.²⁸ Person 2 recalled that he was holding the binoculars.²⁹ Nothing turns on this.
9. Person 1 observed the individual stick his head out from behind a set of rocks.³⁰ Then, from the perspective of the OP, the male walked from the right to the left, and disappeared behind

¹³ Ex R-194, Page 19.

¹⁴ T.2151/19 (P1).

¹⁵ CCT 25.6.21, p.2/44-45 (BRS); T.137/09-13; T.690/20-22 (BRS); T.2158/43-45 (P1); T.2159/04-10 (P1); T.2477/26-34 (P2); T.136/39-44 (BRS).

¹⁶ T.2173/32 (P1); T.2990/40 (P2); T.136/39-44 (BRS).

¹⁷ T.6030/7-9 (P36).

¹⁸ T.2160/5-7 (P1); T.2478/15-21 (P2); T.2285/30 (P21); T.137/15-21; T.691/3-4 (BRS).

¹⁹ T.2160/43-47 (P1); T.2478/40-41 (P2); T.141/15-16 (BRS); Ex R124 and explanation of Ex R-124 at T.2481/5-2482/22 (P2).

²⁰ T.2478/43-47 (P2).

²¹ T.2161/24 (P1); T.691/44-692/2 (BRS).

²² T.2161/38; T.2223/11-13 (P1); T.2508/29-2509/13 (P2).

²³ T.2162/9-13 (P1); T.2480/15-16 (P2); T.143/1-5; T.692/25-26 (BRS).

²⁴ T.2480/31-32 (P2); T.143/07-08; T.692/28-29 (BRS).

²⁵ Ex R-46 (entry 16); T.2162/25-29 (P1); T.2483/1-14 (P2).

²⁶ T.2162/25-29 (P1).

²⁷ T.2162/36-37 (P1).

²⁸ T.2162/40-44 (P1).

²⁹ T.2503/22-23 (P2).

³⁰ T.2162/33-34; T.2224/6-13 (P1).

some other rocks.³¹ Person 2 reported the sighting over radio to the LUP, whispering "All callsigns, one male, front of the OP, moving from right to left."³² After observing the male's body language, Person 1 and Person 2 concluded that the individual had not seen the OP – as Person 1 described it, the individual did not have the 'dinner plate eyes' one would expect from an enemy combatant encountering hidden Coalition troops.³³

10. Person 1 and Person 2 agreed on the appearance of the individual: it was a male with some facial hair, wearing traditional Afghan dress, and aged between 14 and 20.³⁴ Mr Roberts-Smith, who observed the male closely when he engaged him, stated that the individual was at least 20 years old.³⁵ At this stage, Person 1 and Person 2 did not observe any weapons or webbing on the male.³⁶ After about sixty seconds, the male reappeared from behind the rocks, and (from the perspective of the OP) walked from left to right.³⁷ Person 1 and Person 2 observed that the male now had a bag slung across his back but the male did not appear to have a weapon or webbing.³⁸ Person 2 radioed the LUP, whispering "All callsigns, one male reappeared, now moving from left to right away from the OP."³⁹
11. The members occupying the OP recorded the activity they observed in an OP Log.⁴⁰ Entry 16 of the OP Log records, at 9:11am local time, "1 ACM spotted from OP moving NE along ridge (see Incident RPT)". Person 2 says Person 1 was the dedicated scribe who would have made this entry.⁴¹ Person 1 indicated that he thought he wrote the words "1 ACM spotted from OP moving NE along ridge", but not the words "(see Incident RPT)".⁴² It is unclear who wrote those words, but it is apparent that they were added separately (and subsequently) to the original entry. Mr Roberts-Smith acknowledged that the fact that the OP Log does not record ammunition or armaments is consistent with weapons having not been observed.⁴³
12. Shortly thereafter, Sgt Locke and Mr Roberts-Smith moved to the OP,⁴⁴ where Sgt Locke asked Person 1 "What happened?".⁴⁵ Person 1 and Person 2 explained that they had seen a male walk from right to left, disappear behind some rocks, then walk from left to right.⁴⁶ Sgt Locke then asked Person 1 and Person 2 why they had not engaged the male.⁴⁷ Person 1 and Person 2 explained that they did not wish to compromise the location of the OP.⁴⁸ Sgt Locke then asked Person 1 and Person 2 "Which way did he go?"⁴⁹ Person 2 pointed to the right of the OP, being the direction of where they had lost sight of the individual,

³¹ T.2163/27-38; T.2224/15-19 (P1); T.2483/27-32; T.2483/44-2484/03; T.2506/43-46 (P2).

³² T.2484/1-3 (P2).

³³ T.2163/5-15 (P1); T.2484/16-29; T.2484/39 (P2).

³⁴ T.2163/17-19, T.2163/25 (P1); T.2483/13-14; T.2506/26-27 (P2).

³⁵ T.697/32-36 (BRS).

³⁶ T.2163/21-23 (P1); T.2483/34-37 (P2).

³⁷ T.2163/43-2164/02; T.2224/21 (P1); T.2484/5-8; T.2507/1 (P2).

³⁸ T.2164/4-18; T.2224/23 (P1); T.2483/34-49; T.2484/10-14; T.2507/8-10; T.2515/41-42 (P2).

³⁹ T.2484/31-33 (P2); T.143/9-10 (BRS).

⁴⁰ T.2166/31-33 (P1); T.2480/25-30 (P2).

⁴¹ T.2504/7-33 (P2).

⁴² T.2168/4-8 (P1).

⁴³ T.695/13-18 (BRS).

⁴⁴ T.2484/41-43; T.2484/46-47 (P2).

⁴⁵ T.2164/28-29 (P1).

⁴⁶ T.2164/29-34 (P1).

⁴⁷ T.2164/36-37 (P1); T.2484/43-44; T.2485/1-2 (P2).

⁴⁸ T.2164/39-2165/04 (P1); T.2485/04-11 (P2).

⁴⁹ T.2485/14-15 (P2).

and said "that way".⁵⁰ Person 1 then saw Sgt Locke move back towards the LUP.⁵¹

13. Mr Roberts-Smith gave a different account. He said he was located in the LUP, and recalled receiving a radio transmission from the OP that a male was approaching the OP.⁵² Mr Roberts-Smith said he, Sgt Locke and Person 33 moved to a better position to see the individual.⁵³ Mr Roberts-Smith says he saw the individual 50 to 60 metres from the OP.⁵⁴ Mr Roberts-Smith said he saw (by looking through the scope of his rifle from the LUP)⁵⁵ that the male was wearing chest webbing, but that the male did not have a weapon.⁵⁶ Mr Roberts-Smith said he saw the individual stop, turn left, and traverse the side of the mountain away from the OP/LUP position to the right.⁵⁷ Mr Roberts-Smith considered that the individual had seen "us", and had "taken the decision to try and walk off because he didn't ... want to walk into our OP or LUP".⁵⁸ Mr Roberts-Smith said Person 33 gave an order to 'Go', and that Sgt Locke and he then moved along the ridge in the direction that they had seen the individual move.⁵⁹ Mr Roberts-Smith denied going to the OP at all before encountering the male.⁶⁰
14. Whether Mr Roberts-Smith and Sgt Locke saw the individual from the LUP, or whether Mr Roberts-Smith and Sgt Locke went to the OP before the engagement is not a matter of great significance. Nevertheless, there are three reasons why the evidence of Person 1 and Person 2 should be preferred. *First*, Mr Roberts-Smith has given a prior account of the mission where he said he did not see the individual from the LUP.⁶¹ *Secondly*, Mr Roberts-Smith's evidence was that he saw the individual from the LUP through the scope of his rifle. Had this occurred, he could have engaged the individual from the LUP; there would have been no need to leave the LUP at all. *Thirdly*, the after-action reporting stated that the individual had *not* compromised the OP.⁶² Mr Roberts-Smith conceded that this reporting contradicted his evidence.⁶³ The Court should conclude that Mr Roberts-Smith has invented the story about looking at the individual through his rifle to give credence to his assertion that the individual compromised the LUP/OP.
15. Sgt Locke and Mr Roberts-Smith then engaged the male.⁶⁴ After the engagement, Sgt Locke and Mr Roberts-Smith went back to the LUP.⁶⁵ Later that day, Person 1 overheard Sgt Locke discussing the engagement, in which he suggested that a flare or other smoke-emitting device was ignited during the engagement.⁶⁶
16. The engagement compromised the OP. Mr Roberts-Smith has previously conceded that it

⁵⁰ T.2485/20-23 (P2).

⁵¹ T.2165/6-8 (P1).

⁵² T.143/11-12; T.697/1-5 (BRS).

⁵³ T.143/1-19; T.697/5-9 (BRS).

⁵⁴ T.143/21-22 (BRS).

⁵⁵ T.143/20; T.696/24-30 (BRS).

⁵⁶ T.143/22-25; T.156/39-43; T.696/05-15; T.697/20-21 (BRS).

⁵⁷ T.143/25-29 (BRS).

⁵⁸ T.143/32-37 (BRS).

⁵⁹ T.144/39-145/8; T.731/46-732/6 (BRS).

⁶⁰ T.732/3-6 (BRS).

⁶¹ Ex R-189 (aide memoire), page 13, lines 550-560.

⁶² Ex R-48, page 2.

⁶³ T.709/32-36 (BRS).

⁶⁴ T.145/8-12; T.698/24-26 (BRS).

⁶⁵ T.2485/41-43 (P2); T.699/16-19 (BRS).

⁶⁶ T.2166/9-16 (P1).

was a 'hard' compromise as 'we'd gone loud'.⁶⁷ The after-action reporting also shows it attracted the attention of Taliban insurgents (we address this below). That is consistent with Person 1's evidence.⁶⁸ Person 33 contemporaneously declared it a 'soft compromise'⁶⁹ (an assessment which Mr Roberts-Smith agreed with during his evidence).⁷⁰

The false SITREP

17. Immediately after the engagement, the patrol leadership sent a SITREP describing the engagement (Ex R47). It described the male as an "armed ACM with AK variant weapon" ... "aggressively patrolling, both hands on weapon, ready to fire". That statement was false. Mr Roberts-Smith accepted that this reporting was not correct⁷¹ but denied creating or issuing the SITREP.⁷² He suggested it was prepared by Person 33.⁷³ The false SITREP was never retracted. Instead, the lie that the individual was armed was picked up and repeated in further reports: see paragraphs D1 to D3 of the Respondents' Closed Court Submissions. That lie was also repeated by Mr Roberts-Smith on subsequent occasions.

The subsequent engagement

18. About 8 or 9 hours after the engagement of the individual,⁷⁴ and after completing their shift in the OP, Person 1 and Person 2 heard some yelling to the east.⁷⁵ A major contact followed during which Person 1's weapon had repeated stoppages because it was not correctly lubricated.⁷⁶ Person 1 said he did not take weapon lubricating oil with him on the mission.⁷⁷ Person 1 acknowledged that he should have taken oil on the mission,⁷⁸ and that not doing so was a mistake.⁷⁹ Later that night, the patrol left the OP/LUP and descended the same route.⁸⁰
19. Before leaving the LUP, Person 1 woke up saying "friendly, friendly, friendly", holding his hand in front of him.⁸¹ Person 1 remembered Mr Roberts-Smith yelling something at him – followed by Person 33 yelling at Mr Roberts-Smith to "stand down" as Person 1 was sleep talking.⁸² Person 1 denied holding his weapon.⁸³ Mr Roberts-Smith remembered Person 1 waking up and 'screaming' "I'm a friendly" multiple times.⁸⁴ Mr Roberts-Smith said Person 1 was pointing his Minimi machine gun directly at Mr Roberts-Smith, and that Person 33 intervened by stepping between the pair, rousing Person 1, and calming him down.⁸⁵

⁶⁷ Ex R-198, page 13, line 569.

⁶⁸ T.2169/10-29 (P1).

⁶⁹ T.2487/41-2488/3 (P2); T.146/40-46; T.702/40-43 (BRS).

⁷⁰ T.146/40-46; T.702/19-36 (BRS).

⁷¹ T.700/32-701/11 (BRS).

⁷² T.732/20-23 (BRS).

⁷³ CCT 25.6.21 p.3/30-41; T.5/5 -11 (BRS).

⁷⁴ T.2226/14-15 (P1).

⁷⁵ T.2169/44-2170/8 (P1); T.2488/15-20 (P2).

⁷⁶ T.2172/42-43 (P1).

⁷⁷ T.2172/45-46 (P1); T.151/40-152/3 (BRS).

⁷⁸ T.2173/01 (P1).

⁷⁹ T.2174/23-28; T.2227/29-42 (P1)

⁸⁰ T.2174/16-19 (P1); T.2493/29-32 (P2); T.153/24-27 (BRS).

⁸¹ T.2174/3-4 (P1).

⁸² T.2174/6-8 (P1).

⁸³ T.2174/10-11; T.2243/41-46 (P1).

⁸⁴ T.153/4-5 (BRS).

⁸⁵ T.153/8-14 (BRS).

Mr Roberts-Smith accepted that he was holding his own weapon during the altercation.⁸⁶

Contemporaneous account at *Tarin Kowt*

20. Shortly after returning to Camp Russell, Person 1 visited the room housing Electronic Warfare (EW) operators.⁸⁷ Person 1 recounted what occurred on the mission to the EW operator, stating that he had seen an Afghan male walk in front of the OP, radioed the sighting to the LUP, and had been 'abused' by Sgt Locke for not engaging the individual.⁸⁸ Person 1 said Mr Roberts-Smith and Sgt Locke moved in front of the OP, and returned a short time later, indicating that they had engaged the male, and again yelled at Person 1.⁸⁹ Finally, Person 1 told the EW operator that, at a later point on the mission, Person 1 had a weapon stoppage, and that Mr Roberts-Smith had "again abused" Person 1.⁹⁰ Person 1 did not recall the specific conversation,⁹¹ but it was overheard by Person 69. Person 1's contemporaneous disclosure provides significant corroboration of Person 1's account of Chora Pass.

Accounts of events on *Khoran Ghar* in following years

21. After the mission, an After-Action Report was prepared.⁹² The After-Action Report does not retract or amend the statement in the SITREP (Ex R47) that the individual was armed. A second, shorter version of the After-Action Report was prepared as a recommendation for Person 23.⁹³ This shorter version omits information about the 'ignition' of a smoke grenade on the chest of the individual, and any criticisms of Person 1 and 2's conduct. Again, the SITREP was not retracted. A third After Action Report was prepared by Person 23 (Ex R52), which also stated that the individual had 'popped smoke to signal to the others he had been killed', and that the engagement was immediately followed by machine gun fire. Nothing contradicting the SITREP appears in this third report either.
22. Mr Roberts-Smith subsequently gave two public accounts repeating the falsehood contained in the SITREP. In February 2011, Mr Roberts-Smith recorded an interview with the Australian War Memorial.⁹⁴ In the course of that interview, Mr Roberts-Smith repeatedly referred to two individuals approaching the OP who were "all armed and wearing chest rigs".⁹⁵ In a subsequent letter Mr Roberts-Smith wrote to the Director of the Australian War Memorial, Mr Roberts-Smith acknowledged that he was wrong to state that *two* insurgents had approached the OP, but did not correct his statement that they were armed.⁹⁶ In April 2011, Mr Roberts-Smith gave an interview to *The Australian* newspaper⁹⁷ In the interview, Mr Roberts-Smith said there was one individual and again said he was armed.⁹⁸

⁸⁶ T.735/11-12 (BRS).

⁸⁷ T.2302/25-28 (P69).

⁸⁸ T.2302/35-41 (P69).

⁸⁹ T.2303/8-10 (P69).

⁹⁰ T.2303/15-16 (P69).

⁹¹ CCT 17.2.22 p.2/36-39 (P1).

⁹² Ex R-48,

⁹³ Ex R-49; T.711/36-43 (BRS),

⁹⁴ Ex R-189.

⁹⁵ Ex R-189 (aide memoire), line 628.

⁹⁶ Ex A-10, Tab 26.

⁹⁷ Ex R-190.

⁹⁸ Ex R-190, p 3, line 107.

23. In these proceedings, Mr Roberts-Smith conceded that the individual was not armed.⁹⁹

Bullying of Person 1 during 2006

24. Person 1 accepts his performance on the mission to Chora, and other missions around that time, was below the standard expected. In a performance review prepared by Person 33 immediately after the mission, Person 1 was listed as having seven attributes in which he showed 'disappointing progress'.¹⁰⁰ Person 1 accepted that, overall, the feedback given to him by Person 33 was legitimate.¹⁰¹ Person 1 also accepted that other aspects of feedback given to him, in performance appraisals and in-person, was appropriate.¹⁰²
25. Person 1 felt that he could not seek guidance from other members of his patrol to build his experience and knowledge.¹⁰³ As an example, on a mission in 2006, Person 36 asked Person 1 to prepare a rocket launcher. The way in which the question (or order) was conveyed to Person 1 left doubt as to whether he was *actually* being asked to prepare the weapon, and so Person 1 equivocated.¹⁰⁴ This failure was reported by Sgt Locke in his performance appraisal of Person 1.¹⁰⁵ Mr Roberts-Smith repeated it in his evidence as an example of Person 1's failure.¹⁰⁶ Properly understood, it was an example of the lack of confidence Person 1 was experiencing at the time.
26. Person 1's lack of confidence was exacerbated by Mr Roberts-Smith's conduct. Mr Roberts-Smith would berate Person 1 when they were in the same room.¹⁰⁷ When Person 1 and Mr Roberts-Smith would walk past each other, Mr Roberts-Smith would try and make eye contact with Person 1 and when they were close together, he would spit on the ground in front of Person 1.¹⁰⁸ On other occasions, Mr Roberts-Smith would hold the door for Person 1 and then let it slam in his face.¹⁰⁹
27. On one occasion, Person 1 was in his team room when Mr Roberts-Smith walked in to the room aggressively and said to Person 1 words to the effect of, 'If your performance doesn't improve on our next patrol, you're going to get a bullet in the back of your head.'¹¹⁰ Person 1 interpreted those words as meaning that if he did not improve, Mr Roberts-Smith would shoot him in the back of his head on the next patrol.¹¹¹ This death threat made Person 1 fearful of his personal safety and caused him to lose confidence.¹¹²
28. Person 1 subsequently told Person 21 and Person 89 about the threat, and they recommended that Person 1 report it to his troop headquarters.¹¹³ Person 21 recalled

⁹⁹ T.719/34-36 (BRS).

¹⁰⁰ Ex R-121, Tab 3.

¹⁰¹ T.2177/21-35 (P1).

¹⁰² T.2179/09-22; T.2180/44-45 (P1); Ex R-121 Tab 4, paragraph [2] and Tab 5, paragraph [3(c)]; T.218/19-24 (P1); Ex R-121 Tab 5, paragraph [3(a)]; T.2174/21-28 (P1); T.2227/29-42 (P1).

¹⁰³ T.2179/3-7 (P1).

¹⁰⁴ T2179/24-44 (P1); see also T.153/32-154/31 (BRS) and Ex R-121, Tab 4.

¹⁰⁵ Ex R-121, Tab 4, paragraph [3].

¹⁰⁶ T.153/32-154/31 (BRS).

¹⁰⁷ T.2184/25-31 (P1).

¹⁰⁸ T.2186/10-20 (P1).

¹⁰⁹ T.2186/10-20 (P1).

¹¹⁰ T.2184/33-42 (P1).

¹¹¹ T.2184/41-42 (P1).

¹¹² T.3185/1-6 (P1).

¹¹³ T2185/28-32 (P1).

Person 1 saying to him words to the effect of, "Ben Roberts-Smith told me he was going to fuck me off out of the unit" and that Mr Roberts-Smith threatened to kill him.¹¹⁴ Person 21's evidence was unchallenged on this point. It records an immediate, contemporaneous disclosure by Person 1 of the death threat and strongly corroborates Person 1's evidence.

29. Person 1 subsequently made a formal report to his Troop Commander and Troop Bravo: Person 37 and Person 61.¹¹⁵ Shortly after he made that report, Mr Roberts-Smith approached Person 1 in the lunch line and said "If you're going to make accusations, cunt, you better have some fucking proof."¹¹⁶

Person 1's improved performance

30. On around 2 July 2006, Person 1 was transferred to Person 21's patrol. He was instructed that failure to improve would result in his return to Australia, and he was to use the patrol transfer as an opportunity to improve his skills (which was known as an 'OC's Warning').¹¹⁷ Person 21 assigned Person 1 to be his driver, so that he could closely supervise his conduct.¹¹⁸ Person 21 noticed that Person 1 was initially nervous, but he was receptive to feedback and increased in confidence.¹¹⁹
31. Some five days after the transfer, on 7 July 2006, Person 21 prepared an 'Operational Report', appraising Person 1's performance.¹²⁰ The report reveals the impact that the culture of Person 33's patrol had on Person 1. Person 1 was no longer an underperforming soldier: he was assessed as meeting the standards of an operator. The Report lists Person 1's attributes as a mix of 'Steady/Satisfactory Progress' and 'Impressive Progress', noting that Person was 'more at ease in the new Ptl environment', and that he was 'hard working and gets along with all members ... He has fitted in well into the Ptl considering the personality clashes he has had with other members of the Tp to date.'¹²¹
32. By August 2006, the OC's warning had been removed. Person 1's performance appraisal for the month of August 2006, prepared by Person 37, noted that he 'approached all tasks with a positive attitude [and] executed them to a satisfactory standard'.¹²² Appraisals of Person 1's performance continued to be positive in the following years. In 2008, Person 1's appraisal noted he 'could be relied upon to organise and complete tasks with minimal supervision and maintained a very good level of productivity'.¹²³ Person 1 attributed his progress to the fact that he was assigned to team leaders who were supportive.¹²⁴ Person 1 also received positive appraisal reports in 2009,¹²⁵ 2011,¹²⁶ 2012,¹²⁷ and 2013.¹²⁸

¹¹⁴ T.2291/35-39 (P21).

¹¹⁵ T.2185/34-37 (P1).

¹¹⁶ T.2185/46-2186/05 (P1).

¹¹⁷ Ex R-121, Tab 8.

¹¹⁸ T.2288/38-44 (P21).

¹¹⁹ T.2289/01-09 (P21).

¹²⁰ Ex R-121, Tab 9.

¹²¹ Ex R-121, Tab 9.

¹²² Ex R-121, Tab 10.

¹²³ Ex R-121, Tab 11; see also T.3591/38-3592/09 (P7).

¹²⁴ T.2189/15-18 (P1).

¹²⁵ Ex R-121, Tab 12.

¹²⁶ Ex R-121, Tab 13.

¹²⁷ Ex R-121, Tab 14.

¹²⁸ Ex R-121, Tab 15.

Ongoing campaign of bullying: 2006 to 2013

33. Despite Person 1's strong performance since July 2006, Mr Roberts-Smith continued to tell other people that Person 1 was incompetent and a coward.¹²⁹ Person 31 heard that from Mr Roberts-Smith's patrol commander, Person 5.¹³⁰ During a handover patrol in 2006, Mr Roberts-Smith also spoke to Person 24 about Person 1 in a derogatory manner.¹³¹
34. In another incident at Camp Russell in 2010, Mr Roberts-Smith pushed Person 1 as Mr Roberts-Smith was walking past, and said "Get out of my way, cunt, or I will kill you."¹³²
35. In early 2012, Mr Roberts-Smith had a conversation with Person 7 about Person 1's character, in which Mr Roberts-Smith called Person 1 a coward and said that he had let down the unit.¹³³ Person 7 prepared a statement to this effect on 10 May 2013 in support of Person 1's complaint to the RSM.¹³⁴
36. In early 2013, Mr Roberts-Smith had attended a 'manning meeting' (in which the staffing of patrols was discussed), made disparaging remarks about Person 1, and indicated that Person 1 did not deserve to be made 2IC.¹³⁵
37. Mr Roberts-Smith's treatment of Person 1 became notorious in the Regiment. Mr Hastie gave evidence that on one occasion during pre-deployment training at Bindoon, Mr Roberts-Smith appeared on the TV on The Morning Show talking about mental health charities he supported. Person 68 said loudly, so that everyone could hear, "RS gave Person 1 depression. Now, he's going to help him fight it" and everyone laughed.¹³⁶

Quick Assessment and Mediation

38. After Person 1 learned of Mr Roberts-Smith's intervention at the manning meeting, he made a complaint to the RSM that he had been unfairly treated by Mr Roberts-Smith.¹³⁷ The RSM told Person 1 to collect statements of witnesses so that possible action could be considered.¹³⁸ Person 1 spoke with colleagues, but believed he did not have enough statements to formalise the complaint.¹³⁹ Person 1 prepared his own statement, but did not pass it on to the RSM.¹⁴⁰ Person 1 decided to not pursue the complaint.
39. On 2 August 2013, after Mr Roberts-Smith himself requested action, Person 138, a Captain was appointed to conduct a quick assessment 'into the alleged activities of [Mr Roberts-Smith] in relation to threatening language against [Person 1]'.¹⁴¹ The Captain interviewed Person 1 and Mr Roberts-Smith.¹⁴² On 13 August 2013, Person 1 participated in an

¹²⁹ T.2196/32-33 (P1); T.4636/01-10 (P31); T.3592/44 (P7).

¹³⁰ T.4709/38 -39 (P31).

¹³¹ T.3350/05 -07 (P24).

¹³² T.2212/08 -16 (P1).

¹³³ T.3592/29-3593/31 (P7).

¹³⁴ Ex R-143.

¹³⁵ T.2200/1-7 (P1); T.3593/33-3594/15 (P7).

¹³⁶ T.4235/31-38 (AH).

¹³⁷ T.2201/22-29 (P1); T.3594/15-43 (P7); Ex R-118 [5], [6] and [11].

¹³⁸ T.2202/31 -33 (P1).

¹³⁹ T.2201/35-2202/03 (P1). See also Ex R-143.

¹⁴⁰ Ex R-121, Tab 16.

¹⁴¹ Ex R-118.

¹⁴² Ex R-118, [3] and [14].

interview with Person 138 and disclosed that Mr Roberts-Smith had bullied and verbally harassed him.¹⁴³ He also said Mr Roberts-Smith had made a death threat against him in the terms set out at paragraph 27 above.¹⁴⁴

40. The Quick Assessment Brief dated 14 August 2013 records that Person 138's 'initial assessment' was that there was 'sufficient evidence to suggest that [Mr Roberts-Smith] may have verbally insulted [Person 1] in Afghanistan on SOTG in 2006', and that 'an act of unacceptable behaviour may have been carried out by [Mr Roberts-Smith] during the deployment to Afghanistan in 2006'.¹⁴⁵
41. On 22 November 2013, a mediation was held between Person 1 and Mr Roberts-Smith. In the course of the mediation, Person 1 asked Mr Roberts-Smith why he had made disparaging comments to Person 1, and to other about Person 1, since 2006.¹⁴⁶ Mr Roberts-Smith did not deny the allegations made by Person 1 but contested the characterisation as bullying. He said they were professional comments made as a result of Person 1's conduct in 2006.¹⁴⁷ The mediation concluded with Mr Roberts-Smith stating that he would 'say nothing further about [his] opinions of Person 1'.¹⁴⁸

Further evidence of animus against Person 1

42. Mr Roberts-Smith's animus against Person 1 continued to manifest itself in later years. On 6 July 2017, Mr Masters provided Mr Roberts-Smith with a draft copy of parts of his manuscript, which in part concerned the mission at Chora.¹⁴⁹ Less than two weeks later, Mr Roberts-Smith (through his solicitors) wrote to Person 1, threatening to sue him personally for defamation because Person 1 had given an account "of the battle of Koran Ghar in 2006" which was "significantly different from the official After Action Report."¹⁵⁰ This was a brazen attempt to intimidate Person 1 into not revealing the truth that the ACM below the OP was unarmed, contrary to the false SITREP and the false account that Mr Roberts-Smith had promulgated to both The Australian newspaper and the War Memorial. Despite threatening to sue Person 1 for defamation in 2017, Mr Roberts-Smith now concedes Person 1 is correct.
43. In June 2018, Mr Roberts-Smith drafted two letters to Person 1 at the same time as he drafted two threatening letters to Person 18 (see paragraphs 46-75 in Section XIII). The contents of the letters to Person 1 are unknown. Moreover, the letters were never sent because Person 1 was overseas on deployment. Nevertheless, the mere fact that Mr Roberts-Smith drafted these letters *at all* demonstrates his ongoing obsession with Person 1.
44. Person 1 gave compelling evidence about the impact of Mr Roberts-Smith's bullying on him. He said that the death threat meant that he not only had to worry about the Taliban, but he

¹⁴³ Ex R-118, paragraph 15(b).

¹⁴⁴ Ex R-118, paragraph 15(f).

¹⁴⁵ Ex R-118, [16].

¹⁴⁶ Ex A-1, Tab 23; T.2213/09-12 (P1).

¹⁴⁷ Ex A-1, Tab 23, T.2213/14-16 (P1).

¹⁴⁸ Ex A-1, Tab 23.

¹⁴⁹ Ex A-29.

¹⁵⁰ Ex A-30; T.729/34-730/17 (BRS).

also had to look over his back because of people in his own squadron.¹⁵¹ Person 1 said that Mr Roberts-Smith's conduct "resulted in years of lost sleep and worrying about – about my position, about my future, about my employment and about my chosen career. And I believe it hamstrung my career for many years and slowed my career progression from my peers."¹⁵²

C. Conclusion

45. Person 1 was a credible and impressive witness. He frankly acknowledged his performance issues in 2006 despite the significant personal and professional embarrassment of making those concessions. He accepted that his performance was unsatisfactory in certain respects, and he accepted it was appropriate he receive professional feedback and guidance on these issues. He has always acknowledged his mistake in not taking gun oil on the Chora Pass mission and accepted that it was a serious error. His candour in making significant concessions against interest stands greatly to his credit.
46. Person 1's account of Chora Pass is corroborated by Person 2 and has been conceded in this case to be correct. He has always maintained that the male below the OP was unarmed, despite the false SITREP and Mr Roberts-Smith's public claims to the contrary. It took Mr Roberts-Smith 16 years – in this proceeding – to finally admit that the ACM was not armed.¹⁵³
47. Person 1's account of bullying conduct and the effect that Mr Roberts-Smith's campaign had on his reputation in the Regiment is corroborated by other witnesses (Person 7, Person 21, Person 24, Person 31 and Mr Hastie) as well as prior consistent statements in 2013 where he disclosed the death threats to the Captain conducting the Quick Assessment¹⁵⁴ and in his own written statement.¹⁵⁵ Tellingly, when confronted with allegations of bullying in the Quick Assessment mediation, Mr Roberts-Smith did not deny the incidents themselves. He merely disputed their characterisation.
48. Mr Roberts-Smith's account of his interactions with Person 1 should not be accepted. He is not a witness of credit generally, for the reasons outlined at Section XIII of these submissions. To the extent Mr Roberts-Smith sought to characterise the incidents as professional feedback, that too should be rejected. He had no legitimate professional reason to denigrate Person 1 years after they ceased working together. He never had a legitimate professional reason making death threats or assaulting Person 1. Even Mr Roberts-Smith's own witness, Person 36, conceded that death threats and assaults were never legitimate.¹⁵⁶
49. At the outset of his case, Mr Roberts-Smith foreshadowed his intention to call Persons 23, 33 and 37 in relation to Chora Pass and the alleged bullying of Person 1. The Court should infer, from his failure to do so, that their evidence would not have assisted him.

¹⁵¹ T.2214/8-11 (P1).

¹⁵² T.2214/11-14 (P1).

¹⁵³ T.719/34-36 (BRS).

¹⁵⁴ Ex R-118, [6], [15].

¹⁵⁵ Ex R-121, Tab 16.

¹⁵⁶ T.6044/1-8 (P36).

SECTION XI: BLUE-ON-BLUE AND THREAT TO PERSON 10**A. Introduction**

1. On 15 July 2012, Mr Roberts-Smith was the lead planner for a special reconnaissance mission in the same area that Sergeant Diddams had been killed two weeks earlier. Two serious incidents occurred during the mission. First, there was a blue-on-blue / friendly fire incident when the patrol commander of another SASR patrol, Person 55, fired upon the position of Mr Roberts-Smith's patrol with the bullet impacting very close to Person 22's head. This was a serious embarrassment to Mr Roberts-Smith just two weeks into his first tour as a patrol leader, and as the lead mission planner. Second, Person 10 fired his weapon in the direction of what he thought to be insurgents, but what ultimately transpired to be a woman and a child. Neither incident had any direct consequence on the ground, but both ultimately had significant consequences for Person 10.
2. On return from the mission Mr Roberts-Smith assaulted and verbally abused Person 10 in the presence of the patrol. He then made him the scapegoat for the blue-on-blue, resulting in him being removed from the patrol.
3. The relevant Particulars of Truth are [70]-[85]. They are relied upon in relation to the substantial truth of Imputation 13.
4. The imputation thus relates to very specific, and narrow conduct (and does not in terms raise the admitted assault of Person 10).¹ The assault and other aspects of Mr Roberts-Smith's conduct towards Person 10 are nonetheless relevant to placing the critical threat to Person 10 in context.

B. Proposed factual findings***Mission orders***

5. On 15 July 2012 Mr Roberts-Smith was the lead planner for a special reconnaissance patrol in the Chora Valley.² His patrol for the mission was comprised of Person 4 (as 2IC), Person 11, Person 10 and Person 22.³ Person 10 was the patrol signaller.⁴
6. The mission was to be conducted in two phases. The plan for the mission was that Mr Roberts-Smith's patrol and Person 55's patrol would insert up to a forward operating base, or FOB, in the area the night before and then walk in to the target area and take up blocking positions. Once those blocking positions were established the rest of the troop, comprised of Person 7, Person 31 and Person 57's patrols, would insert by helicopter near a compound of interest known as the Hilton. Mr Roberts-Smith's patrol and Person 55's patrol would block any insurgent squinters coming from the Hilton, and then marry up with the assault forces before extracting from the Hilton.⁵

¹ T.22/11-15 (BRS).

² CCT 25.6.21, p15/31-36; T.3602/38-39; 3603/7-12 (P7).

³ T.218/15-26; 219/1-4; CCT 25.6.21, p.16/42-47 (BRS); T.4516/16-22 (P10); T.6056/35-47; 6062/41-43 (P22).

⁴ CCT 25.6.21, p.17/15-16; T.4517/9 (P10).

⁵ T.219/27-42; CCT 25.6.21, p.15/38-42 (BRS); T.4516/24-37 (P10); T.6064/28-32 (P22); Ex A-13.

The failed mission

7. After the walk in, once the patrols of Mr Roberts-Smith and Person 55 had separated, Person 10 and Person 4 were tasked with identifying their patrol's blocking position to Person 55's patrol with an IR flash strobe, and receiving theirs, which they did. Person 55's patrol was to the south of their blocking position.⁶ They then collapsed into a disused building to wait until the helicopters with the assault teams were inbound before shaking out to take up their blocking position.⁷
8. The assault element was wheels up at Tarin Kowt at 0558DE.⁸ At about this time the patrol shook out to take up their blocking positions.⁹ There were then shots fired in the patrol's general direction from the south/south-west. Three shots were fired in quick succession, which impacted just above Person 22's head.¹⁰ At the time it was not known where those shots had come from, and it was thought that the patrol was in contact from enemy positions. Mr Roberts-Smith had a radio communication with Person 55, who indicated that Person 55's patrol had seen a fighting aged male to the south of their position.¹¹ After the mission, it was ascertained that these shots had in fact been fired by Person 55.¹²
9. This was a serious incident. Person 55 fired bullets which missed Person 22's head by centimetres. That such an incident occurred on a mission planned by Mr Roberts-Smith had the potential to reflect poorly on him and cause him embarrassment.¹³ Covering up this friendly fire incident, and using Person 10 as a scapegoat, was Mr Roberts-Smith's motivation for his subsequent treatment of Person 10 discussed below.¹⁴
10. Having received incoming fire from an, at the time unknown, source, Mr Roberts-Smith, Person 10 and Person 22 moved tactically out across the open ground to clear the ground and marry up with Person 55's patrol.¹⁵ Mr Roberts-Smith said that 'we still thought we were in contact, or didn't know what had happened, other than someone had shot at us'.¹⁶ Person 10 took cover behind a mound to be able to provide covering fire if needed as Mr Roberts-Smith and Person 22 moved across the open ground. He saw what he described as a "snap exposure" of movement in the wadi to the southwest, which on his quick assessment he thought was two insurgents, one of whom he thought was carrying a medium calibre machine gun or a PKM where they hold the handle.¹⁷ He started 'drake shooting' in the area as a method to stop the perceived threat from manoeuvring to a better

⁶ T.221/10-14; CCT 25.6.21, p.18/24-27 (BRS); T.4519/6-20 (P10).

⁷ T.221/20-24; CCT 25.6.21, p.18/30-31 (BRS); T.4519/30-34 (P10); T.6064/7-10 (P22).

⁸ Ex R-192, tab 9.

⁹ T.4520/1-4 (P10).

¹⁰ T.221/24-28 (BRS); T.4520/6-16; 4551/43-46 (P10); T.6064/44-46 (P22).

¹¹ T.221/26-31; CCT 25.6.21, p.20/31-47 (BRS); T.4520/18-21 (P10). See also Ex R-192, tab 9. Person 22 accepted that there was confusion and that for a short period of time they thought they were receiving fire from a Taliban source: T.6073/16-18; 27-29 (P22). His evidence that the confusion was quickly removed by the radio call with Person 55 and his experience from having been in country for the months prior (T.6073/20-29) does not sit comfortably with Mr Roberts-Smith's evidence. There is no evidence that Person 55 took responsibility for the shots in the radio call, and it is inconsistent with subsequent confusion on the topic.

¹² CCT 25.6.21, p.20/16-18 (BRS).

¹³ CCT 25.6.21, p.22/37-46 (BRS).

¹⁴ CCT 25.6.21, p.23/4-9 (BRS).

¹⁵ T.221/30-34 (BRS); T.4520/25-30; (P10); T.6065/31-38 (P22).

¹⁶ T.221/36-37 (BRS).

¹⁷ T.4520/31-37-42; 4548/10-11; 4553/29-46; 4555/8-14; 4577/32-37; 4578/16-32 (P10).

firing position.¹⁸ Person 10 had a number of stoppages, which he rectified, and he continued firing until Mr Roberts-Smith called “Ceasefire. Ceasefire. Ceasefire”. He says he fired no more than five bursts.¹⁹

11. Shortly after that two things happened: Person 55’s patrol threw blue smoke to indicate their position (which was the east of and approximately 50 metres from the location where Person 10 had been firing), and a woman carrying a birdcage and child emerged from the wadi in about the same area that Person 10 had been firing.²⁰
12. There is a dispute on the evidence as to whether Person 10 was responding to requests for target indications. Person 10 says that he was shouting out two enemy, and their rough distance and location.²¹ Mr Roberts-Smith and Person 22 both contend that he was not responding.²² The most likely explanation is that Person 10’s responses were unheard over the sound of the machine gun. It is not in dispute that upon being told to “ceasefire” that Person 10 did so.
13. This was the second serious event on the mission. There is no suggestion that Person 10 deliberately shot in the direction of a woman and child. But Person 10 accepted that he made an error in not positively identifying a target.²³
14. Whilst waiting for extraction Mr Roberts-Smith said to Person 10 “I want you to tell me who were you shooting at: woman and child or the Taliban? You don’t have to tell me now”, and he walked away.²⁴ Mr Roberts-Smith came around again before they extracted and Person 10 told him that he shot at a woman and child.²⁵
15. Mr Roberts-Smith also had a conversation with Person 55 at the extraction point when Person 55 said to him “those first shots were mine”.²⁶

The assault

16. Upon return to base, the patrol were waiting in the patrol room save that Mr Roberts-Smith was not yet in there. Person 10 was sitting on a couch. Mr Roberts-Smith entered the room, shut the door behind him and walked over to Person 10. He said “Stand up”. After Person 10 stood up Mr Roberts-Smith punched him on the left of his jaw. Person 10 fell back and the couch broke his fall. Mr Roberts-Smith then verbally berated Person 10. Person 10 was rattled and in shock, and does not recall what was said.²⁷ Mr Roberts-Smith then said “As far as I’m concerned, that’s it. And you know, nothing leaves this room”.²⁸

¹⁸ T.4520/40-42; 4521/10-19; 4548/27-38; 4554/4-7 (P10).

¹⁹ T.4520/44-8; 38-39; 4554/9-19 (P10). As to Person 10 engaging see T.221/41-43; 222/11-12; CCT 25.6.21, p.21/1-18; 40-41 (BRS); T.6066/1-4 (P22).

²⁰ T.222/18-27; CCT 25.6.21, p.22/1-11 (BRS); T.4521/41-4522/21; 4555/19-21 (P10); T.6067/1-13 (P22).

²¹ T.4521/2; 21-36; 4554/23-25; 4554/43/4555/6 (P10).

²² T.222/3-14; CCT 25.6.21, p.21/20-29 (BRS); T.6066/9-31 (P22).

²³ Ex R-160, [11].

²⁴ T.4522/29-36 (P10). See also T.222/37-38 (BRS).

²⁵ T.222/36-38 (BRS); T.4523/31-37; 4556/10-29 (P10).

²⁶ T.223/3-7; CCT 25.6.21, p.22/18-26 (BRS).

²⁷ T.4547/33-4548-3; 4557/32-47 (P10).

²⁸ T.224/5-23; CCT 25.6.21, p.23/11-33 (BRS); T.4523/1-25; 4556/46-4557/25; 4581/10-26 (P10); T.6069/23-25; 6070/26-34 (P22). See also Person 19’s evidence at T.2322/37-41; 2374/40-43 about a contemporaneous report Person 10 made to him about the assault.

17. Mr Roberts-Smith's conduct in assaulting a subordinate was inexcusable. Not only did it constitute an offence under the *Defence Force Discipline Act 1982 (Cth)*²⁹, it amounted to bullying and a gross failure of leadership.³⁰ Mr Roberts-Smith and Person 22 both sought to justify the assault by contending that Person 10 giggled or was jovial.³¹ Person 10 firmly denied this.³² Person 22 ultimately conceded that he did not see Person 10 laugh.³³ Whether he did or not, of course, is utterly irrelevant.
18. Mr Roberts-Smith admits that he assaulted Person 10, but denies that he said "nothing leaves this room". To support his denial, he contends that he self-reported the assault.³⁴ That evidence should not be accepted. It is inconsistent with the fact that no action was taken against him,³⁵ notwithstanding that it would have been a 'notifiable incident' within the meaning of the *Defence Instructions (General)*.³⁶ It is also inconsistent with Person 100's evidence that when Person 10 reported the assault to him in 2013 he said he would investigate it, and asked Person 10 if he would appear as a witness if taken further.³⁷ There would be no need for an investigation if Mr Roberts-Smith had already self-reported the assault, nor would there be a need for Person 10 to appear as a witness if the conduct was admitted. It is also inconsistent with the threats Mr Roberts-Smith later made to Person 10 to attempt to stop him reporting the assault, as discussed below.

The scapegoat

19. By the time they arrived back at base, there were whispers that there had been a blue-on-blue.³⁸ Mr Roberts-Smith knew that he needed an explanation for what happened on the ground that would deflect attention away from any planning failures on his part that may have led to that incident.³⁹ Person 10's error on the ground was sought to be used to cover up the blue on blue.⁴⁰
20. After their return to base there was a troop debrief conducted by the Troop Commander. The Troop Commander started the debrief by saying "We're hearing some things have gone on here, a possible blue-on-blue", and he asked Mr Roberts-Smith and Person 55 what happened. Person 55 explained that he had seen movement and he and one other engaged that individual that he saw moving. When he asked Mr Roberts-Smith what happened he started finger-pointing on the table and said about Person 10 "That cunt – that cunt, I fucking gave him an opportunity. He's gone and let me down". The Troop Commander asked him what happened and he said "His eyes rolled in the back of his head and he was blazing

²⁹ Section 33 and 34.

³⁰ CCT 25.6.21, p.23/28-43 (BRS); T.4575/7-12 (P10).

³¹ T.224/10 (BRS); T.6070/16; 34-25 (P22). The evidence is inconsistent in any event. Mr Roberts-Smith contends that Person 10 giggled in response to a question he asked him, whereas Person 22's evidence was consistent with Person 10's that the only thing Mr Roberts-Smith said was "Stand up".

³² T.4557/11-25 (P10).

³³ T.6075/20-21 (P10).

³⁴ T.224/31-15; CCT 25.6.21, p.23/35-36 (BRS).

³⁵ See Person 10's evidence that he was not approached by the Troop Sergeant or the Troop Commander about the assault: T.4558/1-10 (P10).

³⁶ Ex R-247.

³⁷ T.5607/37-5608/37 (P100).

³⁸ T.3604/46-47 (P7).

³⁹ CCT 25.6.21, p.22/32-23/2 (BRS).

⁴⁰ CCT 25.6.21, p.23/4-9 (BRS). T.4577/5-14 (P10).

away uncontrollably with his Minimi machine gun".⁴¹

21. In his evidence Mr Roberts-Smith said that at the troop debrief Person 55 said to the whole troop "I will understand if you don't want to work with me. I initiated the blue-on-blue. I fired my rifle. I honestly thought it was an insurgent. I didn't realise it was another SAS operator. If you don't want to work with me, I'm happy to go home".⁴² This evidence should not be accepted. It is inconsistent with each of Person 7 and Person 31's evidence about what was said at the debrief. Neither was challenged about their evidence. More significantly, Mr Roberts-Smith's version of what was said was not put to either of them.
22. Person 10 said after the patrol meeting he went to bed. He was woken up and told to go into the Tactical Operations Centre, where he had a meeting with Mr Roberts-Smith, Person 58 (the Troop Alpha) and Person 26 (the Troop Bravo). Person 10 does not remember what was said but that performance issues were brought up and "I do remember that blue-on-blue. So the accusation that I fired at our patrol was raised". The next day he was brought into the SSM's office and told "basically, it was a blue-on-blue and that I would be going home".⁴³ Ultimately other patrol commanders raised concerns surrounding what actually happened on the ground and Person 10 was removed from the patrol instead of being sent home. He was given a formal warning and was not allowed to go outside the wire.⁴⁴
23. The most compelling evidence that Mr Roberts-Smith conflated the two incidents and used Person 10 as a scapegoat for the blue-on-blue initiated by Person 55 is the contemporaneous reporting and the action (or lack of action) taken after the mission:
 - (a) First, the OPSUM⁴⁵ says nothing of Person 55 shooting near Mr Roberts-Smith's patrol. It simply says that a suspected insurgent was engaged.⁴⁶
 - (b) Secondly, as a result of the incident a quick assessment was conducted into Person 10's "weapon incident".⁴⁷ No such quick assessment was conducted in relation to Person 55's weapon incident. The QA relied upon statements from Mr Roberts-Smith and Person 55.⁴⁸ There is no reference at all in the QA to the blue-on-blue having been initiated by Person 55.⁴⁹ The initial engagement was described as follows⁵⁰:

At 150605DE July 2012, shots were heard to the left flank of G2 and, after initial investigation, the G2 Patrol Commander, CPL Roberts-Smith, assessed that his

⁴¹ T.3604/42-18 (P7); CCT 25.6.21, p.23/45-24/8 (BRS). See also Person 31's evidence that Mr Roberts-Smith was notably angry about Person 10's performance: T.4642/29-4643/26 (P31). Person 22 said there was "a bit of confusion what was actually happening on the ground", so the Troop Commander broke up the debrief and only the Patrol Commanders remained in the troop debrief: T.6067/37-42; 6068/1-6069/3; 6073/37-45 (P22).

⁴² T.223/8-10; 226/7-21; CCT 25.6.21, p.24/9-14 (BRS).

⁴³ T.4523/27-29; 4253/42-4524/46 (P10).

⁴⁴ T.4525/3-10 (P10); Ex R-159.

⁴⁵ Ex R-192, tab 9.

⁴⁶ CCT 25.6.21, p.25/4-15 (BRS).

⁴⁷ Ex R-192, tab 10.

⁴⁸ See [9] and the list of attachments on the final page of Ex R-192, tab 10. Mr Roberts-Smith's statement is Ex A-18.

⁴⁹ CCT 25.6.21, p.26/1-3 (BRS).

⁵⁰ See [6]-[7] of Ex R-192, tab 10.

patrol had come under fire.

After describing Person 10's engagement (without any reference to the women and children), the QA states 'At this time blue smoke could be seen IVO G3's location. CPL Roberts-Smith informed Tpr Person 10 that he had probably seen elements of G3, as there was no sign of the FAM in the area of ground between G2 and G3.

- (c) Thirdly, Mr Roberts-Smith's statement for the purpose of the QA⁵¹ also contains (a): an account of the initial engagement that excludes any reference to Person 55 having fired the shots; (b): no reference to Person 10 having shot in the direction of a women and child⁵²; and (c): a statement that at the same time as Person 10's engagement "G3 had thrown a blue smoke grenade to make their location which at that point was around 150 meters to our West South West. Subsequently I then impressed upon G23 that he had probably seen G3 patrol members as there were no other FAM's between G3 and our call sign."

24. The clear inference from Mr Roberts-Smith's statement was that he was contending that Person 10 was responsible for the blue-on-blue. Mr Roberts-Smith's evidence that he omitted referring to the women and child in his statement because "the point of the document was more about him losing control"⁵³, and because it "was just irrelevant"⁵⁴ is unpersuasive. The QA was into the "unauthorised discharge of Person 10's weapon". That he failed to obtain positive identification of a target and could have potentially shot a woman and a child was on any view pertinent to that inquiry.⁵⁵
25. It is in this context that Person 10 came to prepare his statement, and that Mr Roberts-Smith made the threat referred to in the imputation. At this time, Person 10 did not understand the nature of the blue-on-blue incident he was accused of. He said that the accusation that he was firing at a friendly call sign was simply false.⁵⁶ He did not at that time have any understanding about where the initial shots (Person 55's shots) had come from.⁵⁷

The threats

26. Mr Roberts-Smith asked Person 10 to prepare a statement, and they did it together because Person 10 had not prepared a statement like that before.⁵⁸ Person 10 said that "in preparing his statement – and my statement, there were differences in our statements".⁵⁹ Person 10 said that Mr Roberts-Smith was trying to compel him in relation to the 'actual firing', and said that he threatened him that he could "go to the Hague if I put that I was firing at a woman and child".⁶⁰ Person 10 subsequently obtained legal advice and then kept his original

⁵¹ Ex A-18.

⁵² CCT 25.6.21, p.26/5-6 (BRS).

⁵³ T.227/17-28 (BRS).

⁵⁴ CCT 25.6.21, p.26/8-11 (BRS).

⁵⁵ CCT 25.6.21, p.26/18-20 (BRS).

⁵⁶ T.4525/16-18; 31-46 (P10). See also Ex R-159.

⁵⁷ T.4527/42-47 (P10).

⁵⁸ T.4616/12-14 (P10).

⁵⁹ T.4526/22-40 (P10).

⁶⁰ T.4526/42-4527/3 (P10). Mr Roberts-Smith denied that he told Person 10 to write his statement the same as his and not to mention the woman and child because otherwise he could go to the Hague: T.226/26-29; CCT 25.6.21, p.26/25-33 (BRS).

statement that he fired at the woman and child.⁶¹

27. Person 10 was cross-examined about his evidence about this statement, and it was put to him that his evidence in cross-examination was different to his evidence in chief. His evidence was entirely consistent. The only difference was that in chief Person 10 gave evidence of the statement made, without characterising it as a threat, which is reflective of an honest witness trying not to embellish. In cross-examination it was put to him it was not a threat, and he firmly disagreed repeatedly, stating “he threatened to report me to the Hague if I did not write a statement that was conducive to his”, “he threatened to report me to the Hague if I did not state that I was firing at the other patrol, essentially the blue on blue” and “you could go to the Hague if I do not – if I didn’t write a statement conducive to his. That’s a – that’s a threat”.⁶²
28. The threat was reinforced by the further threat Mr Roberts-Smith sought to have Person 19 convey to Person 10. When Person 19 told Mr Roberts-Smith that Person 10 was thinking of making a formal complaint about the assault, Mr Roberts-Smith said to Person 19 “You tell that cunt, he’d better not say anything, otherwise, I’ll get him charged for war crimes.”⁶³ Person 19 told Person 10 about Mr Roberts-Smith’s threat.⁶⁴
29. In February 2013, after Person 10 had received a Notice to Show Cause⁶⁵, Mr Roberts-Smith issued Person 10 with a more direct threat: he said to him “If you threaten me or my family, I will fuck you up.”⁶⁶ Person 10 understood Mr Roberts-Smith to be indicating that if Person 10 referred to the fact that Mr Roberts-Smith had assaulted him in his response to the Notice to Show Cause there would be consequences.⁶⁷
30. Person 10 was ultimately removed from the SASR.⁶⁸

Person 10’s credibility

31. A significant focus of the cross-examination, and of the evidence about Person 10 in the case generally, related to his ability as a soldier.⁶⁹ Person 10 candidly accepted that his performance during the time he was in Echo troop was poor, and said that his poor performance was “nobody else’s fault but mine”.⁷⁰ He rejected the proposition that he raised a complaint about the assault in his exit interview to justify his poor performance.⁷¹ It may be readily accepted that he made a grave error on the ground on 15 July 2012. That does not, however, say anything one way or the other about Person 10’s honesty and reliability as a witness. The fact that Person 10 made appropriate concessions about his performance as a soldier is an indication that he is an honest witness doing his best to assist the Court.

⁶¹ T.4527/5-20 (P10); Ex R-160, [9].

⁶² T.4616/29-4618/12 (P10).

⁶³ T.2321/43-2323/6; 2392/29-32 (P19); CCT 25.6.21, p.27/1-15 (BRS).

⁶⁴ T.2392/41-2393/19 (P19).

⁶⁵ T.4528/25-28 (P10).

⁶⁶ T.4528/44-46; 4575/20-33 (P10). See also Person 19’s evidence that Mr Roberts-Smith asked him for Person 10’s phone number and Person 19 gave it to him: T.2323/25-38 (P19).

⁶⁷ T.4529/1-9 (P10).

⁶⁸ T.4529/11-13 (P10).

⁶⁹ See, e.g., T.4531/1-6; 4559/4-8; 4561/8-14; 4583/1-29; 4587/9-4590/45 (P10).

⁷⁰ T.4528/14-23; 4559/1-2 (P10).

⁷¹ T.4558/35-46 (P10).

32. It was clear from Person 10's evidence that he did not want to be giving evidence at all, see, e.g., the first question asked in cross-examination at T.4530/21-22: "Person 10, it's fair to say that you don't wish to be here; correct?---That's correct Mr Moses". Person 10 went so far as to have a conversation with Person 19 about how they could both get out of giving evidence.⁷² Further, the proposition that Person 10 engaged in false humility in accepting his poor performance should be rejected.⁷³ As Person 10 said, his acceptance of his poor performance comes with the maturity he has gained over the last 10 years.⁷⁴
33. It was put to Person 10 that he was "not willing to take responsibility for having made a bad judgment that day", because he didn't accept that he could have killed the woman and child.⁷⁵ That was not a fair characterisation of the evidence. Person 10 accepted he made an error that day as long ago as 2012.⁷⁶ On his evidence of the engagement, his 'drake' fire was in the area of where the woman and child came from, designed to fix them in place. He was not shooting directly at that them. And he did that because he saw what was two insurgents, one with a machine gun, whilst Mr Roberts-Smith and Person 22 were exposed in open ground. He said he "wasn't going to put Mr Roberts-Smith's and Person 22's life in jeopardy."⁷⁷
34. Person 10 said that he does not blame Mr Roberts-Smith for his removal from Gothic 2.⁷⁸ That he bears no animus towards Mr Roberts-Smith affirmed by his unchallenged evidence that in 2016 he reached out to Mr Roberts-Smith on LinkedIn to say 'g'day'⁷⁹.

C. Conclusion

35. For the foregoing reason, the Court should find that the Respondents have established the matters at paragraphs [70] to [85] of the Particulars of Truth of the Third Further Amended Defence, and that Imputation 13 is substantially true.

⁷² T.4530/21-22; 4568/30-42 (P10); T.2332/30-33, T.2371/36-39 (P19).

⁷³ CCT 1.4.22, p.12/7-16 (P10).

⁷⁴ CCT 1.4.22, p.12/13-16; 18/25-27 (P10).

⁷⁵ T.4555/30-33 (P10).

⁷⁶ Ex R-160, [11].

⁷⁷ T.4578/25-28 (P10).

⁷⁸ T.4576/41-4577/6 (P10).

⁷⁹ T.4530/8-9 (P10).

SECTION XII: THE ASSAULT ON PERSON 17**A. Introduction**

1. On 13 October 2017 Mr Roberts-Smith commenced an extra-marital affair with Person 17 which lasted until 6 April 2018. On that latter date, Person 17 arrived unannounced at the marital home of Mr Roberts-Smith and his then wife, to reveal the affair to her. Just over a week earlier, late on the night of 28 March 2018, Mr Roberts-Smith had assaulted Person 17 in their hotel room in Canberra. It is that assault that lies at the heart of the Respondents' case that each of imputations 7 and 8, alleged to be conveyed by the Group 3 articles, are substantially true. The relevant paragraphs of the Particulars of Truth are [130] to [138] of the Third Further Amended Defence.
2. While assessments of the credibility of Mr Roberts-Smith and Person 17 will obviously play a significant role in the resolution of this aspect of the case, it is noteworthy that on the critical issue of the assault (as well as other issues), Person 17's evidence is supported by contemporaneous documents. Furthermore, it is submitted that the cross-examination of Person 17 was underpinned by an outmoded and discredited set of stereotypes about how a victim of domestic violence "should" act. On any view, Person 17 dealt impressively with a robust cross-examination. But when it is recalled that, on the Respondents' case, she is the victim of a violent assault compelled to come to Court to give evidence, in a very public trial, not only about that traumatic event, but also of very deeply personal and devastating surrounding events and circumstances, her evidence was particularly powerful.
3. The assessment of Mr Roberts-Smith's evidence on this aspect of the case, of course, cannot be divorced from his evidence in the proceedings as a whole. On the Respondents' case, Mr Roberts-Smith has given deliberately false evidence in relation to a succession of the most serious allegations. If the Respondents' case in relation to some or all of those other allegations in the case are accepted, it follows that Mr Roberts-Smith is a witness who is prepared to lie repeatedly under oath.
4. But even putting all other aspects of the proceedings to one side, Mr Roberts-Smith's evidence concerning his relationship with Person 17 and related matters can be shown to involve several deliberate lies, and an attempt to mislead the Court. It follows that the Respondents submit that, for reasons developed below, Mr Roberts-Smith's evidence in relation to the assault of Person 17 should not be accepted.
5. Although the key issue requiring determination in relation to these imputations is the assault, as a result of some of the attacks on Person 17's credibility it is necessary to deal also with some of the background to the relationship and circumstances leading up to the assault.

B. Proposed factual findings***The relationship***

6. Mr Roberts-Smith and Person 17 first met on 13 October 2017 at a charity lunch.¹ After that time they engaged in a relationship which Person 17 described as intense, passionate and

¹ T.782/43-47 (BRS); T.4025/23-25 (P17).

all-consuming.² Between 13 October 2017 to 6 April 2018, Mr Roberts-Smith and Person 17 saw each other roughly every 10 days or so, when Person 17 would travel to where Mr Roberts-Smith was speaking or attending an event, and she would spend a night or two, or sometimes three to four nights with him. When they were not physically together, they communicated extensively via text messages (on various apps), by telephone, and by leaving each other draft messages in a shared Gmail account.³ Mr Roberts-Smith and Person 17 discussed a future together on multiple occasions.⁴

The pregnancy, miscarriage, and surveillance of Person 17

7. When Person 17 was in London in early February 2018, she found out that she was pregnant. She knew that Mr Roberts-Smith was the father, as she had not slept with anyone else, including her husband, and in any event her husband had had a vasectomy.⁵ Person 17 did not tell Mr Roberts-Smith about the pregnancy immediately, given the nature of the conversations they were having at that time, including about the relationship potentially ending and Mr Roberts-Smith telling Person 17 that he wasn't sure he loved her, which she said left her really hurt and really upset.⁶
8. Person 17 said she told Mr Roberts-Smith about the pregnancy about a week later over a phone call. He was initially surprised, and said to Person 17 "You know, well, we're going to have to deal with that when you get back to Australia". The following morning Mr Roberts-Smith phoned Person 17 and said she would have to provide him with proof of the pregnancy, which she provided.⁷ Mr Roberts-Smith recalls Person 17 sending him either a photo or a video of a pregnancy test showing a positive result.⁸
9. In his evidence Mr Roberts-Smith said that Person 17 had texted him that she was pregnant, and then they subsequently had a telephone discussion.⁹ Nothing is likely to turn on how Person 17 communicated to Mr Roberts-Smith that she was pregnant, but to the extent it matters, it is noted that it was not put to Person 17 that she told Mr Roberts-Smith by text message.
10. Mr Roberts-Smith also said that he did not believe that Person 17 was pregnant.¹⁰ This was despite him having received a photo or video of a positive pregnancy test, and him ultimately requiring Person 17 to take a pregnancy test in front of him (discussed below), and it also displaying a positive result. Critically, it was not put to Person 17 that she lied about being pregnant.
11. Shortly after Person 17 returned to Australia she travelled to Brisbane and met with Mr Roberts-Smith. They discussed the pregnancy, and it was agreed that Person 17 needed to terminate the pregnancy.¹¹ Over the following period Mr Roberts-Smith and Person 17

² T.4026/25-37 (P17).

³ T.262/29-31; 772/1-21; 783/1-43 (BRS); T.4026/39-4027/17; 4029/5-5-12 (P17).

⁴ T.783/45-47 (BRS); T.4027/19-28;4028/7-23 (P17).

⁵ T.4030/8-24 (P17).

⁶ T.4030/26-43 (P17).

⁷ T.4030/45-4031/19 (P17).

⁸ T.786/24-30; 39-43 (BRS).

⁹ T.265/3-19 (BRS).

¹⁰ T.265/31 (BRS).

¹¹ T.787/26-27 (BRS); T.4031/39-46 (P17).

discussed plans for the termination. Person 17 was having second thoughts about the termination. Mr Roberts-Smith told her that if she kept the baby, he would not stick around long term.¹²

12. Over the course of several days from about the afternoon of 2 March 2018, Person 17 miscarried the baby.¹³ She did not tell Mr Roberts-Smith about the miscarriage straight away as they had been fighting a lot during the week, the situation was really tense, and there was a period when Mr Roberts-Smith would not take her calls. This is evident from the messages that occurred over that period, in particular the messages on 3 March 2018.¹⁴ Person 17 considered it would be better to tell Mr Roberts-Smith about the miscarriage face to face when she saw him. She said that she was in a really bad place and that she was going through something awful.¹⁵ Person 17 told Mr Roberts-Smith that she was coming to Brisbane on 6 March 2018, and let him believe that she was coming to have a termination.¹⁶
13. Despite her obvious distress at having to give evidence about the miscarriage, Person 17 was cross-examined extensively about this, and particularly why she had not told Mr Roberts-Smith about the miscarriage in the few days between when the miscarriage started and when she saw Mr Roberts-Smith on 6 March 2018. Person 17 said that she was in a terrible state of mind over that period.¹⁷ There can be no suggestion that a woman suffering the physical and emotional trauma of a miscarriage has any obligation to prioritise communicating that fact to a man who she is fighting with, who is not returning her calls, and who wants the pregnancy terminated in any event. The suggestion that Person 17 engaged in a “calculated campaign of deceit”¹⁸ in that period, and that her message on 4 March 2018 where she said she was dealing with it by herself (which she was) was a “monstrously deceitful message”¹⁹ are baseless. There was absolutely nothing dishonest or improper in Person 17 prioritising her own welfare during this difficult period over Mr Roberts-Smith’s right to know that the baby that he didn’t want anyway had been lost.
14. Person 17 travelled to Brisbane on 6 March 2018. It had previously been arranged that Person 17 would go to the Greenslopes Day Surgery to have the termination procedure, and then Mr Roberts-Smith would pick her up from the nearby Greenslopes Hospital. As she no longer required the termination procedure, she went straight to the Greenslopes Hospital and contacted Mr Roberts-Smith to come and pick her up. He said that he had been caught up in a meeting and to instead get a taxi to the hotel.²⁰
15. Unbeknownst to Person 17, Mr Roberts-Smith had arranged for a private investigator, John McLeod, to surveil Person 17. Mr Roberts-Smith dishonestly told Mr McLeod that it was a surveillance job for an executive at Channel Seven.²¹ Mr Roberts-Smith provided Mr McLeod with a photograph of Person 17 and told Mr McLeod that he wanted video

¹² T.4032/1-12 (P17).

¹³ T.4140/8-15; 4153/26-4153/32 (P17).

¹⁴ Ex A-150, pp100-

¹⁵ T.4032/22-27; 36-38; 4159/42-43 (P17).

¹⁶ T.4032/27-34 (P17).

¹⁷ T.4154/24-37 (P17).

¹⁸ T.4155/9 (P17).

¹⁹ T.4157/25-47 (P17).

²⁰ T.4032/38-19 (P17).

²¹ T.2407/13-14 (JM)

evidence of her entering and leaving the Greenslopes Day Surgery.²² Mr Roberts-Smith said he did this because of his belief that Person 17 was not pregnant, and he wanted to know the truth. The inference that more naturally flows from this conduct is that he in fact knew that Person 17 was pregnant, and he wanted to ensure Person 17 went through with the termination in circumstances where she had been having second thoughts.

16. Mr McLeod first went to the airport to see when Person 17 arrived, however he did not see her arrive. He received a message from Mr Roberts-Smith saying she was at the clinic, so he travelled to the Greenslopes Day Surgery and positioned himself to observe the only entry to the clinic.²³ After several hours Mr McLeod received a message from Mr Roberts-Smith saying that Person 17 was about to come out.²⁴ He presumably knew this from Person 17 contacting him requesting for him to pick her up. Mr McLeod thought that Person 17 may have been at the nearby Greenslopes Hospital, so he made a decision to go there. As he arrived at the hospital he observed Person 17 and took a video of her.²⁵ That video is Ex R-123 (a confidential exhibit).²⁶ Mr McLeod sent that footage to Mr Roberts-Smith.²⁷ Mr Roberts-Smith paid Mr McLeod \$1,500 for conducting this surveillance on Person 17.²⁸
17. The Respondents sought a copy of this video by Notice to Produce dated 15 December 2020, and Mr Roberts-Smith responded that he no longer had it in his possession.²⁹ That response was despite the fact that Mr Roberts-Smith's then wife had asked Danielle Scott to obtain a copy of it in October 2018, which she did,³⁰ and there was a copy of it on one of the USBs in Mr Roberts-Smith's possession.³¹ Mr Roberts-Smith agreed that he intended to rely upon that video to show that Person 17 had not had an abortion that day.³² No doubt once he received Person 17's outline which stated that she had miscarried the baby,³³ he was conscious that rather than helping him, the video would reflect poorly on him as evidencing that he had Person 17 under surveillance, and he took steps to conceal the video.
18. Person 17 caught a taxi from the Greenslopes Hospital to the Milton Hotel. Person 17 said that not long after Mr Roberts-Smith arrived he suggested to Person 17 that they go and have coffee downstairs, but Person 17 said that she would prefer to go back and talk in the room. When they got inside the room Mr Roberts-Smith said to Person 17 "What flight were you on this morning? You weren't – you didn't get the morning flight, did you?" She replied "No. I got a mid-morning flight." Mr Roberts-Smith told Person 17 that he knew she was not on the early morning flight because he had access to the Virgin flight manifest and that she was on a different flight. Mr Roberts-Smith asked Person 17 "What's going on? You know, you haven't had a termination this morning, have you? If you're not even – if you're not even

²² T.265/31-47; 787/42-44 (BRS); 2407/1-24; 2408/7-10 (JM).

²³ T.2407/32-13 (JM).

²⁴ T.2408/18-19 (JM).

²⁵ T.2408/20-41 (JM).

²⁶ T.2409/16-32 (JM).

²⁷ T.266/5-9 (BRS); T.2408/45 (JM).

²⁸ T.2410/2-6 (JM); T.1924/1-10 (ER).

²⁹ T.822/26-29; Ex R-74.

³⁰ T.2409/36-46 (JM); Ex A-265.

³¹ T.822/31-42 (BRS).

³² T.822/44-45 (BRS).

³³ T.823/22-24 (BRS).

pregnant, you know, you might as well just leave now.” He then he got out a pregnancy test that he had brought with him and made Person 17 do it in front of him, however the test did not work (in that the control line didn’t show up and it didn’t render a result). Mr Roberts-Smith then made Person 17 come with him downstairs to a nearby small shopping centre. Person 17 was afraid, so she waited down at the entrance of an underpass to get to the shopping centre. Mr Roberts-Smith bought another pregnancy test and brought it back to the room and made Person 17 do it, and the result was positive.³⁴ Mr Roberts-Smith denies this and said that Person 17 has never taken a pregnancy test in front of him.³⁵ This denial is contradicted by Emma Roberts’ evidence that she later asked Mr Roberts-Smith whether he knew that Person 17 was pregnant, and he said yes, because he was with Person 17 when she bought the pregnancy test, although he also told Ms Roberts that he was not with her when she did the actual test.³⁶ It is highly unlikely that Mr Roberts-Smith would have informed his wife that he was sure that Person 17 was pregnant unless he had obtained that certainty from observing a test being performed. This evidence (which was not challenged) is strongly supportive of Person 17’s evidence.

19. Mr Roberts-Smith gave quite a different account of the interaction at the hotel. First, contrary to Person 17’s evidence, he contends that he arrived before Person 17 and that when he observed her get out of the taxi at the hotel she was wearing large, dark glasses, with a bandage on her arm (like a bandage from a canula), and was looking quite frail.³⁷ Secondly, on his account of the conversation in the hotel room he was compassionate from the outset, asked her how she was feeling, whether he could get her anything, whether she felt alright, and about the procedure.³⁸ In circumstances where Mr Roberts-Smith said that from seeing the video it was evident to him that Person 17 had lied and did not have the procedure that day, it is implausible that he would have responded with compassion to Person 17 when she arrived.³⁹
20. It is common ground that during the conversation in the hotel room Mr Roberts-Smith showed Person 17 the video of Person 17 getting into a taxi at Greenslopes Hospital, which is Ex R-123. Mr Roberts-Smith’s characterisation of his attitude in the hotel room as compassionate is, in our submission, irreconcilable with him showing Person 17 a video of her being covertly recorded earlier that day. Person 17 said that he also showed her video footage of the Greenslopes Day Surgery which showed different women coming in and out.⁴⁰ Mr Roberts-Smith’s characterisation of his attitude in the hotel room as compassionate is, in our submission, irreconcilable with him showing Person 17 a video of her being covertly recorded earlier that day. This second footage has not been produced, although in light of Mr McLeod’s evidence of the surveillance he conducted, it is likely to exist. Mr Roberts-Smith asked Person 17 what had happened, and whether she had the procedure done in Townsville. Person 17 said that she knew all that Mr Roberts-Smith cared about was that

³⁴ T.4033/21-37; 4035/1-4 (P17).

³⁵ T.789/29-30 (BRS).

³⁶ T.1929/10-13 (ER).

³⁷ T.266/39-43 (BRS).

³⁸ T.267/1-6 (BRS).

³⁹ T.266/11-14; 25-31; 788/26-38 (BRS).

⁴⁰ T.267/11 (BRS); T.4034/14-44 (P17).

she was not pregnant anymore, so she said yes. After Mr Roberts-Smith said to Person 17 that she “better be able to show me proof of that”, and that he could get the CCTV from Townsville, she told him that she had miscarried the baby.⁴¹ Mr Roberts-Smith’s account of this part of the conversation is similar, although he says that he disputed the Townsville suggestion by saying “Townsville doesn’t have a clinic”, even though he didn’t know whether that was correct or not.⁴²

21. It is clear that neither person was completely honest with the other in this conversation. Bearing in mind that Person 17 had just suffered a miscarriage, had suffered the indignity of being made to do a pregnancy test in front of Mr Roberts-Smith, had been told that Mr Roberts-Smith had been tracking her movements and had been and shown evidence that Mr Roberts-Smith had her under surveillance (all clear indications to her that Mr Roberts-Smith did not trust her), it is understandable that she may have been guarded and less than frank with him. There is no explanation however for Mr Roberts-Smith’s lies about having access to the Virgin flight manifest and the termination clinic in Townsville; this dishonesty could only have been designed to intimidate Person 17.
22. At dinner that night Mr Roberts-Smith said to Person 17 said that he was “a good friend to have” and “not someone you want to get on the wrong side of”. Person 17 raised that being followed, getting CCTV and thinks like that was not something she was used to. Mr Roberts-Smith said that it was usual in his world, and that anyone could find out what they want about her. He said to Person 17 “I could get into your bank accounts if I wanted to”, and then told her a spurious story about an Army friend of his taking out a false AVO against his ex-wife.⁴³
23. Again, Mr Roberts-Smith has given a different version of the conversation at dinner, stating that the discussion was about the best way to end the relationship.⁴⁴ Mr Roberts-Smith’s version of the conversation, and his expressed concern that he was being manipulated, is difficult to reconcile with the fact that the relationship did continue, and only weeks later he invited Person 17 to travel with him to Canberra.⁴⁵ This is not the conduct of a person who feels they are being manipulated. Further, part of his response when this conversation was put to him in cross-examination was that he has never threatened Person 17, ever.⁴⁶ That evidence is demonstrably false in light of the text message he sent to Person 17 on 2 March 2018 stating “Don’t fucking abuse me again because it won’t end well!”⁴⁷ That message is unequivocally a threat. Mr Roberts-Smith’s evidence that this was a reference to him “hanging up and ending the conversation”⁴⁸ was a dishonest attempt to avoid having been caught out in a lie.
24. At dinner that night Mr Roberts-Smith also asked Person 17 when she last checked her Telegram messages. When she got back to the room that night and checked her Telegram messages, the original chat thread between Mr Roberts-Smith and Person 17 had been

⁴¹ T.4033/39-4034/2 (P17).

⁴² T.267/10-15 (BRS).

⁴³ T.4034/8-11; 4035/4-15 (P17).

⁴⁴ T.267/17-41 (BRS).

⁴⁵ T.793/38-45 (BRS).

⁴⁶ T.790/29-30; 791/32 (BRS).

⁴⁷ Ex R-72.

⁴⁸ T.814/18-24 (BRS).

deleted. Person 17 asked Mr Roberts-Smith how he did this, and what he was doing. He responded that she shouldn't be keeping them all, and "should get rid of that stuff". The next day Person 17 made a contemporaneous note about this in the Notes App on her phone, setting out what she wanted to say to Mr Roberts-Smith when she spoke to him. A copy of that note, and the index page from the App showing the date the note was last edited, is Ex R-148.⁴⁹ In light of the contents of that contemporaneous note, there can be no doubt that Mr Roberts-Smith somehow deleted the Telegram messages from the original chat thread, and that Person 17 felt intimidated and scared by Mr Robert-Smith doing so. What Mr Roberts-Smith was not aware of, was that Person 17 had saved the majority of her messages with Mr Roberts-Smith, and they remained available in a saved messages thread and were ultimately available to be produced by Person 17.⁵⁰

25. There was a degree of confusion in the cross-examination as to what messages were produced by Person 17 and have become Ex A-150 (a confidential exhibit). Person 17 said these were the messages that were saved on her phone in the Telegram app. That is, she was drawing a distinction between the original chat thread, and the saved messages thread.⁵¹ That what was produced is the thread of messages that had been saved is confirmed by the time stamps running down the right hand side of the page, which differs from the time of message (for example, on page 1 it can be seen that the first six messages all bear the marking "04:05" on the right hand side, even though the messages all bear different times). Person 17 said that the time on the right hand side reflects the time the message was saved.⁵² The way the messages display on Person 17's phone can be seen in Ex R-276. Those messages clearly display a heading "Saved Messages", and an option to go back to the "Chats".⁵³ In the circumstances, that the saved messages were still in existence to be produced does not say anything one way or the other about whether Mr Roberts-Smith deleted the messages as Person 17 said he did.

The assault

26. In late March 2018 Person 17 travelled with Mr Roberts-Smith to Canberra, where he was travelling to speak at some functions and for meetings.⁵⁴ They stayed at the Hotel Realm.⁵⁵ On Wednesday 28 March 2018 the pair spent the day together, first for an interview at the Australian War Memorial, followed by lunch at Pialligo Estate Winery. Lunch went from about 12:30pm to about 3pm and during that time Person 17 drank a cocktail, Mr Roberts-Smith drank about a bottle of wine, and they shared a second bottle of wine.⁵⁶ After lunch they returned to the hotel, and each had another drink in the courtyard of the hotel.⁵⁷
27. That night, Mr Roberts-Smith was a joint Master of Ceremonies at the Prime Minister's

⁴⁹ T.4035/15-4036/12; 4077/14-15 (P17). It is noted that Mr Roberts-Smith's solicitors inspected the original of this Note on Person 17's phone to check the metadata and at the conclusion of that process it was confirmed that the time stamp on the note was 7 March 2018, 6:13pm (see T.4148/46-4150/14).

⁵⁰ T.4036/41-45; 4075/41-4076/9 (P17).

⁵¹ T.4075/41-4076/9; 4200/21-32; 47 (P17).

⁵² T.4078/1 (P17).

⁵³ T.4220/30-4221/4 (P17).

⁵⁴ T.267/43-268/2 (BRS); T.4037/33-42 (P17).

⁵⁵ T.794/10-11 (BRS).

⁵⁶ T.268/7-13 (BRS); T.4037/44-25 (P17).

⁵⁷ T.4038/27-29 (P17).

Veterans' Employment Awards, which was held in the Great Hall at Parliament House. It was decided that Person 17 would accompany Mr Roberts-Smith to the awards ceremony, and steps were taken to obtain a ticket for her.⁵⁸

28. Mr Roberts-Smith contends that Person 17 "had a couple more drinks" in the room, and also that she took a Valium.⁵⁹ Person 17 said that she did not take Valium when she was in Canberra.⁶⁰ She had a prescription for it, but was not taking it.⁶¹ Person 17's evidence is consistent with Ex A-26, which appears to show that no tablets have been removed from the sleeve.
29. At the dinner Person 17 sat between Veterans' Affairs Minister Darren Chester MP, and Vice Admiral Ray Griggs.⁶² Person 17 continued drinking at the function, and was talking to the men either side of her. Person 17 recalls Mr Roberts-Smith looking at her from the stage and subtly shaking his head like "What are you doing?"⁶³
30. By the end of the night, Person 17 was quite drunk.⁶⁴ Mr Roberts-Smith gestured angrily at Person 17 that they needed to leave.⁶⁵ Person 17 did not come out straight away, and left Mr Roberts-Smith waiting for about 15 to 20 minutes for her to come out, requiring him to go back in twice to tell her to come. Mr Roberts-Smith was annoyed and frustrated at having to wait for Person 17.⁶⁶ Person 17 started to leave the venue at about 9:55pm.⁶⁷ As Person 17 was leaving the venue she was accompanied by Terry Nicholls, who she had approached to ask for assistance in locating Mr Roberts-Smith.⁶⁸ Person 17 can be seen exiting the building and walking along the veranda in the CCTV footage in Ex A-158. She can be seen to be walking unaided and talking to Mr Nicholls.
31. As Person 17 went down the stairs to the basement carpark she fell. Person 17 described that the stairs comprised of two sets of stairs of about eight steps each, that turned back on themselves with a landing in between. She said that as she was walking down the first set, she turned to look at the man behind her and fell down two to three steps to the landing. Mr Nicholls said that Person 17 fell down the last third of the first set of stairs, which he estimated at about six steps. Nothing turns on the difference. Person 17 hit the left side of her forehead when she fell and also hit her left thigh on the stair as she went down.⁶⁹ Mr Nicholls described that there was a large haematoma on the left side of Person 17's forehead above her eye left eyebrow.⁷⁰ Person 17 was able to speak, and said to Mr Nicholls, "I'm ok, I just need to see Ben."⁷¹
32. At about this time two AFP officers came to assist, and Mr Nicholls let them know that he

⁵⁸ T.268/18-20 (BRS); T.4038/29-35 (P17).

⁵⁹ T.268/17-18; 270/27 (BRS).

⁶⁰ T.4044/12 (P17).

⁶¹ T.4182/24-31 (P17).

⁶² T.4039/19-25 (P17).

⁶³ T.4039/27-33 (P17).

⁶⁴ T.4039/35-37 (P17).

⁶⁵ T.4039/39-44 (P17).

⁶⁶ T.268/39-269/13; 795/24-46 (BRS).

⁶⁷ See the time stamp on the CCTV videos which are Ex A-158.

⁶⁸ T.4039/44-4040/2 (P17); T.5841/39-5842/7 (TN).

⁶⁹ T.4040/4-13; 4068/18-21 (P17); T.5842/36-45 (TN).

⁷⁰ T.5843/18-21; 5843/44-5844/13 (TN).

⁷¹ T.5843/26-20 (TN).

was concerned about Person 17 and asked if an ambulance could be arranged. Mr Nicholls then went to find Mr Roberts-Smith and informed him about Person 17's fall, and that he was concerned for her safety. Mr Roberts-Smith thanked him and walked off towards the stairs.⁷² When Mr Roberts-Smith arrived one of the AFO officers, Jack Grosskreutz, asked Mr Roberts-Smith if he would like Person 17 to receive medical treatment or if he was happy for her to be placed in his care. Mr Roberts-Smith responded that he was happy to take care of her.⁷³ Mr Roberts-Smith then accompanied Person 17 to the car.

33. Mr Roberts-Smith said that Person 17 was extremely intoxicated, "she wasn't really coherent. She couldn't string words together. The only thing that she would say to me after that were simple one-word answers and/or that her head hurt".⁷⁴ Mr Roberts-Smith's evidence is inconsistent with what can be seen on the CCTV footage, where Person 17 appears to be talking⁷⁵, and also the observations of Officer Grosskreutz, who recalls Person 17 answering his questions, apologising for falling down the stairs, and stating that she was embarrassed for causing a scene.⁷⁶ Mr Roberts-Smith's lie was plainly designed to portray Person 17 as more intoxicated than she in fact was. This is discussed more below.
34. In the car on the way to the hotel there was discussion about whether or not Person 17 should be taken to the hospital or a doctor. The driver offered to take them to a hospital emergency centre, but Mr Roberts-Smith said no, that he would look after Person 17.⁷⁷ Mr Roberts-Smith contends that it was he who asked the driver if there was a hospital nearby, was told there was one "a reasonable distance away", and that he asked Person 17 if she wanted to go to a hospital, and she said no. He said that she was lying down and "sort of, in and out of consciousness".⁷⁸ If Person 17 was as incapacitated as Mr Roberts-Smith contends, such that he considered taking her to a hospital and she was losing consciousness, it is difficult to accept that he did not take her to hospital simply because she said no, or because the hospital was a "reasonable distance" away. According to Google maps, Canberra Hospital is 8.5km, or about a 12 minute drive, from Parliament House⁷⁹, which is hardly a long distance to travel to get a person the medical attention they may need. Even if Mr Roberts-Smith did consider her situation to be "more intoxication than the bump on the head",⁸⁰ a head injury was on any view a complicating factor and the prudent course if she was in fact in the condition he says she was, would be to have her medically examined. The more compelling inference is that, at this point in time at least, Person 17 was not as incapacitated as Mr Roberts-Smith contends, she was not losing consciousness, and that it was Mr Roberts-Smith who declined to go to the hospital. Mr Roberts-Smith's motive for exaggerating Person 17's level of intoxication is discussed further below.

⁷² T.269/29-33 (BRS); T.5843/32-42; 5844/24-5845/12 (TN).

⁷³ Ex A-1, tab 64.

⁷⁴ T.269/42-270/3 (BRS).

⁷⁵ T.4185/3-4 (P17).

⁷⁶ Ex A-1, tab 64; T.4070/44-4071/1 (P17).

⁷⁷ T.4040/23-4041/ 9 (P17).

⁷⁸ T.270/13-22 (BRS).

⁷⁹ It has been held that a map falls within the category of information that is capable of verification by reference to a document the authority of which cannot reasonably be questioned, such that the Court can take judicial notice of it pursuant to s144 of the *Evidence Act*: see *Wentworth District Capital Ltd v Commissioner of Taxation* [2010] FCA 862 at [2], per Perram J.

⁸⁰ T.270/24-29 (BRS).

35. Person 17 described that when they arrived back to the room, Mr Roberts-Smith got really angry with her. She said he was sort of up in her face, just inside the doorway, and he was shaking her by the shoulders, and he said, “Fuck [Person 17], what the fuck have you done? You were all over the other men at dinner. They’re all going to know we’re having an affair. I should have just left you there. You made a big scene as we were leaving. I let you into my world and I trusted you, and you just treated it like a high school formal.”⁸¹ Person 17’s evidence about what Mr Roberts-Smith said to her has the objective ring of truth about it. It is likely to have reflected what Mr Roberts-Smith was thinking after the events of the night. Mr Roberts-Smith agreed that he was embarrassed by Person 17’s behaviour at the dinner, and that he thought her behaviour was disrespectful and inappropriate. He said he was annoyed and frustrated that a person who he brought to the dinner had behaved in a disrespectful way.⁸²
36. Person 17 said that Mr Roberts-Smith was pacing around the lounge area. She was apologising to Mr Roberts-Smith and trying to encourage him to go to bed. She said that she was holding his hands and moving closer to the bedroom area, saying to him “My head’s hurting. Can we please – like, let’s just go to bed. Just forget about it”. When she said her head was hurting Mr Roberts-Smith said words to the effect “It’s going to fucking hurt more” or “I’ll show you hurt” and then punched her with his right fist on the left side of her face next to her eye and temple.⁸³ Person 17 said his punch impacted her in the left temple and eye. It was in the same area as where Person 17 had earlier hit her head, but not in the same spot.⁸⁴ Person 17 fell back onto an ottoman at the end of the bed. She ended up lying on the bed and lay still. She was still clothed. She heard Mr Roberts-Smith go into the bathroom, and then she doesn’t remember anything after that.⁸⁵
37. Mr Roberts-Smith denies that he assaulted Person 17.⁸⁶ He said that when they arrived back at the hotel Person 17 was unsteady on her feet and he had to take off her high heel shoes and escort her to the room. He said that he let her into the room and put her down on the bed, and at that point she had “completely passed out” and was unconscious. Mr Roberts-Smith attempted to back track from his evidence that she was unconscious in cross-examination, presumably appreciating that the evidence may be significant.⁸⁷ He said that he undressed her and put her into bed. He called room service to bring up a bucket of ice and put the ice on the bump on her head.⁸⁸ He said that he stayed up all night to “monitor her vital signs”, because it was an “unknown” and he was concerned about her.⁸⁹ In circumstances where he was able to do all of this apparently without her waking, his earlier evidence, that she was unconscious, is more likely.
38. Irrespective of her level of intoxication, the fact that Person 17 was now unconscious was a serious deterioration from her state at Parliament House when Mr Roberts-Smith her

⁸¹ T.4041/14-17; 4042/1-7 (P17).

⁸² T.797/22-28; 798/4-21 (BRS).

⁸³ T.4191/27-36 (P17).

⁸⁴ T.4068/26-35 (P17).

⁸⁵ T.4042/8-41 (P17).

⁸⁶ T.275/17-18; 29-35 (BRS).

⁸⁷ T.799/30-38 (BRS).

⁸⁸ T.270/31-45 (BRS).

⁸⁹ T.271/4-6; 313/4-13; 800/4-16; 31-34 (BRS).

declined medical attention. It must have occurred to Mr Roberts-Smith that Person 17 had potentially suffered a serious head injury when she fell down the stairs.⁹⁰ Mr Roberts-Smith's evidence that he "monitored her vital signs" is itself an indication that he appreciated the potential seriousness of her condition at this time. The only rational explanation for why Mr Roberts-Smith did not seek medical attention for Person 17 at this stage, after she fell unconscious, is because he knew that between the time that she fell down the stairs and immediately before she passed out, he had punched her in the head.⁹¹ No doubt Mr Roberts-Smith feared that if he called an ambulance Person 17 might report that she had been assaulted.⁹²

39. The tension in Mr Roberts-Smith's evidence about Person 17 being unconscious, and him not seeking medical treatment for her, explains why Mr Roberts-Smith has lied about Person 17 having taken Valium, and about her level of intoxication/incapacity when leaving Parliament House. He is seeking to falsely bolster his asserted belief that she passed out due to mainly due to intoxication.⁹³ For the reasons set out above, Mr Roberts-Smith's evidence about Person 17 having taken Valium, and her level of intoxication should not be accepted.
40. Mr Roberts-Smith said that when Person 17 was unconscious he went through her handbag to take a photo of her Valium because he thought that "may be relevant if emergency services turned up, or if I did need to call an ambulance I would need to identify the drugs she had taken". He says that he then flicked through a notebook looking for a schedule of drugs, and came across handwritten notes that pertained to him, and took a photo of those notes. The notebook was in fact Person 17's private diary, and the notes were deeply personal.⁹⁴
41. Mr Roberts-Smith also took photographs of Person 17 in bed with an icepack on her head, copies of which are Ex A-25. In addition to these photographs, he took photographs of Person 17 naked in the bed with no sheet covering. He showed these photographs to Person 17 the next morning before they left the hotel. He said to her "Do I need to keep these photos?"⁹⁵ The more plausible explanation for Mr Roberts-Smith's behaviour in rifling through Person 17's handbag and taking photos of its contents, and taking photos of Person 17 naked in bed is that he wanted to obtain material he could use to hold over Person 17 in the event she threatened to disclose the assault (as he did the following morning and on 5 April 2018 which is discussed below), or to corroborate his lie about her level of intoxication and taking Valium.⁹⁶
42. A further troubling aspect of Mr Roberts-Smith's conduct in relation to photographs is what he did, and failed to do, with them after. Specifically:
 - (a) On 17 August 2018, that is two days after he commenced these proceedings,

⁹⁰ T.800/8-9 (BRS).

⁹¹ T.800/36-42 (BRS).

⁹² T.800/44-801/5 (BRS).

⁹³ T.801/7-10 (BRS).

⁹⁴ T.271/4-15; 273/22-28; 274/4-9; 801/12-15 (BRS); Ex A-25 (which is a confidential exhibit); Ex A-26.

⁹⁵ T.T.4043/18-45 (P17).

⁹⁶ T.802-804 (BRS).

Mr Roberts-Smith emailed Ms Roberts, his then wife, amongst other things, the photograph of the Valium packet, and the photos of Person 17's private diary notes.⁹⁷ Mr Roberts-Smith contends that his wife somehow accessed his email and sent this material to herself.⁹⁸ Ms Roberts confirmed that she has never had access to, or accessed, Mr Roberts-Smith's email with the domain name "@me.com" (the one used to send those emails), and she did not know the password to that account.⁹⁹ In any event, irrespective of who sent the email, it confirms that as at that date, the files attached to those emails were documents in Mr Roberts-Smith's possession.¹⁰⁰

- (b) In his outline of evidence in reply, Mr Roberts-Smith referred to having taken a photograph of Person 17's medication, but did not produce a copy of the photograph.¹⁰¹
- (c) On 15 December 2020 the Respondents issued a Notice to Produce seeking a copy of all photographs that Mr Roberts-Smith took in the hotel room in Canberra on 28 March 2018. Mr Roberts-Smith failed to produce the photograph, and instead through his solicitors falsely contended that the original images had been deleted when his relationship with Person 17 ended in about April 2018. When pressed about production of that document in March 2021, he repeated that response through his solicitors.¹⁰²
- (d) Ultimately the document was obtained by the Respondents independently of Mr Roberts-Smith.¹⁰³

43. Mr Roberts-Smith's outline of evidence referred to the medication as "5 Valpam"¹⁰⁴. It can be seen from Ex R-75 that "Valpam" is the generic name of Person 17's medication and 5 is the dosage which appears on the package after the registered trademark symbol. It is easy to see how a person reading the name of the medication off the package might read the name as "5 Valpam". It is less easy to understand how someone could come up with that incorrect name from memory or by Googling diazepam. The overwhelming inference is that Mr Roberts-Smith had the photograph of Person 17's medication available to him when he prepared his outline of evidence, but he deliberately took steps to conceal it because he was conscious of the fact that the photo shows that no tablets were removed from the blister pack and that would disprove his evidence that Person 17 took Valium, and affect his ability to contend she was as intoxicated as he claimed.¹⁰⁵ Mr Roberts-Smith's conduct in concealing this evidence, and in lying about Person 17 taking Valium to explain why she passed out is evidence that is indicative of a consciousness of guilt.

44. Person 17 said that she woke up in the night and she was on the bed closest to the bathroom, and was naked. She got up to go to the bathroom, and Mr Roberts-Smith followed

⁹⁷ Ex A-256 (see also Ex R-75); T.819/14-29 (BRS).

⁹⁸ T.819/31-41 (BRS).

⁹⁹ T.2083/31-39 (ER).

¹⁰⁰ T.819/43-820/3 (BRS).

¹⁰¹ T.817/36-43 (BRS).

¹⁰² Ex R-74; T.818/1-47 (BRS).

¹⁰³ T.819/1-12 (BRS).

¹⁰⁴ T.817/45-47; 820/22-24 (BRS).

¹⁰⁵ T.820/22-821/28 (BRS).

her. She said to him “My head hurts. I want to go to the hospital.” He replied “No, you will be fine. I will look after you. It’s okay”. That Mr Roberts-Smith did not take Person 17 to a hospital at this point when she asked to go is explicable by the fact that he feared her reporting the assault.¹⁰⁶ If her injury was sustained only by the fall, and she was asking again to go to the hospital, after a period of sobering up, there is no other rational reason for him not to have acceded to her request. Person 17 said instead they then went back to bed. Later that night they woke up and had intercourse and Mr Roberts-Smith was telling Person 17 it was going to be ok, and she was again apologising to him and saying she loved him.¹⁰⁷

The following day

45. The next morning Person 17 observed that her eye was all black and swollen, and she had a lump on her head.¹⁰⁸ A photograph of her eye, taken later that day is Ex R-149 (a confidential exhibit).¹⁰⁹ It is impossible to say whether Person 17’s black eye was caused by the injury she sustained falling down the stairs, the punch, or a combination of the two. Given Person 17 had earlier fallen down the stairs and hit her head, the fact that Person 17 woke with a black eye does not say anything one way or the other about whether or not Mr Roberts-Smith punched her. That she had fallen down the stairs is significant however, as it provided Mr Roberts-Smith with an opportunity to punch her, whilst at the same time using the fact that she had fallen down the stairs as a cover for any injury the punch might have caused.¹¹⁰
46. The next day Mr Roberts-Smith and Person 17 had a discussion in Mr Roberts-Smith’s car at Brisbane airport. Mr Roberts-Smith said to Person 17 “What happens for us now is going to depend on what you say to your husband when you get home. What are you going to tell him about what happened last night? Do you remember what happened in the hotel room?” Person 17 responded that she did not, and Mr Roberts-Smith said “Good girl, you hurt yourself when you fell over”. The reason Person 17 said she did not remember what had happened was because she was afraid of what Mr Roberts-Smith would do if she said otherwise. Mr Roberts-Smith then said to her “You need to tell your husband that you were drinking alone in your hotel room in Brisbane and you took some of your medication to help you sleep; that when you got up later in the night to go and get food, you fell down some stairs and that’s how you hurt yourself and got the injury to your face. You need to tell him that I wasn’t with you.”¹¹¹
47. After Person 17 left the car she sent the photo of her black eye to her husband. He responded “Did he do that to you?” Person 17 told her husband the story that Mr Roberts-Smith had told her to in the conversation in the car, namely that she had been alone in Brisbane sleeping, she had taken a sleeping tablet and that she had fallen down the stairs

¹⁰⁶ T.800/41-801/5 (BRS).

¹⁰⁷ T.4042/43-4043/7 (P17).

¹⁰⁸ T.4034/11-12 (P17).

¹⁰⁹ T.4045/12-13 (P17).

¹¹⁰ The contrary proposition put to Person 17 in cross-examination (T.4189/21-24) is illogical. No one would rationally make up an allegation in circumstances where there is another event that could explain the injury.

¹¹¹ T.4044/31-47 (P17).

when she went to get food.¹¹²

48. In examination in chief Mr Roberts-Smith said that the conversation about what Person 17 would tell her husband took place in Canberra while they were waiting for the aircraft, although in cross-examination he did not dispute that it took place in his car at Brisbane (it is unlikely that anything will turn on when the conversation took place). He contends that he said to Person 17 “He’s going to think that I’ve struck you. You’re going to have to tell him that you’ve fallen down the stairs and we were together”. Mr Roberts-Smith says that it was Person 17 who did not want her husband to know that she was with him, because she had already lied to him and told him she was not with Mr Roberts-Smith.¹¹³ This evidence, particularly in the context of the messages that followed (discussed below), is strange. It is highly unlikely that immediately after saying that Person 17’s husband will think Mr Roberts-Smith hit her, he would have actively encouraged her to tell her husband she was with him. The more likely scenario is that Mr Roberts-Smith would have been encouraging Person 17 to say she was not with him, as Person 17 contends. Further, Mr Roberts-Smith’s evidence that it was Person 17 who did not want her husband to know she was with Mr Roberts-Smith is at odds with her message stating that she had told her husband she had been with Mr Roberts-Smith earlier in the week. It is quite apparent that it was not Person 17 who had sensitivity around her husband knowing she was still seeing Mr Roberts-Smith.
49. Later that day Person 17 and Mr Roberts-Smith exchanged messages on Telegram¹¹⁴, which are revealing, for at least the following reasons:
- (a) First, the message exchange commences with a message from Mr Roberts-Smith saying that he hopes Person 17’s head feels ok. That message is, in itself, neutral.
 - (b) Secondly, the message exchange then proceeds to a discussion of what Person 17 will tell her husband to hide the true circumstances of the cause of the injury. In the exchange Mr Roberts-Smith asks “Does he think I did it?” and “Did you say I was there at all?”. It is clear from the exchange that Mr Roberts-Smith was concerned for Person 17’s husband to not know that she was with him. This is contrary to his evidence of the earlier conversation, discussed above. This lie is evidence which is indicative of a consciousness of guilt. If the injury had been sustained unequivocally by Person 17 falling down the stairs at Parliament House, there is no reason why Mr Roberts-Smith would need to hide his presence or involvement. Person 17’s husband was aware of the affair, and on Mr Roberts-Smith’s evidence had indicated to Mr Roberts-Smith that he thought Person 17 would be better with him.¹¹⁵ Why would Mr Roberts-Smith be concerned about Person 17’s husband knowing he was with her and (on his version of events) had cared for her after the fall?
 - (c) Thirdly, and most importantly, the key exchange is Person 17’s message “I’ve some other bruises - including a massive one on my thigh on the same side of my body - which will hopefully make **the falling story** more believable”, to which Mr Roberts-

¹¹² T.4045/8-10; 4047/8-13 (P17).

¹¹³ T.276/11-17; 276/46-277/10; 805/13-15; 46-806/4 (BRS).

¹¹⁴ Ex A-28.

¹¹⁵ T.262/44-263/2; 807/34-40 (BRS).

Smith responds “Ok, well hopefully he believes you and is sympathetic...” If Mr Roberts-Smith’s case was true (that is that the only potential cause of the black eye was the fall down the stairs at Parliament House), and what he had told Person 17 to tell her husband was that she had fallen down the stairs and that they were together, there would no need for it to be described as a “falling story”, and Mr Roberts-Smith would likely have responded differently to the way he did. Further, Person 17’s reference to injuries to her thigh (which were caused by the fall) and the injury to her eye which she links to the “falling story” is evidence that contemporaneously she considered the cause of the black eye to be a different event, namely the assault.

This exchange of messages provides strong and powerful corroboration for Person 17’s evidence that Mr Roberts-Smith assaulted her.

50. Later that afternoon Person 17 went to see a doctor. Her regular doctor was not available so she made an appointment with another doctor at the practice. The doctor asked her “Has someone hit you?” and she replied “No, I fell over when I was drunk”. Person 17 said she did not want to “open up another can of worms, basically” and described a number of close connections between the medical practice and her family.¹¹⁶ A victim of domestic violence hiding the truth about how they sustained an injury is hardly a novel phenomenon. There are many reasons why victims do this. Person 17’s reasons for not disclosing this to the doctor are entirely understandable. It could have resulted in community gossip implicating her husband, or revealing that she was having an affair. The fact that Person 17 did not initially disclose the assault does not provide a basis to disbelieve her.
51. In any event, Person 17 disclosed the assault to her husband only days later (over the Easter long weekend).¹¹⁷ This evidence was not challenged.
52. None of the above is undermined by a text message sent by Person 17 on 31 March 2018, stating “Please don’t punish me. I’m already hurting – physically & mentally. I know it’s my fault & I hate that I can’t change what happened. I really need to know what you’re thinking & where we stand”.¹¹⁸ The significance of this message should not be overstated. It is entirely consistent with the victim of a domestic violence attack accepting blame for the attack as a way to diffuse the situation and appease the aggressor. Person 17 confirmed that at the time she blamed herself for the assault stating “I thought I had got what I deserved for being silly”.¹¹⁹ This construction of the text message is reinforced by Person 17’s desire to know what Mr Roberts-Smith was thinking and where they stood.

The events of 5 and 6 April

53. Mr Roberts-Smith phoned Person 17 on the Tuesday after Easter, being 3 April 2018. He said to Person 17 “We need to end this. It’s just become sort of like toxic and bad – bad for both of us and dangerous for both of us”. Person 17 agreed but said that she wanted to see Mr Roberts-Smith one more time, because she didn’t want things to end the way they did

¹¹⁶ T.4046/30; 4048/24-39 (P17). See also Ex A-271.

¹¹⁷ T.4049/17-24 (P17).

¹¹⁸ Ex A-38.

¹¹⁹ T.4062/21-22 (P17).

after the Canberra trip.¹²⁰ Ultimately they agreed to meet in Brisbane on Thursday 5 April 2018.¹²¹

54. Mr Roberts-Smith and Person 17 met at the Novotel Brisbane Airport on 5 April 2018. They discussed ending the relationship, but also discussed the potential of meeting up again in June to see where they were both at.¹²² At dinner that night Mr Roberts-Smith said to Person 17 “As long as we’re on the same page, you’ve got nothing to worry about, but if you do anything stupid or turn on me, I will burn your house down and it might not be you that get’s hurt, but people that you love and care about.” Mr Roberts-Smith also showed Person 17 the photos of her diary and other contents of her handbag that he took on 28 March 2018.¹²³ That is, Mr Roberts-Smith used the photos of Person 17’s diary for the very purpose the Respondents contend he took them, namely to hold them over Person 17 to ensure she remained silent about the assault. Mr Roberts-Smith agreed that he discussed the notes with Person 17 at this dinner, but denies that he said to Person 17 what she contends.¹²⁴
55. The next morning, Person 17 felt that she had to do something to put an end to the relationship. While Mr Roberts-Smith was in the shower she looked at his driver’s licence and took a note of his address. After some prevarication, she drove to Mr Roberts-Smith’s house on the Sunshine Coast and told Ms Roberts about the affair.¹²⁵
56. During the meeting at the house, before Ms Roberts had arrived, Ms Roberts’ mother asked Person 17 what happened to her face and Person 17 responded that she fell down the stairs when she was drunk. Ms Roberts later asked Person 17 the same question, and Ms Roberts’ mother repeated Person 17’s earlier answer. Person 17 said that she did not tell them about the assault because her purpose was to tell Ms Roberts about the affair, she was scared that if she told them any more than that she would be targeted by Mr Roberts-Smith.¹²⁶
57. Person 17’s fear is understandable in light of the threats Mr Roberts-Smith had made to her previously, and the intimidating conduct he had subjected her to (including having her placed under surveillance) as discussed above. To conclude that Person 17 did not disclose the assault at this time because it didn’t happen (as Mr Roberts-Smith contends) would not reflect the overwhelmingly complex issue of why domestic violence victims do not report abuse.
58. Ms Roberts said that she asked Person 17 why she was not going to be seeing Mr Roberts-Smith anymore, and she kept pointing to her black eye, saying, “because of this”. Ms Roberts asked her what she meant, and Person 17 replied “Because of this, he won’t see me anymore.” When Ms Roberts’ mother asked if Person 17 was saying that Mr Roberts-Smith did that to her, she didn’t answer.¹²⁷ Person 17’s silence in response to

¹²⁰ T.811/21-23 (BRS); T.4049/24-35 (P17).

¹²¹ T.4049/37-41 (P17).

¹²² T.4050/25-29 (P17).

¹²³ T.4050/8-14 (P17).

¹²⁴ T.815/4-7; 13-14; 18-24 (BRS).

¹²⁵ T.4050/29-38 (P17).

¹²⁶ T.1920/15-19 (ER); 4051/33-41; 4052/7-15 (P17).

¹²⁷ T.1921/32-37 (ER).

this question is significant. It is indicative that she did not want to continue the lie Mr Roberts-Smith was imposing upon her, but she was also too scared to disclose the truth about the assault.

59. When Person 17 was at the house she received a message from Mr Roberts-Smith stating “You have been holding this over me since last year...what you have done, this is outright blackmail.” Person 17 responded over a series of messages “No. It most certainly is not blackmail. I’m not asking for or expecting anything from you. Please don’t waste your time with intimidation or payback either. The benefit of seeing what you were capable of a few weeks back & knowing the threats you’ve made to me since...”¹²⁸ Person 17 confirmed that her reference to “seeing what [Mr Roberts-Smith] was “capable of a few weeks back” was a reference to everything that had happened since 6 March 2018, including when Mr Roberts-Smith had her followed in Brisbane, threatened her, did things with her phone, and the assault in Canberra.¹²⁹

Reporting of the assault and contact with Mr McKenzie

60. After having gone to Mr Roberts-Smith’s home to disclose the affair, Person 17 was worried what Mr Roberts-Smith might do, so she decided to take steps to report the assault. On 8 and 20 April 2018 she went to the police station in the town where she lives. She wanted to speak to someone senior, because she was concerned about Mr Roberts-Smith’s connections in the military and police. However, she was unable to speak to anyone senior. She told them some details, without naming Mr Roberts-Smith, but not about the assault. As she wouldn’t name Mr Roberts-Smith, police declined to do anything.¹³⁰ The summary of the visits by Queensland police corroborate Person 17’s fear as to what Mr Roberts-Smith might do after she disclosed the affair, and are consistent with her evidence of the threats Mr Roberts-Smith had made to her previously.¹³¹
61. In the following period, Person 17 said that her husband heard that there was a big news story coming out about Mr Roberts-Smith, which she assumed was about the affair, and she was worried. She tried to contact Mr Roberts-Smith through his PA, and also through the joint Gmail account.¹³² She received missed calls from an unidentified number, and later emails from a person who purported to be “Danielle Kennedy”. Person 17 said that there was “something off about it”, and that she felt it was designed to look as though it was a legal threat. She felt intimidated by the letter, and didn’t know who the person contacting her was.¹³³ Copies of the letters Person 17 received from “Danielle Kennedy” are Ex R-151 and R-152. It is now known that those emails were drafted by Mr Roberts-Smith and provided by him to his then wife’s best friend, Danielle Scott, for her to send them to Person 17.¹³⁴
62. In about May 2018 Person 17 decided to contact Mr McKenzie. She said at this point, because of what her husband had told her about there being a story coming out and strange

¹²⁸ Ex R-70; T.4061/14-21 (P17).

¹²⁹ T.4061/39-46 (P17).

¹³⁰ T.4062/22-40; 4065/32-37 (P17).

¹³¹ Ex R-154.

¹³² Ex A-153; A-283; A-284; A-161; T.4110/1-4113/35; 4117/6-4118/24 (P17).

¹³³ T.4062/42-4064/2; 4064/28-45 (P17).

¹³⁴ Ex R-73; T.282/5; 816/1-39 (BRS).

things that were happening, she was really afraid what she was caught up in, and was paranoid and fearful (as to the “strange things” she identified the Danielle Kennedy emails, the anonymous letters sent to Mr Roberts-Smith’s house and being approached on the beach by someone with compromising photos of her and Mr Roberts-Smith, which is discussed further). Person 17 was aware that Mr McKenzie was writing articles about Mr Roberts-Smith, so she contacted him to see if she could obtain more information about what she was caught up in, so that she could try to protect herself in circumstances where she had not been able to report the assault to the police.¹³⁵

63. Person 17 met with Mr McKenzie in Melbourne and told him about the assault. Mr McKenzie encouraged Person 17 to report it to the police. Mr McKenzie facilitated Person 17 having contact with the Australian Federal Police, and the matter was subsequently referred to ACT Police. Person 17 expressed to police that she did not want to make a formal complaint, but she just wanted to tell someone about it because she was scared. Ultimately Person 17 informed ACT Police that she did not want to proceed with a formal complaint.¹³⁶

Person 17’s credibility

64. Despite a lengthy and robust cross-examination, permeated with stereotypical notions of how women and victims should behave, Mr Roberts-Smith has not established any basis to disbelieve Person 17’s evidence. It is true that she did not immediately tell Mr Roberts-Smith that she had miscarried the baby, but that does not make her deceptive. It is true that she wanted one more night alone in a hotel with Mr Roberts-Smith, but that does not mean that he did not assault her days prior. It is true that she disclosed her affair with Mr Roberts-Smith to his wife, but that does not mean she did that because she was desperate to keep Mr Roberts-Smith for herself or was vindictive and vengeful. It is true that she was upset at the breakdown at the relationship, but that does not mean that she is a woman scorned who will stop at nothing to get revenge against Mr Roberts-Smith or to get him back. These outdated ideas of accepted behaviours and norms do not grapple with the complexity of the situations Person 17 found herself in, nor do they assist the Court to ascertain where the truth lies.
65. The suggestion put to Person 17 that she “would hardly have been suggesting spending a night alone with my client in a hotel room if, in fact, he had hit you five or six days before in another hotel room” is particularly misconceived. As Person 17 eloquently described her situation, she was “simultaneously in love with him and afraid of him”.¹³⁷ The question reflected a stereotypical expectation of how a victim in such a situation should behave, and should be rejected.¹³⁸ So too the suggestion that Person 17 was deceptive in not immediately informing Mr Roberts-Smith that she was miscarrying, as discussed above.
66. It is anticipated that Mr Roberts-Smith will submit that Person 17 has fabricated her evidence about a man approaching her on the beach on the morning of 3 April 2018, showing her photos of Mr Roberts-Smith and her having sex against the windows of the Milton Hotel and

¹³⁵ T.4065/15-24; 4065/37-39 (P17).

¹³⁶ T.4065/41-4067/35; Ex R-153.

¹³⁷ T.4085.38-4086/5; 4202/27-45 (P17).

¹³⁸ See *Nguyen v R* [2022] NSWCCA 126 at [57]-[58]. The same reasoning applies by analogy to victims of domestic violence.

telling her that they would be made public if she didn't tell Mr Roberts-Smith's wife about the affair.¹³⁹ There is no doubt that the event described by Person 17 is very strange, and she herself agreed it is bizarre.¹⁴⁰ But in the context of other events that undoubtedly occurred, for example anonymous letters being sent to Mr Roberts-Smith's house¹⁴¹, Mr Roberts-Smith arranging for surveillance of Person 17¹⁴², Mr Roberts-Smith somehow deleting Person 17's Telegram messages despite not knowing the password to her phone, and emails being sent to Person 17 by someone using a fake identity¹⁴³, it is far from implausible. In cross-examination, much was sought to be made of the fact that Person 17 did not mention the incident to Mr Roberts-Smith in the text messages she sent him that day.¹⁴⁴ The messages exchanged that day reveal a clear tension between the pair. Person 17 said that at that point she was more concerned about trying to have the relationship end in a way that was better than it had been when they left Canberra, and that she didn't trust Mr Roberts-Smith, or what was happening. She thought that Mr Roberts-Smith might have been involved with it.¹⁴⁵ Those are all plausible explanations.

67. A particularly revealing clue as to who is telling the truth in this regard lies in the proposition put to Person 17 in cross-examination, designed to cast doubt on the plausibility of someone having photographs of Mr Roberts-Smith and Person 17 having sex in a hotel room, that she never ever had sex with Mr Roberts-Smith up against a hotel window. That proposition was presumably put on instructions. It was outright contradicted by the message in Ex R-191 that Mr Roberts-Smith himself sent to Person 17 from a hotel room saying "Fuck I wish you were here. We would break these windows." To the extent there was any doubt about it, Person 17 confirmed its meaning in re-examination.¹⁴⁶ Further, the proposition put to Person 17 that she had said something different to the AFP¹⁴⁷ should also be rejected. The officer's draft statement prepared during the meeting on 30 May 2018 is not inconsistent with Person 17's evidence, and her recollection is that she told the AFP officers that the photos were of her and Mr Roberts-Smith up against the windows having sex.¹⁴⁸
68. Person 17 was also cross-examined to the effect that she had not been honest or frank with the police in relation to disclosing the affair to Mr Roberts. It was suggested to Person 17 that the chronology that she prepared in April 2018, that she later gave to the AFP, was dishonest to the extent it contained an entry for 6 April 2018 "Emma finds out" without stating that Person 17 had travelled to the matrimonial home and told Ms Roberts about the affair.¹⁴⁹ There are two difficulties with this proposition. First, Person 17 indicated that the chronology was not prepared for the AFP, it was a document prepared by her in April 2018 to keep a record of what had happened, because she was afraid. Secondly, it is clear that Person 17 did tell the police what she had done in going to the house and disclosing the affair to

¹³⁹ T.4079/8-34; 4081/10-11; 4130/9-4131/39; 4132/11-12 (P17).

¹⁴⁰ T.4108/38-42 (P17).

¹⁴¹ Ex A-34.

¹⁴² Ex R-123.

¹⁴³ Ex R-151 and R-152.

¹⁴⁴ Ex A-150, pp125-126.

¹⁴⁵ T.4080/18-28 (P17).

¹⁴⁶ T.4216/30-4217/2 (P17).

¹⁴⁷ T.4152/36-4153/6 (P17).

¹⁴⁸ Ex A-272, [29]; T.4219/8-19 (P17).

¹⁴⁹ T.4072/3-9; 25; 4073/37-4074/28 (P17); Ex A-274.

Ms Roberts. She did not try to hide this fact at all. See in particular Ex A-275 and [33] of Ex A-272 being the statement drafted by police during their interview with her on 30 May 2018. See also Ex R-154 which demonstrates that Person 17 also told Queensland Police this fact.

69. Further, it was suggested to Person 17 that the reason she told police that she did not want to proceed with her complaint was because they had sought her consent for her medical information to be released.¹⁵⁰ In circumstances where Person 17 had already told police upfront that she had told the doctor that she fell down the stairs, there would be no reason why she would be concerned about the police obtaining her medical records.¹⁵¹
70. Person 17 was also criticised for the fact that her affidavit sworn in support of the application for a suppression order did not include reference to her having fallen down the stairs at Parliament House.¹⁵² That fact would have not been relevant to that application and there would not have been any reason to include it. The affidavit was not purporting to be Person 17's evidence in the proceedings. In any event, there can be no suggestion that Person 17 was seeking to conceal the fact that she fell down the stairs. By the time she swore that affidavit she had told many people that fact and it was well established. She had told her at least her doctor, Ms Roberts and Mr McKenzie. Moreover, before the date of the affidavit it was included in the Group 3 articles¹⁵³, and particularised by the Respondents in the Defence.¹⁵⁴
71. None of these matters, or any other matter, establishes that Person 17 was being dishonest in her evidence. Person 17 presented as a witness who was finding the process of giving evidence difficult, and at times she was overcome by emotion. Despite that, she made appropriate concessions, and answered questions directly. She was not evasive or argumentative and gave honest evidence even when it related to matters of a deeply personal nature. Particularly when regard is had to contemporaneous and corroborative evidence as discussed above, Person 17 can comfortably be accepted as an honest and reliable witness.

Mr Roberts-Smith's credibility

72. Mr Roberts-Smith has an obvious motive to lie in connection with these allegations. Moreover, his evidence on these events suffers from all of the flaws and inconsistencies outlined above. There is a particular issue, however, connected with this part of the case that provides yet another example of Mr Roberts-Smith's propensity to give deliberately false evidence, and to pressure other people to support him in doing so. That issue concerns the question whether he was separated from his wife at the time of his affair.

¹⁵⁰ T.4095/44-4096/15 (P17).

¹⁵¹ Ex A-275; Ex A-272, [26]; T. 4220/4-28 (P17).

¹⁵² Ex A-273; T.4102/1-18 (P17).

¹⁵³ T.4099/32-39 (P17).

¹⁵⁴ See particular [134].

The separation lie*Genesis and development of the separation lie*

73. The Group 3 articles, published on 10/11 August 2018, described Mr Roberts-Smith's relationship with Person 17 as an "extramarital relationship", an "affair" and described Person 17 as Mr Roberts-Smith's "mistress".¹⁵⁵ Mr Roberts-Smith responded to those articles publicly by giving an interview to *The Australian* on 10 August 2018, which results in an article entitled "War hero lashes his accusers".¹⁵⁶ In that article Mr Roberts-Smith is said to have stated that "during the period in question he was separated from his wife". Mr Roberts-Smith agreed that this accurately reflected what he said in the interview.¹⁵⁷
74. The lie told during that interview was the implementation of a plan discussed by Mr Roberts-Smith and Ms Roberts in April 2018, after Person 17 had disclosed the affair to Ms Roberts. Ms Roberts said that she had made the decision to stay with Mr Roberts-Smith, and that they were very paranoid that Person 17 would go to the press. She said that Mr Roberts-Smith suggested that the only way they would survive if the affair hit the press would be to say that they had been separated. Ms Roberts said that she did not want to lie, because she felt there had been enough lies, but that Mr Roberts-Smith pointed to their children who were in the lounge room and said "if you don't lie, you will lose them". Ms Roberts said that at that point she knew she had to lie for Mr Roberts-Smith.¹⁵⁸
75. Ms Roberts' evidence is corroborated by a contemporaneous text exchange with her best friend, Ms Scott, on 27 April 2018 about Mr Roberts-Smith's plan and her discomfort with it, as follows:¹⁵⁹

ER: *BRS thinks if it hits the press I say we were separated 😊*

DS: *Ooooooh are you ok with that?*

ER: *Not really*

He thinks that will stop a story lingering.

76. On 10 August 2018, Ms Roberts was on her way home from an excursion with her children when she spoke to Mr Roberts-Smith, and he told her that they had to do a story to say they were separated. Ms Roberts said that she did not want to do it. Mr Roberts-Smith had already been interviewed by the time Ms Roberts arrived home. Ms Roberts ultimately took part in a photoshoot, but did not speak to the journalist.¹⁶⁰
77. Mr Roberts-Smith has since repeated the lie, including on oath, on several occasions. In particular:
- (a) On 2 September 2020 he affirmed an affidavit which stated "Emma and I first separated in or about September 2017 for approximately six months, however,

¹⁵⁵ See, for example, Ex A-1, tab 55, page 217.

¹⁵⁶ Ex R-71.

¹⁵⁷ T.781/22-24 (BRS).

¹⁵⁸ T.1924/45-1925/19 (ER). See also T.781/5-16 (BRS).

¹⁵⁹ Ex R-109; T.1925/21-1925/45 (ER).

¹⁶⁰ T.1926/32-1927/32 (ER).

attempted to reconcile. We thereafter separated on a final basis on or about 19 January 2020.”¹⁶¹

- (b) In his verified answers to interrogatories in the proceedings;¹⁶² and
 - (c) In his evidence in these proceedings, where he stated that he and Ms Roberts separated towards the ends of September 2017, for about six months.¹⁶³
78. In his verified answers to interrogatories and in his evidence Mr Roberts-Smith provided additional detail, purportedly to give corroboration for the lie, namely that during that period when he was not travelling he would stay in a granny flat/separate living quarters in the house, or he would stay in Brisbane at Jed Wheeler’s house, or he would stay on the Sunshine Coast at Neil Mooney’s house.¹⁶⁴ Mr Roberts-Smith also stated that at or about the time of the separation he had informed Neil Mooney, Jed Wheeler and Person 29 of the separation.¹⁶⁵
79. Mr Roberts-Smith also supplemented the lie in his evidence, claiming that he told Ms Roberts of his relationship with Person 17 when they were in Singapore in January 2018.¹⁶⁶
80. Leaving aside the seriousness of himself lying on oath, an additional serious aspect of the separation lie is that Mr Roberts-Smith attempted to suborn Ms Roberts to also tell the lie on oath. Mr Roberts-Smith served two outlines of evidence of Ms Roberts in the proceedings, both of which included the lie that Mr Roberts-Smith and Ms Roberts had separated between about October 2017 to about April 2018. Ms Roberts stated that she told those lies to Mr Roberts-Smith’s lawyers for inclusion in the outlines because Mr Roberts-Smith had asked her to, and because she was scared of losing her family.¹⁶⁷

Mr Roberts-Smith’s evidence that he was separated is a deliberate lie

81. Ms Roberts said in her evidence that she was not separated from Mr Roberts-Smith in the period from October 2017 to April 2018. She said that during that time Mr Roberts-Smith was living in the family home, and sleeping in their bed. She said that he was not sleeping in the spare room or separate living quarters, and in fact her parents had been staying in the self-contained apartment in the period October to December 2017. She said that whilst Mr Roberts-Smith more than likely stayed at Mr Wheeler’s house, it was when he was working in Brisbane. She said he did not stay at Mr Mooney’s house. Ms Roberts said that during that time they attended events as a couple, and as a family, including school events, Mr McLeod’s daughter’s wedding, a family holiday to Singapore and Australian War Memorial events. They celebrated their wedding anniversary in December by going to dinner and giving gifts. In the period they also attended marriage counselling. Ms Roberts asked Mr Roberts-Smith whether the counselling was to wrap up the relationship or save it,

¹⁶¹ Ex R-54, [10]; T.757/34-43 (BRS).

¹⁶² Ex R-55; T.759/1-36 (BRS).

¹⁶³ T.261/37-43; 760/5-36 (BRS).

¹⁶⁴ T.261/45-262/4 (BRS). See also Ex R-55, answers to 2(b) and 2(d).

¹⁶⁵ Ex R-55, answer to 2(c); T.760/40-46 (BRS).

¹⁶⁶ T.263/12-34 (BRS).

¹⁶⁷ Ex R-110, [20]; Ex R-111, [3]; T.1929/18-1932/15 (ER).

and he replied, “to save it”.¹⁶⁸

82. The Respondents accept that the Court should approach Ms Roberts’ evidence with caution in circumstances where, on her own evidence, she had previously lied to Mr Roberts-Smith’s solicitors about the state of her marriage in the period October 2017 to April 2018. It is to her credit however that she admitted to telling this lie (against her own interests), and ultimately told the truth when under oath.
83. Mr Roberts-Smith relies upon the text messages exchanged between Ms Roberts and Ms Scott during the Singapore trip, when Mr Roberts-Smith had told Ms Roberts that he didn’t love her anymore.¹⁶⁹ The question “How is he ever going to tell Kerry we are separated” is clearly a hypothetical question as to what would happen if they did separate. See in particular the preceding question “Do you think he’s made his mind up?”
84. Further, Ms Roberts’ messages to her friends after the publication of the Group 3 articles need to be understood in light of the fact that they were sent at a time when she was maintaining the separation lie for Mr Roberts-Smith.¹⁷⁰
85. In any event, there is a significant body of objective and contemporaneous evidence demonstrating that Mr Roberts-Smith and Ms Roberts were still together between October 2017 – April 2018, and that the separation story is false. Specifically:
 - (a) On about 7 November 2017, Mr Roberts-Smith consulted his general practitioner, Dr Gogna, to seek a referral to a psychiatrist. Mr Roberts-Smith considered Dr Gogna a friend and trusted him to treat information disclosed to him with the utmost confidence.¹⁷¹ In the referral Dr Gogna recorded that Mr Roberts-Smith “has a very kind and supportive wife and two children”.¹⁷² There was no mention of any marital issues or separation.
 - (b) In December 2017, Mr Roberts-Smith exchanged text messages with Ms Roberts which included a message where he said that he missed her, and further messages inconsistent with them being separated.¹⁷³
 - (c) On 6 December 2017, Mr Roberts-Smith engaged in a text message exchange with Person 17 after an anonymous letter had been sent to his house which contained information about his affair with Person 17.¹⁷⁴ In the message he said to Person 17 “I think Em has bought the story”.¹⁷⁵ There would be no need to tell Ms Roberts a “story” if, as he contends, they were separated at the time. Mr Roberts-Smith said the “story” was probably just telling Ms Roberts it wasn’t true, which of course was itself a lie.
 - (d) On about 18 December 2017, Mr Roberts-Smith consulted a psychiatrist, Dr Bruce Lawford. In the patient details form for Dr Lawford, Mr Roberts-Smith recorded his

¹⁶⁸ T.1911/15-37;1912/19-1915/26 (ER).

¹⁶⁹ Ex A-255; T.1970/23-1972/5 (ER).

¹⁷⁰ Ex A-257; T.1973/32-1974/19; 1975/25-1976/4 (ER).

¹⁷¹ T.761/5-20 (BRS).

¹⁷² Ex R-56.

¹⁷³ Ex R-43, tab 6; T772/30-773/9 (BRS).

¹⁷⁴ A copy of the letter is Ex A-34.

¹⁷⁵ Ex R-64; T.773/31-774/9 (BRS).

address as the address of the marital home.¹⁷⁶ Mr Roberts-Smith understood that Dr Lawford was required to treat anything that Mr Roberts-Smith told him in complete confidence and understood that it was important to provide Dr Lawford with an accurate history of his circumstances so that he could provide the best treatment. Mr Roberts-Smith told Dr Lawford that he had a good relationship at home.¹⁷⁷

- (e) On 23 December 2017, Ms Roberts asked Mr Roberts-Smith whether he was seeing someone else, and said that the letter was bothering her. Mr Roberts-Smith lied to her and said that he wasn't. In a text message to Person 17, Mr Roberts-Smith said that Ms Roberts "really wants time with me. It's just hard".¹⁷⁸ Similarly on 26 December 2017, Mr Roberts-Smith sent a text to Person 17 stating that "Em is feeling my lack of affection, it's getting pretty obvious, it makes me sad but I have fallen for you and there is just no other way to describe it".¹⁷⁹ It is hard to see how those messages, and Ms Roberts' desire for time and affection, can be reconciled with Mr Roberts-Smith's contention that he was separated from Ms Roberts at the time.
- (f) On 30 December 2017, Mr Roberts-Smith responded to a question from Person 17 indicating that he had slept with Ms Roberts that week.¹⁸⁰
- (g) On 31 December 2017, Mr Roberts-Smith and Ms Roberts appeared in photos together where they appear to be happy and affectionate.¹⁸¹
- (h) On 9 January 2018 Mr Roberts-Smith sent a text message to Person 17 which referred to "when I separate", which is a clear indication that he was not presently separated at the time of the message.¹⁸²
- (i) On 17 January 2018, Ms Roberts engaged in a text message exchange with Ms Scott which demonstrates that as at that date Ms Roberts had a suspicion that Mr Roberts-Smith was seeing someone else. She also stated that Mr Roberts-Smith was "still not back from the gym...gone 2 hours".¹⁸³ That message is indicative of a shared domestic life, rather than a separated life.
- (j) From 22 January 2018 to 12 February 2018, Mr Roberts-Smith and Ms Roberts attended marriage counselling. In the first session it was indicated that the main issue was that they were "distant from each other". In the second session an update was provided that they "had a good weekend away with family" and "family life has been good over last weeks". Strategies were discussed at the homework set was to date. The notes of the third session record that they had time together in Perth, which was really good, that the week has been good overall, and that they had been spending time together. In the final session an update was provided that they are "Going really well, both are in good space" and the file was closed after "successful ending of

¹⁷⁶ Ex R-57; T.763/32-46 (BRS).

¹⁷⁷ Ex R-58; T.764/18-46 (BRS).

¹⁷⁸ Ex R-65; T775/1-17 (BRS).

¹⁷⁹ Ex R-66; T.775/32-41 (BRS).

¹⁸⁰ Ex R-67; T776/113-36 (BRS).

¹⁸¹ Ex R-59; T.765/20-31 (BRS).

¹⁸² Ex R-68; T.777/7-778/25 (BRS).

¹⁸³ Ex R-106; T.1916/4-31 (ER).

therapy". Mr Pansier was not told that they were separated.¹⁸⁴

- (k) On 5 April 2018, Mr Roberts-Smith and Person 17 spent the night together at the Novotel at Brisbane airport. In a text message on 4 April 2018, Mr Roberts-Smith asked Person 17 to book a separate room and stated that he was "concerned about the room because it's school holidays and Emma could turn up".¹⁸⁵ It is difficult to see why Ms Roberts would turn up to the hotel if they were separated.

86. Further, it is notable that, having served outlines of evidence for both Mr Wheeler and Mr Mooney, Mr Roberts-Smith elected not to call them to give evidence.¹⁸⁶ These are two of the people Mr Roberts-Smith contends knew about the separation, and at whose places he stayed during the separation. No explanation was provided for why these witnesses were not called. In these circumstances, it may be inferred that Mr Wheeler and Mr Mooney's evidence would not have assisted Mr Roberts-Smith.¹⁸⁷ The same inference flows in relation to the evidence of his housekeeper at the time, Diane Young. The outlines of Ms Young, served presumably on Mr Roberts-Smith's instructions, also contained a statement that Mr Roberts-Smith and Ms Roberts had been separated between September 2017 to April 2018.¹⁸⁸ However she was also not called, without explanation.

87. Moreover, despite calling Person 29 to give evidence in his case, Mr Roberts-Smith did not ask him any question about his knowledge of the separation, even though he was the only other person Mr Roberts-Smith says that he told about the separation. In these circumstances, the natural inference is that Mr Roberts-Smith feared to ask the question, and it may be inferred that Person 29's evidence would not have assisted Mr Roberts-Smith.¹⁸⁹

88. Mr Roberts-Smith's evidence is completely uncorroborated. In view of the significant body of contrary evidence, the Court can be comfortably satisfied that Mr Roberts-Smith's evidence that he was separated is false. The only available explanation for the falsity of the evidence is that it was a deliberate lie.

Mr Roberts-Smith's evidence that he told Ms Roberts about Person 17 in Singapore is a deliberate lie

89. Ms Roberts said that Mr Roberts-Smith did not ever tell her that he was seeing someone else, and that the first time she knew about Mr Roberts-Smith's relationship with Person 17 was when Person 17 came to her house on 6 April 2018.¹⁹⁰ On that day she called Mr Roberts-Smith and asked him who Person 17 was. He responded "who are you talking about?"¹⁹¹ Later that night Ms Roberts asked him how he will ever live with himself, and he was very apologetic.¹⁹² These interactions are clear indications that he had not previously

¹⁸⁴ Ex R-60-R63; T.767/13-771/37 (BRS); T.1914/9-10 (ER).

¹⁸⁵ Ex R-69; T.778/41-779/28 (BRS).

¹⁸⁶ T.5632/13-15.

¹⁸⁷ *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298.

¹⁸⁸ T.822/10-22 (BRS).

¹⁸⁹ *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389.

¹⁹⁰ T.1915/28-29; 35-37; 1973/1-2; 1917/43-44; 1963/14-16 (ER).

¹⁹¹ T.1918/29-38 (ER). See also Person 17's evidence at T.4051/46-47 that Ms Roberts told her on 6 April 2018 that she had phoned Mr Roberts-Smith in the car on the way home, and he told her he had no idea who she was.

¹⁹² T.1922/24-30 (ER).

told his wife about Person 17.

90. So too is Ms Roberts' conduct in transferring \$50,000 to her parents on 6 April 2018 in order to protect herself.¹⁹³ That conduct is consistent with Ms Roberts' life having "just imploded",¹⁹⁴ and going into self-preservation mode after finding out about her husband's affair with Person 17.
91. Ms Roberts had suspicions that Mr Roberts-Smith was having an affair, but when she asked him about it, he denied it.¹⁹⁵ That Ms Roberts had suspicions, but not actual knowledge, is corroborated by her texts to Ms Scott.¹⁹⁶
92. Further, Mr Roberts-Smith's evidence that he told Ms Roberts about the affair whilst they were in Singapore "in the interests of trying to move forward and have any hope of maintaining our relationship"¹⁹⁷, does not sit comfortably with the objective facts that he continued his relationship with Person 17 after this date, and that he did not tell the marriage counsellor about his relationship with Person 17.
93. Mr Roberts-Smith relies upon Ms Roberts' affidavit sworn in other proceedings to establish that she knew in December 2017.¹⁹⁸ The better view is that there was a mistake in the drafting of the affidavit which was not picked up when Ms Roberts read it before signing it.¹⁹⁹ This is particularly so given, even on Mr Roberts-Smith's evidence, Ms Roberts did not know about the affair in December 2017. It is notable that the same paragraph goes on to refer to the events of 6 April 2018.
94. The contents of the text messages between Ms Roberts and Ms Scott during the Singapore trip also do not assist Mr Roberts-Smith.²⁰⁰ As Ms Roberts said, the reference in those messages to "she" relates to her suspicion that Mr Roberts-Smith was having an affair, rather than knowledge of any particular person. Ms Scott's reference to a "s*** mother who didn't want to spend time with the kids anyway" is clearly a pejorative reference to Mr Roberts-Smith (with "mother" being an abbreviation for "mother-fucker").
95. In these circumstances, the Court can also be satisfied that Mr Roberts-Smith's evidence that he told Ms Roberts about the affair when they were in Singapore is also a lie.

The significance of the lies

96. Whether or not the relationship between Mr Roberts-Smith and Person 17 was an extra martial affair or not, and whether or not his wife knew about it, is not itself directly relevant to any matter in issue in the proceedings. Mr Roberts-Smith does not sue on any imputation that he had an affair without his wife's knowledge. However, in circumstances where Mr Roberts-Smith has told these lies on oath, they are highly relevant to Mr Roberts-Smith's credibility.

¹⁹³ T.1924/22-39 (ER).

¹⁹⁴ T.1924/26 (ER)

¹⁹⁵ T.1915/1-6; 17-18; 1915.39-1916/2; 1917/29-41 (ER).

¹⁹⁶ Ex R-106; Ex R-107; T.1916/4-1917/13 (ER).

¹⁹⁷ T.263/26-27 (BRS).

¹⁹⁸ Ex A-254; T.1963/30-1966/11 (ER).

¹⁹⁹ T.1967/40-46 (ER).

²⁰⁰ Ex A-255; T.1972/7-1973/5 (ER).

97. It appears that the initial purpose of the separation lie was to “take the sting out of” the allegation made in the Group 3 articles that Mr Roberts-Smith had engaged in an extra marital affair.²⁰¹ An honest witness who took their oath seriously would admit that they told an untruth to a journalist, perhaps explain why, and would otherwise tell the truth. Mr Roberts-Smith’s willingness to repeat the lie on oath, especially when it is not directly relevant to any matter in issue, demonstrates that he regards his oath as meaningless.

Ms Roberts' credibility

98. Ms Roberts emerged from robust cross-examination as an impressive and credible witness.

99. The first challenge to Ms Roberts was that she was lying, in giving her evidence, that she and Mr Roberts-Smith separated between October 2017 – August 2018. For the reasons set out in paragraphs 85 to 87 above, the Court can be comfortably satisfied that they were not separated, that Mr Roberts-Smith pressured Ms Roberts to lie about it, and that Ms Roberts' evidence is truthful. In support of this challenge, Mr Roberts-Smith relies on Ms Roberts' affidavit sworn in other proceedings to establish that she knew about Mr Roberts-Smith's relationship with Person 17 in December 2017.²⁰² However, as set out in paragraph 93, the better view is that the affidavit contains a mistake, given that even on Mr Roberts-Smith's evidence, Ms Roberts did not know of the affair in December 2017.

100. The second broad challenge to Ms Roberts was that she had "come to hate" Mr Roberts-Smith and was therefore prepared to lie to harm him.²⁰³ In support of this challenge, Mr Roberts-Smith relied on text messages that Ms Roberts exchanged with her best friend, Ms Scott, about Mr Roberts-Smith.²⁰⁴ Ms Roberts candidly accepted that she was "very frustrated with Ben at the time" because they were "in a very very bitter divorce."²⁰⁵ However, in the Respondents' submission, there is a substantial leap between saying rude things about one's former husband in a text message at the time of an acrimonious separation, on the one hand, and to lying under oath in court proceedings, on the other. There is no evidence to support the leap required to establish that Ms Roberts' evidence is anything but truthful.

101. To the degree that the Court has any hesitancy in accepting Ms Roberts as a reliable witness, it is emphasised that in respect of each of the key matters in respect of which Ms Roberts gave evidence about, she is corroborated by other witnesses, or documents, or both. For example, Ms Roberts' evidence about Mr Roberts-Smith admission to her about the threatening letters to Person 18 is corroborated by the evidence of Mr McLeod, Person 18 and the material provided by Mr McLeod to the AFP (see Section XIII, paragraphs 46-71). In relation to the allegation that Mr Roberts-Smith concealed USBs in their former matrimonial home, Ms Roberts is corroborated by photographs that she took on the day and contemporaneous text messages that she sent to Ms Scott (see Section XIII, paragraphs 121-129). In relation to the supposed separation between October 2017- April 2018,

²⁰¹ T.781/5-16 (BRS).

²⁰² Ex A-254; T.1963/30-1966/11 (ER).

²⁰³ T.2004/10-13 (ER).

²⁰⁴ See for example, T.2057-2059.

²⁰⁵ T.2059/38-45 (ER).

Ms Roberts is supported by substantial corroborative material, including marriage counselling records (see paragraphs 73-88).

C. Conclusion

102. For the foregoing reasons, it is submitted that the Court should find that Mr Roberts-Smith assaulted Person 17 on the night of 28 March 2018, and that each of imputations 7 and 8 are substantially true.²⁰⁶

²⁰⁶ In opening his case Mr Roberts-Smith accepted that he had publicly supported Rosie Batty, a domestic violence campaigner: T.52/25-34.

SECTION XIII: COLLUSION, INTIMIDATION, LIES AND CONCEALMENT**A. Introduction**

1. From about mid-2017, Mr Roberts-Smith embarked on a multi-faceted course of conduct of collusion with friendly witnesses, intimidation of adverse witnesses, and destruction or concealment of material considered to be adverse to his interests. In this section, we first set out the factual instances of collusion, intimidation, and concealment. We then analyse the legal implications of this conduct: specifically, how it affects the weight of Mr Roberts-Smith and his witnesses' evidence, and how aspects of the conduct reveal consciousness of guilt and should be used as admissions against interest.

B. Factual narrative***September 2017: collusion with Person 11***

2. On 19 September 2017, Person 11 received a notice to attend a second interview with the IGADF on 21 September 2017.¹ Person 11 immediately contacted Mr Roberts-Smith to inform him that he had been summonsed.² Person 11 initially denied he had contacted Mr Roberts-Smith at all.³ That was wrong.⁴ He then said that outside of his chain of command, he had only told his wife and Mr Roberts-Smith that he had been summonsed to appear before the IGADF.⁵ The evidence shows that Person 11 and Mr Roberts-Smith did, in fact, discuss the evidence Person 11 was likely to give to the IGADF prior to his interview on 21 September 2017:⁶ see paragraphs E1 to E4 of the Respondents' Closed Court Submissions.

Late 2017: intimidation of Person 6 and attempt to "scare the others"

3. Mr Roberts-Smith and Person 6 have a long-standing animosity towards each other. They did not get along during deployments⁷ and by 2010, Mr Roberts-Smith saw Person 6 as an enemy.⁸ That dislike grew in 2014 when Person 6 was one of several people to complain about Mr Roberts-Smith's Citation for Distinguished Service.⁹
4. By 2017, Mr Roberts-Smith thought Person 6 was talking to other people about him and, with Persons 1, 18, 42 and 44, was part of a whispering campaign against him within the SASR.¹⁰ Mr Roberts-Smith asked SOCOMD to investigate who was speaking to the media, but he considered the response by the SAS hierarchy was ineffective.¹¹
5. By late September 2017, Mr Roberts-Smith was concerned that allegations made about him to the media were being repeated to the IGADF inquiry.¹² Mr Roberts-Smith's concern is

¹ T.5765/1-4 (P11).

² CCT 12.5.22, p.6/26-30 (P11); T.5765/1-4 (P11).

³ T.5765/01-22 (P11).

⁴ Ex R-256; CCT 12.5.22, p.6/26-43 (P11).

⁵ CCT 12.5.22, p.7/15-24 (P11)

⁶ CCT 12.5.22, p.6/26-36 (P11).

⁷ T.588/12 (BRS).

⁸ T.588/21-25 (BRS).

⁹ T.588/17-19 (BRS).

¹⁰ T.588/35ff (BRS).

¹¹ T.588/5-10 (BRS).

¹² T.588/15 (BRS).

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unsurprising. He knew, from speaking with Person 11, that this was correct.¹³

6. In the days following Person 11's second IGADF interview, Mr Roberts-Smith's frustration and concern that serious allegations were being made about him to the IGADF inquiry and the media reached breaking point. He decided to intimidate Person 6 and "scare the others"¹⁴ who he believed were making allegations against him by instigating a police investigation into Person 6 via a series of anonymous disclosures made on his behalf by John McLeod to the AFP, a member of Federal Parliament, and The Australian newspaper.
7. In late September or early October 2017, Mr Roberts-Smith told Mr McLeod that Person 6 had smuggled unregistered guns from Australia to Afghanistan and that Person 6 still had an unregistered firearm in his possession.¹⁵ Mr McLeod gave unchallenged evidence that Mr Roberts-Smith told him that he (Mr Roberts-Smith) "wanted to get it investigated".¹⁶ Mr McLeod told Mr Roberts-Smith that the police would not act on an unsubstantiated allegation from an anonymous source and if Mr Roberts-Smith wanted it investigated, he (Mr McLeod) would need dates, times and locations for any police that became involved.¹⁷
8. Ms Roberts recalled overhearing a conversation between Mr Roberts-Smith and Mr McLeod concerning Person 6, although she could not recall what was said.¹⁸
9. Mr Roberts-Smith subsequently gave Mr McLeod a USB containing a document detailing the allegations against Person 6,¹⁹ saying words to the effect of "it was all on there".²⁰ Mr Roberts-Smith said he gave this material to Mr McLeod knowing that Mr McLeod intended to pass it onto the AFP.²¹ Mr Roberts-Smith sought to downplay his involvement in the scheme to intimidate Person 6, claiming he told Mr McLeod "if you would like to do that [give the material to the AFP], then you can go and do it."²²
10. That evidence should not be accepted. Mr Roberts-Smith's real intention was to initiate an investigation into Person 6.²³ He created this document for the purpose of it being given to the police and furthering his objective of having Person 6 investigated. There is no other rational explanation for its creation. No other purpose is evident from its content or the context in which it was prepared. Mr Roberts-Smith would not have gone to the effort of creating the document if he did not care one way or another what Mr McLeod did with it.
11. On or about 3 October 2017, Mr McLeod created an anonymous email account and sent an anonymous complaint about Person 6 smuggling weapons into Afghanistan to AFP Commissioner Andrew Colvin.²⁴ Although Mr Roberts-Smith denied that he (Mr Roberts-Smith) was responsible for sending it,²⁵ he accepted that the substance of the complaint

¹³ See section entitled "*September 2017: collusion with P11*".

¹⁴ Ex R-43, tab 6, page 4.

¹⁵ T.589/26-33 (BRS).

¹⁶ T.2410/20-24 (JM).

¹⁷ T.2410/26-31 (JM).

¹⁸ T.1955/46-1956/22 (ER).

¹⁹ T.589/35-45, 595/26-33 (BRS).

²⁰ T.2410/36-38 (JM).

²¹ T.589/35-45, 595/26-33 (BRS).

²² T.592/12-14 (BRS)

²³ T.2410/20-24 (JM).

²⁴ Ex R-43, tab 1, pages 1-2; T.590/1-4 (BRS); T.2411/14-16 (JM).

²⁵ T.590/4.

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came from the document he gave to Mr McLeod.²⁶ Mr McLeod subsequently told Mr Roberts-Smith that he had sent the email to the AFP.²⁷

12. On 13 October 2017, Mr McLeod emailed Senator Nick Xenophon using an anonymous email address and alleging that Person 6 was mentally unstable and at risk of performing a repeat of the “Los [sic] Vegas Massacre”.²⁸ The email included the detailed notes authored by Mr Roberts-Smith and stated, “we raised the attached with the Commissioner”.²⁹
13. On 18 October 2017, Mr Roberts-Smith’s lawyers sent a letter to Nick McKenzie repeating the same allegations against Person 6 which Mr McLeod had sent anonymously to the AFP and Senator Xenophon just days earlier.³⁰ This letter underscores Mr Roberts-Smith’s role as both the source and agitator of the allegations against Person 6. He was, on no view, a passive observer to a campaign being waged against Person 6 by Mr McLeod alone.
14. On 20 October 2017, Mr McLeod sent an anonymous email to The Australian newspaper attaching the anonymous complaints he had previously sent to the AFP Commissioner and Senator Xenophon concerning Person 6.³¹ Mr Burrell responded and asked, “are you a serving member of the SAS”?³² Mr McLeod asked Mr Roberts-Smith how to respond, and Mr Roberts-Smith said “It’s not from you; it’s from me. Just respond yes”. Mr McLeod did so.³³ By confirming that the allegations came from an SAS member, Mr Roberts-Smith increased the prospect that the allegations would be published and investigated and furthered his ultimate purpose of seeking to intimidate Person 6 and “scare” others who were making allegations against him at the time.³⁴
15. On 3 and 9 November 2017, The Australian published two articles concerning Mr Roberts-Smith’s allegations against Person 6.³⁵ Both articles refer to an anonymous “military” or “SAS” whistle-blower” (which confirms Mr McLeod’s evidence that he told Mr Burrell an SAS member was the source).³⁶ Mr Roberts-Smith was the “whistle-blower” referred to in the articles, despite his denials to the contrary.³⁷ He asked Mr McLeod to have the allegations investigated. He wrote the substantive material sent to the Australian. And he authorised Mr McLeod to tell The Australian that the information came from a member of the SAS.
16. Mr Roberts-Smith has trenchantly criticised others who spoke anonymously to the media about him. Those criticisms should be viewed with deep scepticism given he engaged in the very same conduct. His criticisms on this point are driven by self-interest, not principle.
17. In mid-November 2017, following a referral by the AFP to the ADF’s investigative service,³⁸ the West Australian police commenced an investigation into Person 6 “allegedly possessing

²⁶ T.590/37.

²⁷ T.592/27.

²⁸ Ex R-43, tab 1; T.2411/24-29 (JM).

²⁹ Ex R-43, tab 1, pages 1-2.

³⁰ Ex R-43, tab 2. T.592/45-593/25 (BRS).

³¹ Ex R-43, tab 1, page 1; T.2411/18-29, 2412/1-18 (JM).

³² T.2412/20-29 (JM).

³³ T.2412/31-40 (JM).

³⁴ Ex R-43, tab 6, page 4.

³⁵ Ex R-43, tabs 3-4.

³⁶ T.2412/31-40 (JM).

³⁷ T.593/43 (BRS).

³⁸ Ex R-43, tab 4, page 1.

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prohibited items in WA".³⁹ Person 6's home was raided, and nothing was found.⁴⁰ The investigation concluded with no charges being laid.⁴¹

18. On 14 December 2017, Mr Roberts-Smith sent a text message to Ms Roberts stating, "what happened to [Person 6] will scare the others".⁴² The words "what happened to Person 6" referred to the police investigation into Person 6. That is the more probable inference available. It is consistent with Mr McLeod's unchallenged evidence that Mr Roberts-Smith wanted Person 6 to be investigated.⁴³ It is also consistent with Ms Roberts's evidence that Mr Roberts-Smith told her Person 6 had his house raided and Mr Roberts-Smith had asked Mr McLeod "to do that".⁴⁴ The balance of the message makes clear that Mr Roberts-Smith's purpose in causing Person 6 to be investigated was "to scare the others". "The others", in this context, means other people who Mr Roberts-Smith thought were making allegations against him in the IGADF Inquiry and to the media including Persons 1, 18, 42 and 44.⁴⁵
19. Mr Roberts-Smith was unable to offer any alternative explanation for the message.⁴⁶ Nevertheless, he said it was impossible he was referring to the Person 6 investigation because he was unaware of it at the time.⁴⁷ That evidence should be rejected. The Australian newspaper publicly reported that the AFP had referred the case to the ADF's Investigative Service "for their action" over one month earlier.⁴⁸ It is implausible that at the time he messaged Ms Roberts on 14 December 2017, Mr Roberts-Smith remained unaware that his efforts to instigate an investigation into Person 6 had born fruit over a month earlier.

February 2018: meeting with Person 11

20. On or about 5 February 2018, Mr Roberts-Smith met Person 11 at the Floriette Hotel in Perth.⁴⁹ Mr Roberts-Smith denied speaking to Person 11 about the IGADF Inquiry and said he was "not sure" he even knew Person 11 had been interviewed at that point.⁵⁰ That was false: Mr Roberts-Smith had extensive interactions with Person 11 concerning his September 2017 IGADF interview just a few months earlier.⁵¹ After the meeting in Perth, Mr Roberts-Smith remained in contact with Person 11.⁵² Person 11 said he spoke with Mr Roberts-Smith "every week or two" after the September 2017 interview.⁵³

8 May 2018: Person 5 disclosed the substance of his IGADF interview

21. On 8 May 2018, Person 5 and Person 18 both attended Campbell Barracks for interviews

³⁹ Ex R-43, tab 5, page 1.

⁴⁰ T.596/32-39.

⁴¹ Ex R-43, tab 5, page 1.

⁴² Ex R-43, tab 6, page 4.

⁴³ T.2410/20-24 (JM).

⁴⁴ T.1956/24-40 (ER).

⁴⁵ T.588/35ff (BRS).

⁴⁶ T.598/28-36 (BRS).

⁴⁷ T.598/28-36 (BRS).

⁴⁸ Ex R-43, tab 4, page 1.

⁴⁹ T.600/27-28 (BRS).

⁵⁰ T.600/30-35 (BRS).

⁵¹ CCT 12.05.22. p.6 (P11); CCT 12.05.22, p.8/5-9 (P11).

⁵² T.601/16-19 (BRS).

⁵³ T.5767/45-46 (P11).

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with the IGADF.⁵⁴ They saw each other in the S1's office⁵⁵ next door to the room where the IGADF interviews were held.⁵⁶ The S1 said "you guys can't see each other before interviews", so Person 5 went and sat outside.⁵⁷ It was apparent to Person 5 that Person 18 had either already been in for an interview, or was going to go in for an interview, or had otherwise had some involvement with the IGADF Inquiry.⁵⁸

22. It is uncontroversial that Person 5 called Mr Roberts-Smith that night and they discussed the topic of Person 5's IGADF interview. The content of the conversation is, however, disputed. On Person 5's evidence, he told Mr Roberts-Smith during that phone call "to prepare himself" because "it was a witch hunt".⁵⁹ Mr Roberts-Smith said Person 5 told him that he was drilled for hours during his interview and that there "was stuff about the VC in there."⁶⁰ However, Mr Roberts-Smith and Person 5 both denied that Person 5 disclosed any substance beyond that.⁶¹ Mr Roberts-Smith said Person 5 was "venting to me because he thought he was going to miss the flight"⁶² and "he certainly didn't go into detail about it".⁶³ The reason for both denials was clear. Any concession by Person 5 would be an admission that he breached the IGADF's non-disclosure direction and engaged in criminal conduct. Similarly, any disclosure by Mr Roberts-Smith would have exposed his friend's criminal conduct.
23. The denials by Person 5 and Mr Roberts-Smith were untrue. They are contradicted by a contemporaneous record of the conversation that exists in the form of a text message from Ms Roberts to her friend, Ms Danielle Scott.⁶⁴ The text message outlines what Mr Roberts-Smith told Ms Roberts about the phone call shortly after the phone call.⁶⁵ It records that Person 5 called Mr Roberts-Smith; Person 5 was "drilled for hours"; there were "lots of questions about Ben and even to the point of questioning his VC action"; Mr Roberts-Smith "didn't get much sleep"; and it's "obvious that someone has said a hell of a lot about Ben".
24. The more probable inference from the fact of the call, the partial admissions as to its content by Mr Roberts-Smith and Person 5, and Ms Roberts' text message, is that Person 5 disclosed the substance of this interview to Mr Roberts-Smith during their telephone call that night. It is implausible that Person 5 would have told Mr Roberts-Smith that he had been "drilled for hours" and asked "lots of questions about Ben" without disclosing what he was drilled about and what the "lots of questions" concerned. Person 5 and Mr Roberts-Smith's denials are directly contradicted by the fact that Ms Roberts records one of the interview topics in her message: Tizak and the Victoria Cross. It is equally implausible that Person 5 would warn Mr Roberts-Smith that it was a "witch hunt" and to "prepare himself" without informing his close friend what he was meant to be preparing himself for. Person 5's warning,

⁵⁴ T.3250/15-24 (P18); T.4969/10-11 (P5).

⁵⁵ T.3250/30-40 (P18); T.4969/16-19 (P5).

⁵⁶ T.3251/1-4 (P18).

⁵⁷ T.4927/20-22 (P5).

⁵⁸ T.4969/21-24 (P5).

⁵⁹ T.4927/29 (P5).

⁶⁰ T.603/18-22 (BRS)

⁶¹ T.4970/32-4972/47 (P5).

⁶² T.321.12-13 (BRS).

⁶³ T.603/45 (BRS).

⁶⁴ Ex R-45.

⁶⁵ T.1937/14-28 (ER).

without the corresponding disclosure, would have been pointless.

25. There is no reason to doubt the reliability or the content of Ms Roberts' text message to Ms Scott. At the time, Mr Roberts-Smith and Ms Roberts were still married and (even on Mr Roberts-Smith's account) not separated. Ms Roberts was providing an honest and contemporaneous account to her "closest confidante"⁶⁶. The reason Ms Roberts told her closest friend that someone had said a "hell of a lot" about Mr Roberts-Smith to the IGADF was because that is the substance of what Person 5 told Mr Roberts-Smith, which Mr Roberts-Smith then relayed to Ms Roberts. There is no other rational explanation for how Ms Roberts could have come to that view.
26. The conclusion that Person 5 disclosed the substance of his interview to Mr Roberts-Smith in a telephone call on 8 May 2018 is reinforced by Person 5's decision on 15 June 2018 to send a comprehensive 3-page letter to Mr Roberts-Smith disclosing the substance of his IGADF interview. Person 5 breached his IGADF non-disclosure direction by sending this letter (we address this further below). There is nothing to suggest that he had any greater regard for his non-disclosure direction 5 weeks earlier, during the 8 May 2018 telephone call. In fact, in denying that his 15 June letter was an attempt to warn Mr Robert-Smith, Person 5 retorted that if he "wanted to warn Ben Roberts-Smith about what was going on in [sic] IGADF, I would have picked up the phone and told him."⁶⁷ In the Respondents' submission, that is precisely what Person 5 did in the hours after his interview on 8 May 2018.
27. One final, critical detail of this telephone call should be noted. Person 5 told Mr Roberts-Smith that he had seen Person 18 in the administration office before he went in for his interview⁶⁸ and that "It looks like Person 18 has been dragged in as well."⁶⁹ Mr Robert-Smith passed that information on to Ms Roberts: he told her that Person 5 saw Person 18 in "somebody's office" at the SASR on the day of the interview and that "there was an altercation."⁷⁰ Mr Roberts-Smith, however, did not give any evidence about Person 5 seeing Person 18 before, during or after Person 5's IGADF interview. We return to this omission below in the context of Mr Roberts-Smith sending threatening letters to Person 18.

Early June 2018: Mr Roberts-Smith arranged legal advice for his friends

28. On 23 May 2018, Person 11's chain of command was notified that the IGADF sought to re-interview Person 11 on 4 June 2018.⁷¹ However, as Person 11 was overseas and only set to return to work on 2 June 2018, the IGADF re-scheduled the interview to 6 June 2018.
29. As soon as Person 11 learned he was being called back for another interview with the IGADF, he contacted Mr Roberts-Smith. He told Mr Robert-Smith he had been called back for another interview and he was very worried that the IGADF wanted to speak to him again.⁷² Person 11 posed a material risk to Mr Roberts-Smith at this point. Person 11 knew the truth about murders at Darwan, Chinartu and Fasil. In a matter of days, Person 11 would

⁶⁶ T.1947.45 (ER).

⁶⁷ T.4979/2-4 (P5).

⁶⁸ T.4973/11-14 (P5).

⁶⁹ T.4928/3 (P5).

⁷⁰ T.1935/16-19 (ER).

⁷¹ Ex R-250, page 1.

⁷² T.5769/32-43 (P11).

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have the opportunity to divulge that information in an interview where any admissions or disclosures would have attracted use and derivative use immunity for Person 11.

30. Despite Person 11 being entitled to legal representation paid for by the Department of Defence⁷³, Mr Roberts-Smith offered to arrange different lawyers for Person 11.⁷⁴ He put Person 11 in touch with his own lawyers: Mark O'Brien Legal⁷⁵ who engaged Arthur Moses SC.⁷⁶ Mr Robert-Smith's idea of common representation with Person 11 soon came to an end. The IGADF raised concerns about the potential conflict between Mr Roberts-Smith and Person 11 and different lawyers were appointed to Person 11. Mr Roberts-Smith subsequently arranged legal representation for Person 5 and Person 35 too.⁷⁷ Person 5, 11 and 35 all ended up being represented by law firm Addisons.⁷⁸
31. The arrangements concerning payment of those legal fees are unusual. Each month, Addisons would render a bill to Mr Roberts-Smith's employer, Seven Network Operations Limited (**SNOL**). Those invoices would then be added to a loan account that Mr Roberts-Smith maintained with SNOL.⁷⁹ The effect of the arrangement was that Mr Roberts-Smith was responsible for paying the legal fees of his friends, Persons 5, 11 and 35, in connection with a military investigation of which they were all targets.
32. Even more unusually, Person 5, 11 and 35 all denied knowledge of this arrangement:
 - (a) Person 5 said he found out that SNOL was paying his legal fees only a few days before being called as a witness in these proceedings.⁸⁰ He said he did not know why SNOL has been paying his legal fees since on or around 11 May 2020, and that he had never spoken to Mr Roberts-Smith about his fees.⁸¹
 - (b) Person 11 denied knowing that the costs of his legal representation would be added to a loan that Mr Roberts-Smith had taken out in respect of legal fees⁸² and denied knowing that he would not have to pay those costs personally.⁸³
 - (c) Person 35 said his "understanding was Mr Kerry Stokes was paying for the legal representation".⁸⁴ Person 35 denied knowledge of the fees being added to the loan account Mr Roberts-Smith has with Mr Stokes.⁸⁵
33. The value of the work done by lawyers representing Person 11 is approximately \$125,000.⁸⁶ Approximately \$65,000 is attributable to Person 5.⁸⁷ The amount for Person 35 is

⁷³ T.5772/10-14 (P11).

⁷⁴ T.601/30-602/2 (BRS).

⁷⁵ T.601/30-32 (BRS).

⁷⁶ Ex R-250.

⁷⁷ T.602/4-8 (BRS).

⁷⁸ Ex R-195; Ex R-228; Ex R-252.

⁷⁹ Ex R-253; T.5780/17-5781/14 (P11); T.5284/45-5285/27 (P35).

⁸⁰ T.5773/28-29 (P11); T.4962/30-4963/27 (P5).

⁸¹ T.4962/44-4963/14 (P5).

⁸² T.5773/24-26 (P11).

⁸³ T.5781/16-19 (P11).

⁸⁴ T.5282/37-41 (P35).

⁸⁵ T.5282/37-41 (P35).

⁸⁶ Ex R-252; T.5779/9-12 (P11).

⁸⁷ Ex R-195. Addison's invoices to SNOL, contained in Ex R-195, total nearly \$170,000 with some of the work billed related to P11 and P35. We had removed the work specifically assigned to those persons and divided the balance by three.

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approximately \$86,000.⁸⁸ This is a material financial benefit conferred or arranged by Mr Roberts-Smith for the benefit of these individuals. Its purpose, the Court should infer, was to instil a sense of obligation and loyalty to Mr Roberts-Smith and ensure they did not turn on him.

34. The mere existence of this arrangement, in and of itself, is a matter relevant to the credibility of each of the witnesses involved. The fact that Persons 5, 11 and 35 denied knowledge of some or all parts of the arrangement, and implausibly denied knowing whether they were responsible for their own legal fees, are also matters relevant to assessing their credit.
35. There is a further implication for the credit of Mr Roberts-Smith specifically. That follows from deliberate and dishonest steps he took to conceal these arrangements from the Respondents. On 21 September 2021, Mr Roberts-Smith swore an affidavit in respect of an interlocutory application in the proceeding.⁸⁹ The affidavit was witnessed by his lawyer, Ms Allen.⁹⁰ The affidavit contained a deliberate falsehood.
36. The affidavit attached a schedule of the loan facility between Mr Roberts-Smith and SNOL which contained certain redactions.⁹¹ At paragraph 11 of the affidavit, Mr Roberts-Smith said "I have caused redactions to be made to that document to redact references to amounts".⁹² That was untrue, in that the redactions also concealed references to Addisons law firm: the representatives of Person 5, 11 and 35. Mr Roberts-Smith only disclosed the references to Addisons on 26 April 2022 during the cross-examination of Person 5 when Mr Roberts-Smith produced a copy of the unredacted loan schedule in response to the Respondents' Notice to Produce dated 24 April 2022.⁹³
37. The Court should find that paragraph 11 of Mr Roberts-Smith's 21 September 2021 affidavit was deliberately false. There is no doubt it is factually inaccurate: the redactions conceal more than "amounts". The positive inference of dishonesty arises from four matters: (a) the references to Addisons would have revealed the existence of an arrangement that bore on the credibility of his key witnesses; (b) no witness knew the details of the arrangement, which is consistent with an intention to keep it concealed; (c) no witness possessed or produced any material relevant to the arrangement, which again is consistent with an intention to conceal; and (d) the subsequent attempt to unravel the arrangement, which we turn to now.
38. At 2:58pm on 26 April 2022 – on the day that Person 5 and Person 35 were giving evidence and some of the payment arrangements involving SNOL were being exposed in open court - Mr Bruce McWilliam, an officer of SNOL, sent an email titled "BRS legal expenses" to colleagues at SNOL and another entity called Australian Capital Equity Pty Ltd (**ACE**). Mr McWilliam asked for Addisons invoices to be debited from Mr Roberts-Smith's SNOL loan

⁸⁸ Ex R-228. Addison's invoices to SNOL, contained in Ex R-228, shows about \$69,000 exclusively relating to Person 35. The balance of the fees (which are not directly attributable to any of Persons 5, 11 or 35) have been divided by three.

⁸⁹ Ex R-277.

⁹⁰ Ex R-277 page 3.

⁹¹ Ex R-277 page 7.

⁹² Ex R-277 page 3.

⁹³ T.5077/44-45.

facility and charged directly to ACE.⁹⁴ Mr McWilliam's request was actioned.⁹⁵

39. No witness gave evidence that the arrangement of Addison's invoices being added to Mr Roberts-Smith's loan facility with SNOL, prior to 26 April 2022, was an error. If it was, it almost certainly would have been detected when redactions were being applied to the loan schedule attached to Mr Roberts-Smith's 21 September 2021 affidavit. If it was an error, one would expect Mr Roberts-Smith to have noticed hundreds of thousands of dollars being wrongly added to his personal loan account. The veil of secrecy over the arrangement also makes little sense if Mr Roberts-Smith was not involved in it. Instead, the more probable inference as to why there was a retrospective attempt to alter the arrangement is a recognition by Mr Roberts-Smith that the arrangement was likely to raise questions about his and his witnesses' credibility.

8-10 June 2018: first articles published and contamination increases

40. On 8-9 June 2018, the Respondents published the article entitled "*SAS's Day of Shame*"⁹⁶ and the article entitled "*Abdul's brother went out to buy flour he never came home*".⁹⁷ On 10 June 2018, the Respondents published the article entitled "*Special Forces rookie blooded by executing an unarmed man*".⁹⁸ These articles related to the allegations at W108 in 2009 and at Darwan in 2012.
41. Almost immediately, Mr Roberts-Smith contacted his close friends - Persons 5, 11, 29 and 35⁹⁹ - to discuss the missions to W108 and Darwan.¹⁰⁰ He said he spoke with other people as well about the allegations in the articles, but he said he could not recall who.¹⁰¹ Mr Roberts-Smith candidly admitted his recollections about those missions "were initially quite vague".¹⁰² Mr Roberts-Smith said although he recalled things he had personally done, he did not have an independent recollection of the entire mission.¹⁰³ Mr Roberts-Smith then sought to downplay his discussions with Persons 5, 11, 29 and 35 about the Darwan and W108 missions, stating that his discussions were "only to the extent that we're talking about the scheme of manoeuvre and the external workings of the operation".¹⁰⁴
42. According to Person 5, the discussions were about "everything that was in the media".¹⁰⁵ Person 5 said he and Mr Roberts-Smith went through the W108 mission "step-by-step".¹⁰⁶ Person 5 said, "As we do, in any debrief or anything, we went through it again reminding ourselves of what happened on 108, because I had never given it a second thought in nearly 12 years or whatever it was."¹⁰⁷

⁹⁴ Ex A-286, page 2.

⁹⁵ Ex A-288.

⁹⁶ Ex A-1, tab 43.

⁹⁷ Ex A-1, tab 40.

⁹⁸ Ex A-1, tab 47.

⁹⁹ T.614/8-14 (BRS).

¹⁰⁰ T.613/23-43 (BRS).

¹⁰¹ T.318/41-43 (BRS).

¹⁰² T.319/1-3 (BRS).

¹⁰³ T.613/23-43 (BRS).

¹⁰⁴ T.614/19-22 (BRS).

¹⁰⁵ T.4928/16-23 (P5).

¹⁰⁶ T.4984/1-19 (P5).

¹⁰⁷ T.4984/1-19 (P5).

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43. Person 5 spoke with others too. He initially said he went through W108 "step-by-step" with Person 29, but then said "it wasn't really step-by-step", they were more "trying to work out where the hell this was coming from and why it was coming".¹⁰⁸ He spoke with Person 35 and Person 52 in June 2018, after the first article was published. He also spoke with Person 38 around that time and it was "possible" that they discussed the mission to W108.¹⁰⁹ Person 5 has also spoken with Person 27 about W108 but it was not around the time the articles were published.¹¹⁰
44. Person 29 acknowledged that he and Mr Roberts-Smith communicate very frequently, being "at the high end, on a weekly basis at times, and then, on the low end, you know, every couple of weeks".¹¹¹ Person 29 gave evidence that "over the period of our IGADF interviews, yes, we would have most definitely spoken to each other within a reasonable timeframe of those interviews. It stands to reason that I would have spoken to him."¹¹² On 13 June 2018, about 3-4 days after the Respondents' articles were published, and on the day of Person 11's IGADF interview, Person 29 also drove up to Sydney from Nowra. Person 11, Person 29 and Mr Roberts-Smith had dinner together that night.¹¹³
45. Person 35 said he spoke with Mr Roberts-Smith about the allegations when they came out in the paper,¹¹⁴ and spoke with Mr Robert-Smith about W108 in June 2018.¹¹⁵ Mr Roberts-Smith also visited Person 35 in New Zealand in August 2018, which was approximately a week before he commenced these proceedings.¹¹⁶

Mid-June 2018: Mr Roberts-Smith sent threatening letters to Person 18

46. During his telephone call with Person 5 on 8 May 2018, it became clear to Mr Roberts-Smith that someone had said a "hell of a lot" about him to the IGADF.¹¹⁷ Mr Roberts-Smith immediately suspected that the "someone" was Person 18. Mr Roberts-Smith had believed for some time that Person 18 was making allegations against him.¹¹⁸ Mr Roberts-Smith also understood that Person 18 had been interviewed by the IGADF because Person 5 had seen Person 18 in the S1's office on the day of his interview and told Mr Roberts-Smith.¹¹⁹ In addition, the topics covered in Person 5's interview principally concerned deployments in 2009 and 2010.¹²⁰ Only two other SASR members served in Person 5 and Mr Roberts-Smith's patrol in both of those years: Persons 4 and 18.¹²¹ None of Mr Roberts-Smith's correspondence identified Person 4 as a suspected source of leaking to the media.¹²²
47. In his evidence, Mr Robert-Smith failed to disclose that Person 5 told him during their phone

¹⁰⁸ T.4984/31-41 (P5).

¹⁰⁹ T.4985/3-26; T.4992/12 -4994/14 (P5).

¹¹⁰ T.4994/28-33 (P5).

¹¹¹ T.5564/40-46 (P29).

¹¹² T.5564/46-5565/2 (P29).

¹¹³ T.623/9-13 (BRS); T.5788/28-29 (P11).

¹¹⁴ T.5277/17-18 (P35).

¹¹⁵ T.5276/33-35 (P35).

¹¹⁶ T.5287/7-5287/15 (P35).

¹¹⁷ Ex R-45.

¹¹⁸ Ex R-43, tab 8, paragraph 3; Ex A-33, paragraph 3.

¹¹⁹ T.4926/33-41; T.4927/24-32; T.4928/1-3 (P5).

¹²⁰ Ex R-43, tab 10.

¹²¹ T.166/19-24; T.187/39-44; T.611/28 (BRS); T.4834/4-11; T.4886/27-30 (P5).

¹²² Ex A-33; Ex R-43, tabs 8, 11 and 12.

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call on 8 May 2018 that he had seen Person 18 at his IGADF interview. The Respondents submit that he deliberately concealed this information because he knew it was relevant to the question of who sent the threatening letters to Person 18 in June 2018. The author of those letters (as discussed below) knew that Person 18 had been interviewed by the IGADF. By deliberately concealing his knowledge that Person 18 had been interviewed by the IGADF, Mr Roberts-Smith sought to create the false impression that the Person 18 letters contained information of which he was unaware, and therefore he could not be the author. The Court should find that this omission was deliberate and is indicative of Mr Roberts-Smith's consciousness of guilt that he did, in fact, send the letters. It should be used as an admission against interest.

48. Another person whom Mr Roberts-Smith had long disliked was Person 1. In 2017, Mr Roberts-Smith believed (wrongly) that Person 1 was spreading allegations about him to the media and threatened to sue Person 1 personally for defamation.¹²³
49. On or about 8-10 June 2018, Mr Roberts-Smith drafted a letter to the CO SASR expressing his view that Person 18 was leaking information to the media.¹²⁴ The draft letter to the CO SASR also stated Person 1 had been approached to provide "negative and defamatory comments" to Chris Masters and expressed scepticism about Person 1's statement that he had declined to do so.¹²⁵ Mr Roberts-Smith evidently had formed the view that the investigation he caused into Person 6 in 2017 had failed. Person 1 and Person 18 were among the "others" he hoped to scare but it appeared (at least to Mr Roberts-Smith) that they were still speaking about him to the media and, in the case of Person 18, to the IGADF. Accordingly, Mr Roberts-Smith decided to threaten Persons 1 and 18 directly via letters sent anonymously to the SASR headquarters in Perth.
50. One day in early June 2018, Mr Roberts-Smith came home with a grey shopping bag containing a packet of Reflex paper, a packet of envelopes and a packet of gloves.¹²⁶ He wrote the letters to Person 1 and Person 18, saved them onto a USB, printed them at the offices of Channel Seven, and sealed them in envelopes.¹²⁷
51. Mr Roberts-Smith then turned to John McLeod for help. Mr Roberts-Smith arranged to meet Mr McLeod at a coffee shop in Bunnings North Lakes.¹²⁸ He handed a light blue folder to Mr McLeod and said, "I'm under the pump. Can you post these for me? The names are inside, and I will give you the addresses tonight."¹²⁹ Mr Roberts-Smith told Mr McLeod that the names of the recipients were inside the folder and he would ring Mr McLeod that night to provide the addresses to him for the envelopes to be posted.¹³⁰
52. The light blue folder contained four envelopes¹³¹ and two scraps of paper in between two

¹²³ Ex A-30.

¹²⁴ Ex A-33, paragraph 3. T.609/18-26 (BRS). (The letter was ultimately sent by Mr Roberts-Smith's lawyers to the IGADF on 28 June 2018 - see Ex R-43, tab 11).

¹²⁵ Ex A-33, paragraph 4.

¹²⁶ T.1958/27-34 (ER).

¹²⁷ T.1957/6-29 (ER).

¹²⁸ T.2413/16-22 (JM).

¹²⁹ T.2413/16-22 (JM).

¹³⁰ T.2416/16-20 (JM).

¹³¹ Ex R-43, tab 7, pages 1-6, 8.

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pieces of blank A4 paper.¹³² The scraps of paper contained the names of Person 18 and Person 1, the ranks of Person 18 and Person 1, and an arrow which said "insert address here".¹³³ The handwriting on the scraps of paper was Mr Robert-Smith's.¹³⁴

53. The Respondents submit that Mr Roberts-Smith's purpose in providing these two scraps of paper to Mr McLeod was to direct Mr McLeod how to address the envelopes to Person 18 and Person 1. Mr Roberts-Smith wrote down all the information he knew at the time of the meeting at Bunnings (the name and positions of Persons 1 and 18). However, he did not yet know their addresses, so he drew an arrow and wrote "insert address here" as a direction to Mr McLeod to insert the addresses once Mr Roberts-Smith provided them later that night. That inference is plain on the faces of the documents. It is also consistent with Mr McLeod's evidence that Mr Roberts-Smith said he would provide the two addresses at a later time.
54. Mr Roberts-Smith, for his part, claims he gave Mr McLeod six pieces of paper with the names and ranks of six people written on them, and the purpose of the arrow and the words "insert address here" was for Mr McLeod to find out the addresses, write them on the scraps of paper and hand them back to Mr Roberts-Smith.¹³⁵ He said he put the request in writing because he was concerned about being intercepted.¹³⁶ There is no objective evidence that Mr Roberts-Smith ever wrote on or disclosed six scraps of paper. Mr McLeod said there were only two¹³⁷ and only two were ever produced.¹³⁸ The Respondents submit that Mr Roberts-Smith's evidence on this point was a fabrication designed to explain why Mr McLeod had two scraps of paper, in Mr Roberts-Smith's handwriting, with the names and ranks of people to whom threatening letters had been written (and in the case of Person 18, sent).
55. The falsity of Mr Roberts-Smith's evidence is apparent from the following matters.
 - (a) Mr Roberts-Smith's explanation requires a tortured interpretation of both the language and intended use of the scraps of paper. A natural reading of the scraps of paper is that Mr Roberts-Smith gave partial address details to Mr McLeod and instructions on how to address the letters once the balance of the information was provided. Mr Roberts-Smith's account, in contrast, involves the improbable scenario that Mr Roberts-Smith not only wanted Mr McLeod to obtain the addresses; he also wanted Mr McLeod to write those addresses on the *same* scraps of paper given to him by Mr Roberts-Smith and then hand those *same* scraps of paper back to Mr Roberts-Smith.
 - (b) Person 1 and Person 18's troop and squadron have no apparent relevance to the request Mr Roberts-Smith claims he made of Mr McLeod (to find their home addresses through non-military contacts). Mr Roberts-Smith did not explain how the words "E Tp 2qn" and "A Tp 1 Sqn" would assist a civilian police officer looking in a

¹³² Ex R-43, tab 7, page 7.

¹³³ Ex R-43, tab 7, page 6; T.2418/30-34 (JM).

¹³⁴ T.605/4-27 (BRS).

¹³⁵ T.298/10-37, 606/21-24 (BRS).

¹³⁶ T.607/43-T.608/2 (BRS)

¹³⁷ T.2148/32 (JM).

¹³⁸ Ex R-43, tab 7.

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civilian police system for the home address of Person 1 or Person 18. As a matter of common sense, they would not. However, consistent with the Respondents' case, Person 1 and Person 18's troop and squadron would be both relevant and appropriate to include on an envelope addressed to them and sent to the SASR PO box in Perth.

- (c) Mr Roberts-Smith could obtain contact details of serving members from his wife and through his friends in the SASR. Ms Roberts knew the number of the SASR PO box in Perth (which is where both letters were sent to Person 18).¹³⁹ Mr Roberts-Smith's friends Person 29, Person 27, Person 32 and Person 35 were all still in the regiment at the time. There is evidence that on at least one other occasion, Person 29 disclosed Person 14's phone number to Mr Roberts-Smith (with Person 14's consent).¹⁴⁰ There is no logical reason why Mr Roberts-Smith considered it necessary to ask a retired police officer from Queensland to use his contacts to obtain the contact details of SASR members when he could ask his wife and friends instead.
- (d) Mr Roberts-Smith was comfortable using encrypted apps on burner phones to speak with his friends about war crimes allegations and various articles in the media.¹⁴¹ It is implausible that he considered obtaining addresses from Mr McLeod to be the one topic so sensitive it could not be done over encrypted apps; it could only be dealt with by exchanging handwritten scraps of paper (which, curiously, left a record of the communication in Mr Roberts-Smith's own handwriting in any event).
- (e) The alleged purpose of Mr Roberts-Smith's request makes no sense. According to Mr Roberts-Smith, once he found out the home addresses, he wanted to employ a PI firm to surveil the homes to determine whether the occupants were colluding with each other or the media.¹⁴² Mr Roberts-Smith never explained how his complex plan to identify then surveil the homes of SASR members would show "collusion" with each other or media based on the other side of the country. At best, it might have shown the unremarkable fact of one SASR member visiting the home of another. It would never have revealed the contents of any electronic communications or the content of any face-to-face discussions (at home, work or any other location).
- (f) Mr Roberts-Smith never followed up with Mr McLeod (on his own account).¹⁴³ Thus, despite apparently being willing to ask Mr McLeod to take the almost certainly unlawful step of obtaining the home addresses of SASR members, despite being willing to spend money on a PI firm to surveil those SASR members once the addresses were supplied, and despite being increasingly frustrated and concerned that people were colluding and speaking to the media, Mr Roberts-Smith claims he just let the matter slide. That proposition only need be stated to be rejected.

56. Later that same day, Mr Roberts-Smith asked Ms Roberts for the PO Box address for the SASR. Ms Roberts knew the address because the Applicant and Ms Roberts used it when

¹³⁹ T.1957/45-T.1958/1 (ER).

¹⁴⁰ T.1447/30-37 (P14).

¹⁴¹ T.607/1-41 (BRS).

¹⁴² T.606/1-3 (BRS).

¹⁴³ T.298/28-32 (BRS).

they lived in Perth.¹⁴⁴ The Court should infer that this conversation occurred later that same day because Mr Roberts-Smith did not know the address at the time of the coffee that morning, but he knew it by the time he called Mr McLeod that night.

57. That night, Mr Roberts-Smith telephoned Mr McLeod and said "I got them addresses for you, buddy".¹⁴⁵ He gave Mr McLeod two addresses (PO Boxes) to which the envelopes should be sent to Person 18¹⁴⁶ and told Mr McLeod to send the letters to Person 18.¹⁴⁷ Mr Roberts-Smith then said that Person 1 was overseas or on deployment and Mr McLeod should throw out the two envelopes that "were destined" for Person 1.¹⁴⁸ Person 1 was, in fact, on deployment overseas at the time.¹⁴⁹ There is no plausible way Mr McLeod could have known that information other than being told by Mr Roberts-Smith.
58. After the telephone call ended, Mr McLeod wrote Person 18's name and the addresses on the two envelopes that related to Person 18.¹⁵⁰ Mr McLeod's evidence was that there was a way of identifying which two envelopes related to Person 18, but he could not now recall what it was.¹⁵¹ Mr McLeod then placed the two envelopes and the scrap of paper relating to Person 1 back into the blue folder and placed in his office.¹⁵² At some later date, Mr McLeod provided the Person 1 envelopes and the two scrapes of paper recording Person 1 and Person 18's rank and position to the AFP via his legal counsel.¹⁵³
59. The following morning, Mr McLeod posted the two letters addressed to Person 18 from a post box in Tweed Heads.¹⁵⁴ Mr McLeod identified the following documents in his evidence:
 - (a) Ex R43, tab 7, pages 1 to 5 are photographs of the two envelopes provided to him by Mr Roberts-Smith on which he (Mr McLeod) had written Person 18's name and address and then posted from Tweed Heads.¹⁵⁵
 - (b) Ex R43, tab 7, page 7 is a photograph of the two scraps of paper provided to him by Mr Roberts-Smith at Bunnings¹⁵⁶. Mr Roberts-Smith identified same two pieces of paper in Ex A32 (which is the same photograph as page 7, tab 7 of Ex R43) as the pieces of paper he provided to Mr McLeod.¹⁵⁷
 - (c) Ex R43, tab 7, page 8 is a photograph of the envelopes containing letters to Person 1, which were provided to him by Mr Roberts-Smith but not ultimately posted.¹⁵⁸
60. At about midday on 12 June 2018, Person 18 had completed training at the range and was heading to his troop office when he went past the squadron pigeonholes and found a letter

¹⁴⁴ T.1957/45-T.1958/1 (ER).

¹⁴⁵ T.2417/33-34 (JM).

¹⁴⁶ T.2417/23-25, 2418/4-9 and 9-11 (JM).

¹⁴⁷ T.2418/4-9 (JM).

¹⁴⁸ T.2418/14-15 (JM).

¹⁴⁹ Ex R-194.

¹⁵⁰ T.2418/20-25 (JM).

¹⁵¹ T.2417/33-40 (JM).

¹⁵² T.2418/26; T.2418/35-44 (JM).

¹⁵³ T.2420/29-39 (JM).

¹⁵⁴ T.2419/15-19 (JM).

¹⁵⁵ T.2419/21-2420/2 (JM).

¹⁵⁶ T.2420/16-19 (JM).

¹⁵⁷ T.297/34-35; T.298/16-26 (JM).

¹⁵⁸ T.2420/27 (JM).

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which had his personal details on the outside of the letter.¹⁵⁹ Person 18 opened the letter and read it in the presence of Person 90.¹⁶⁰ The text of the letter is Ex R133.¹⁶¹ Person 18 took the letter to the RSM and reported what had happened.¹⁶² The RSM took possession of the letter and told Person 18 he would take care of it.¹⁶³ Person 18 went back to his office and wrote a statement outlining what had occurred in respect of the letter he had received.¹⁶⁴ Person 18 subsequently provided this signed statement to the AFP.¹⁶⁵

61. On 14 June 2018, Person 18 received another letter in the troop mail with his address handwritten on the outside.¹⁶⁶ He provided the unopened letter to the RSM, Person 107. Person 18 and Person 107 wrote a statement outlining that Person 18 had provided the letter to Person 107.¹⁶⁷ Person 18 informed Squadron Headquarters what had occurred in respect of the second letter he had received.¹⁶⁸ Person 18 subsequently learned the content of the second letter was the same as the first letter.¹⁶⁹
62. On the same day, The Age and SMH published an article titled "*Witnesses at war crimes inquiry subject to 'mafia style' threats*", which alleged an "inquiry witness and member of the SASR was sent a letter earlier this week threatening retaliation if he did not recant his testimony to the inquiry led by NSW Supreme Court judge Paul Brereton".¹⁷⁰
63. Ms Roberts read the article about the threatening letter that had been sent to a member of the SASR. Shortly afterwards, she asked Mr Roberts-Smith "what the fuck have you done?" Mr Roberts-Smith told Ms Roberts that he had written the letters, saved them on a USB, printed them at the Seven offices, had them sealed in envelopes and then provided them to Mr McLeod to be posted.¹⁷¹ He also told Ms Roberts that Mr McLeod drove over the Queensland-New South Wales border and posted the letters.¹⁷² Ms Roberts's evidence about what Mr Roberts-Smith told her in relation to the letters is consistent with Mr McLeod's evidence about what he *in fact* did with the letters. There is no evidence that Ms Roberts learned what had occurred in respect of the letters through any means other than Mr Roberts-Smith's admission to her.
64. About seven to ten days after the letters were posted, Mr Roberts-Smith "summonsed" Mr McLeod to a meeting at The Milton in Brisbane.¹⁷³ When Mr McLeod arrived, Mr Roberts-Smith walked towards him and yelled "no phones, no phones, no phones". Mr McLeod turned his phone off and left it in the car.¹⁷⁴ Mr Roberts-Smith and Mr McLeod then had a conversation in which Mr Roberts-Smith admitted sending the letters but saying they were

¹⁵⁹ T.3027/13-29 (P18).

¹⁶⁰ T.3027/32-24 (P18).

¹⁶¹ See also T.3234/30 (P18).

¹⁶² T.3028/4-8 (P18).

¹⁶³ T.3028/8 (P18).

¹⁶⁴ T.3028/9 (P18).

¹⁶⁵ T.3028/11 (P18).

¹⁶⁶ T.3028/16-18 (P18).

¹⁶⁷ T.3028/22-23 (P18).

¹⁶⁸ T.3028/25 (P18).

¹⁶⁹ T.3029/1-2 (P18).

¹⁷⁰ Ex A-112.

¹⁷¹ T.1957/6-29 (ER).

¹⁷² T.1958/23-34 (ER).

¹⁷³ T.2421/1-2 (JM).

¹⁷⁴ T.2421/6-9 (JM).

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“just a touch up”. Mr Roberts-Smith asked Mr McLeod to take responsibility for the letters, stating “All you've got to say is that you're a supporter of mine and you were sick of the way I was being treated”. Mr McLeod declined, stating “Fuck that you weak dog”. They have never spoken again.¹⁷⁵

65. The Court should be comfortably satisfied that Mr Roberts-Smith wrote the anonymous threatening letters to Person 18 and Person 1 and caused Mr McLeod to send the letters to Person 18 on his behalf, for the following reasons.
66. *First*, Mr Roberts-Smith acknowledged that the opening words of the letter reflected his state of mind towards Person 18 in June 2018 (namely, “You and others have worked together to spread lies and rumours to the media and the IGADF inquiry”).¹⁷⁶ At about this time, Mr Roberts-Smith wrote a draft letter to the CO SASR accusing Person 18 of materially the same conduct.¹⁷⁷ On 21 June 2018, Mr Roberts-Smith’s lawyers repeated the same claims against Person 18 in a letter to the IGADF.¹⁷⁸ There is no evidence that, in or around June 2018, anyone other than Mr Roberts-Smith held any animosity towards Person 18 or any concern that Person 18 was speaking negatively to the media or the IGADF about them.
67. *Secondly*, Mr Roberts-Smith held a deep negative animus towards Person 1 in June 2018 (and had done so since 2006). Mr Roberts-Smith’s draft letter to the CO SASR written on or about 8 to 10 June 2018 records his belief that Person 1 had been approached to speak with the media and expressed scepticism that Person 1 had declined to do so.¹⁷⁹ Less than a year earlier, in 2017, Mr Roberts-Smith had again accused Person 1 of speaking to the media and threatened to sue him for defamation.¹⁸⁰ There is no evidence that, in or around June 2018, anyone other than Mr Roberts-Smith held any animosity towards Person 1 or any concern that Person 1 was speaking to the media or the IGADF.
68. *Thirdly*, the author of the letters had a deep animus in June 2018 not just to Person 18 or Person 1, but to the unlikely combination of both. As outlined above, there is no evidence before the Court of any person other than Mr Roberts-Smith with any level of animus towards Persons 1 or 18 in June 2018, let alone both. Mr Roberts-Smith alone fits that profile.
69. *Fourthly*, the letter contained details known only to Mr Roberts-Smith and small handful of other ADF members at the time:
 - (a) The letter refers to an alleged execution of PUCs at the Taliban’s “makeshift medical compound” following the battle of Tizak. Mr Roberts-Smith was the only witness in the case to refer to a Taliban “medical centre” at the battle of Tizak.¹⁸¹ Despite multiple witnesses giving extremely detailed accounts of Tizak, it is a fact that he alone appears to recall.
 - (b) The letters refer to Person 18 having been interviewed by the IGADF. That is apparent

¹⁷⁵ T.2421/33-36 (JM).

¹⁷⁶ Ex R-133.

¹⁷⁷ Ex A-33.

¹⁷⁸ Ex A-33

¹⁷⁹ Ex A-33, paragraph 4.

¹⁸⁰ Ex A-30.

¹⁸¹ T.611/13-38 (BRS).

SECTION XIII: COLLUSION, INTIMIDATION, LIES AND CONCEALMENT

from the opening words (“You... have spread lies and rumours ... to the IGADF inquiry”) and the exhortation that Person 18 “approach the inquiry” and change his evidence. At this time, Mr Roberts-Smith knew that Person 18 had been interviewed or “dragged in” by the IGADF on 8 May 2018.¹⁸²

- (c) The author of the letter purported to have operational details of Person 18’s “many tours” of Afghanistan including “specific mission details, dates and witnesses”. Mr Roberts-Smith served as the 2IC of Person 18’s patrol in 2009 and 2010. He was well-positioned to know specific details and dates of missions in which Person 18 participated over “many tours” of Afghanistan.

70. *Fifthly*, the Court should accept the evidence of Mr McLeod. He had no apparent motive to lie and his evidence identifying his handwriting on the envelopes was unchallenged. Two propositions follow once it is accepted that Mr McLeod’s handwriting appears on the envelopes: (a) he would know how those envelopes came into his possession; and (b) he would know where he obtained the information he wrote on those envelopes. The answer to both questions lies in the two scraps of paper handed to Mr McLeod by Mr Roberts-Smith at Bunnings. The Respondents submit that Mr McLeod’s evidence is consistent with a plain reading of the two scraps of paper and the circumstances in which Mr Roberts-Smith provided both the scraps of paper, and the envelopes, to him. Conversely, Mr Roberts-Smith’s evidence concerning the two scraps of paper was utterly implausible and should be rejected for all the reasons set out at paragraph 55 above.
71. A further piece of evidence – seemingly minor but in fact critical – supports Mr McLeod’s account. Mr McLeod said after Mr Roberts-Smith gave him the envelopes and scrap of paper concerning Person 1, Mr Roberts-Smith subsequently told him not to send the letters to Person 1 because he was on deployment overseas.¹⁸³ That was, in fact, correct.¹⁸⁴ However, it is a confidential operational matter that Mr McLeod cannot have known either in June 2018 or at the time he gave evidence in 2022. It is, however, information to which Mr Roberts-Smith had ready access through his friends and contacts in the Regiment.
72. There was no other credible challenge to Mr McLeod’s credit. One irrelevant line of questioning concerned whether Mr McLeod engaged in bribery in Bali. Mr McLeod flatly rejected that allegation.¹⁸⁵ Other questions concerned text message exchanges with Ms Scott.¹⁸⁶ The asserted relevance was to “demonstrate the nature of the relationship between this witness and, first, Ms Scott” because it “ties in with the relationship with Ms Roberts.”¹⁸⁷ However, nothing was put to Mr McLeod as to the purported effect this had on the honesty or accuracy of his evidence. The mere fact that Mr McLeod and Ms Roberts had communications, including about Mr Roberts-Smith, is of no consequence. It was also put to Mr McLeod that he had “formed a hatred” towards Mr Roberts-Smith, such that he

¹⁸² T.4927/24-32; T.4928/1-3 (P5).

¹⁸³ T.2418/4-5 (JM).

¹⁸⁴ Ex R-194.

¹⁸⁵ T.2434/29-31 (JM).

¹⁸⁶ T.2435/37-T.2436/15 (JM).

¹⁸⁷ T.2436/20-26 (JM).

"would do anything to destroy him". Mr McLeod denied that¹⁸⁸ and made clear that "he had no intention of being here [in court]" and that he was "subpoenaed to be here."¹⁸⁹

73. *Sixthly*, the Court should accept the evidence of Ms Roberts. Her evidence is consistent with Mr McLeod and the objective evidence in all material respects. In particular:
- (a) Ms Roberts said Mr Roberts-Smith told her that he wrote the letters and put them in sealed envelopes. That is exactly how Mr McLeod described receiving the letters from Mr Roberts-Smith during their meeting at Bunnings North Lakes.
 - (b) Ms Roberts said that Mr Roberts-Smith asked her for the SASR PO Box number. That is consistent with Person 18's evidence that he received both letters at work. It is also consistent with Mr McLeod's evidence that Mr Roberts-Smith did not know the addresses at the time he provided the envelopes during the meeting at Bunnings North lakes; and needed to ask someone else. In light of Ms Roberts' evidence, and where the letters were ultimately received, the Court should readily conclude that Mr Robert-Smith obtained the addresses from Ms Roberts and passed them on to Mr McLeod, who then wrote the addresses on the letters and posted them.
 - (c) Ms Roberts' evidence was that Mr Roberts-Smith told her that the letters were posted by Mr McLeod in NSW. That is consistent with Mr McLeod's evidence.
74. *Seventhly*, the evidence is consistent with Mr Roberts-Smith's earlier attempt to "scare" witnesses by causing an anonymous complaint to be made about Person 6. The threat was made, in both cases, to silence witnesses speaking to the IGADF and the media. Both threats involved Mr Roberts-Smith providing information to Mr McLeod to send anonymously to others. The *modus operandi* of both threats, in all material respects, is consistent and points exclusively to Mr Roberts-Smith.
75. *Eighthly*, the Court should reject Mr Roberts-Smith's denial that he wrote the letters to Person 1 and Person 18 and caused Mr McLeod to send the letters to Person 18. Out of all the evidence in this case, he emerges as the only person with animus against Person 1 and Person 18 in June 2018. The content of the Person 18 letters aligns with his state of mind at the time. They contain information that he, and few others, knew at the time. His explanation for how his handwriting came to be on the two scraps of paper given to Mr McLeod was implausible. There is no other potential – let alone credible – candidate other than him.

13 June 2018: Person 11's IGADF interview

76. On 5 June 2018, Person 11 told the SASR that he was not fit to attend a scheduled interview with the IGADF, and the date was pushed back to 13 June 2018.¹⁹⁰ The adjournment was important from Mr Roberts-Smith's perspective because it allowed him to see Person 11 twice, in person, before the interview.
77. On 9 June 2018, Mr Roberts-Smith flew to Perth and met with Person 11 and they spoke about Person 11's upcoming IGADF interview.¹⁹¹ On 12 June 2018, Mr Roberts-Smith flew

¹⁸⁸ T.2467/16-21 (JM).

¹⁸⁹ T.2467/26-29 (JM).

¹⁹⁰ Ex R-250, page 1.

¹⁹¹ T.5785/13-28 (P11).

from Brisbane to Sydney because Person 11's IGADF interview was scheduled for the following day in Sydney.¹⁹² Mr Roberts-Smith said that he did not think that he met up with Person 11 before Person 11's interview because "we were very clear about not talking to each other before the interview".¹⁹³ Similarly, Person 11 said that he did not recall meeting up with Mr Roberts-Smith on the night before his interview.¹⁹⁴ That evidence, from both witnesses, was untrue. See paragraphs E5 to E6 of the Respondents' Closed Court Submissions.

78. The Court should infer that the purpose (or at least a purpose) of this meeting was to discuss Person 11's evidence to the IGADF. There is no other rational or innocent explanation as to why these two men met hours before an investigative interview, in the unusual setting of a hotel room in an interstate city. Mr Roberts-Smith's suggestion that he came to Sydney to provide mental health support ought not be accepted. He had a personal interest in ensuring that Person 11 did not disclose the truth to the IGADF. Person 11 was a key ally in defeating the Darwan murder allegations and Mr Roberts-Smith intended to do everything in his power to ensure Person 11 remained on his side.
79. On 13 June 2018, the day of Person 11's IGADF interview, Person 29 drove up to Sydney from Nowra. Person 11, Person 29 and Mr Roberts-Smith had dinner together in Sydney.¹⁹⁵ Person 11, Person 29 and Mr Roberts-Smith each denied that they discussed the substance of Person 11's interview with the IGADF earlier that day.¹⁹⁶ Despite that denial, Person 11 conceded that he complained to Mr Roberts-Smith and Person 29 about his treatment by the IGADF that day.¹⁹⁷ Mr Roberts-Smith also wrote to his solicitors on 15 June 2018, only two days later, stating that "Person 11 will also be writing a letter of complaint"¹⁹⁸. Plainly enough, there was a discussion at that dinner about Person 11's experience during the interview and how unhappy Person 11 was.
80. It is implausible that Person 11 complained about his treatment by the IGADF without disclosing any matters of substance. Indeed, it is almost impossible to imagine how such a nuanced conversation could have occurred. Further, Mr Roberts-Smith had flown around the country, twice, in the days before the interview to see Person 11 and he was paying for Person 11's legal representation. He was also desperate to find out who, at the time, was revealing adverse information about him to the IGADF and to the media. In all those circumstances, the more probable inference is that matters of substance were discussed.

15 June 2018: Person 5 discloses the substance of his IGADF interview

81. On 15 June 2018, Person 5 sent an email to Mr Roberts-Smith with the subject "Statement draft". The email attached a 3-page document titled "Statement about treatment under interrogation by the IGADF". The body of the email said, "Have a read".¹⁹⁹ On the same day, Mr Roberts-Smith forwarded the email and the statement to his solicitor, Mark O'Brien, and

¹⁹² T.622/44-46 (BRS).

¹⁹³ T.623/2-3 (BRS).

¹⁹⁴ T.5787/39-46 (P11).

¹⁹⁵ T.623/9-13 (BRS); T.5788/28-29 (P11).

¹⁹⁶ T.5788/32-24 (P11); T.623/23-24 (BRS); T.5565/44-47 (P29).

¹⁹⁷ T.5788/35-36 (P11).

¹⁹⁸ Ex R-85.

¹⁹⁹ Ex R-43, tab 10 (unredacted closed court version is Ex R-202).

copied it to Bruce McWilliam at SNOL.²⁰⁰ In his email to Mr O'Brien and Mr McWilliam, Mr Roberts-Smith noted that Person 11 "will also be writing a letter of complaint" and that "there will be more I'd assume".

82. Person 5's statement set out the topics raised in his IGADF interview. It then outlined his response to each of the allegations. By sending this letter, Person 5 breached his non-disclosure obligation to the IGADF and committed a criminal offence. He tipped off a key target of the investigation. He undermined the investigation. He deprived the investigators of the advantage of surprise. The effect of its disclosure was improperly to inform Mr Roberts-Smith of the topics and allegations that the IGADF raised with Person 5 and enable Mr Roberts-Smith to prepare accordingly. It improperly informed Mr Roberts-Smith of Person 5's responses to those allegations. It also contaminated Mr Roberts-Smith's own ability to recall events independently.
83. Mr Roberts-Smith and Person 5 both sought to characterise Person 5's statement as an innocent letter of complaint. Mr Roberts-Smith repeatedly denied that the statement disclosed the substance of the interview to him, despite accepting that it contained the questions asked of Person 5 by the IGADF and Person 5's answers to those questions.²⁰¹ The Court should reject that evidence. The statement, on its face, discloses the substance of the interview. Their refusal to accept an obvious characterisation of the statement can only be seen as an awareness of the serious impropriety of what occurred.
84. Several additional points may be made about the statement. *First*, it is evidence of collusion or at least contamination. Mr Roberts-Smith and Person 5 share a common interest in defeating allegations in which they are both implicated. Person 5's statement advances that interest by assisting Mr Roberts-Smith to prepare for his own interview and (where possible) to harmonise his account with that of Person 5.
85. *Secondly*, Person 5's evidence that the document "was not for him (Mr Roberts-Smith)"²⁰² and he "didn't care" whether Mr Roberts-Smith read the document should be rejected. The covering email addressed to Mr Roberts-Smith states, "have a read". He plainly intended for Mr Roberts-Smith to look at it. Person 5's evidence in this respect is also contradicted by Mr Roberts-Smith who said that Person 5 sent it to him because "we're friends and he was upset and probably wanted my view on what he had written or how he had framed it."²⁰³
86. *Thirdly*, Mr Roberts-Smith and his solicitors have been in possession of Person 5's statement since 15 June 2018. On that day, Mr Roberts-Smith sent a copy to Mark O'Brien personally. Yet Mr Roberts-Smith and his lawyers repeatedly failed to disclose the statement in response to agreed discovery categories or notices to produce to which the statement was responsive (we deal with this below). Mr Roberts-Smith filed and served sworn affidavits of discovery on 23 October 2019, 13 July 2020, 12 August 2020 and 23 December 2020. The statement was not discovered by Mr Robert-Smith on any of those occasions. During cross-examination, Mr Roberts-Smith conceded that the statement was "possibly"

²⁰⁰ Ex R-85.

²⁰¹ T.634/24-25 (BRS).

²⁰² CCT 22.4.22, p.12/46 (P5).

²⁰³ T.639/26-28 (BRS).

responsive to at least categories 14, 15 and 16 of the agreed categories of discovery.²⁰⁴ There is no “possibly” about it: it was plainly caught by those categories and should have been disclosed.

87. The statement was eventually produced by Ms Roberts in response to a subpoena issued by Mr Roberts-Smith on 20 May 2021. If she had not produced the statement, the Respondents would have been deprived of a centrally relevant document. The Court would have been misled as to the extent of the collusion between Person 5 and Mr Roberts-Smith. The Court’s ability to assess Person 5’s credibility would also have been impaired. The document is of great significance in the resolution of the dispute about the circumstances of the two engagements at W108. Mr Roberts-Smith’s failure to produce the document can only be seen to be deliberate.

15-20 June 2018: Mr Roberts-Smith learns of AFP referrals

88. On 3 June 2018, the AFP commenced an investigation into the alleged murder of Ali Jan in Darwin following a referral by then chief of the ADF, Air Chief Marshall Mark Binskin AC.²⁰⁵ About a week later, Mr Roberts-Smith received contact from Mick Keelty, the former AFP Commissioner.²⁰⁶ On about 15 June 2018, Mr Roberts-Smith had the first of two meetings with Mr Keelty.²⁰⁷ About five days later, on or about 20 June 2018, Mr Roberts-Smith and Mr Keelty met again in person. Mr Roberts-Smith gave evidence that during this meeting, Mr Keelty said to him that, “he couldn’t talk to me anymore because there had been referrals made to the AFP and therefore, he wouldn’t be able to talk to me about any of that stuff anymore because he had now become aware of that”.²⁰⁸

5 July 2018: burner phones activated

89. On 9 June 2018, after the first articles were published,²⁰⁹ Mr Roberts-Smith asked Danielle Scott to purchase two Telstra prepaid SIM cards and iPhones for him.²¹⁰ Mr Roberts-Smith reimbursed Ms Scott for the two burner phones.²¹¹ and they were registered in the names of Ms Scott and her husband, Mr Darren Pill²¹² on or about 5 July 2018.²¹³ From time to time, Ms Scott topped up the phones at Mr Roberts-Smith’s request and he reimbursed her for doing so.²¹⁴ Shortly after registration, several encrypted messaging apps were installed on the burner phones.²¹⁵ Mr Roberts-Smith gave evidence that he used encrypted apps to speak with everyone, including Persons 5, 11, 29 and 35.²¹⁶
90. The Respondents submit that Mr Roberts-Smith’s primary purpose in communicating with Persons 5, 11, 29 and 35 using encrypted apps on burner phones was to speak without

²⁰⁴ T.672/43-44 (BRS).

²⁰⁵ Ex R-43, tab 9.

²⁰⁶ T.617/26-28 (BRS).

²⁰⁷ T.618/34-39 (BRS).

²⁰⁸ T.619/20-25 (BRS).

²⁰⁹ T.615/13-15 (BRS).

²¹⁰ T.614/39-41, 615/4-11 (BRS).

²¹¹ T.615/20-22 (BRS).

²¹² T.615/36-39 (BRS); Ex R-188, Annexure A and Annexure A1.

²¹³ T.615/24-27 (BRS).

²¹⁴ T.615/32-39 (BRS).

²¹⁵ T.615/41-44 (BRS).

²¹⁶ T.616/4-5 (BRS).

being intercepted by law enforcement agencies including the AFP and the IGADF. By the time the burner phones were activated in July 2018, Mr Roberts-Smith knew that the IGADF was focused on him.²¹⁷ By 20 June 2018, Mr Roberts-Smith also knew that referrals had been made to the AFP²¹⁸ (although he denied knowing of an “investigation into [him] particularly”).²¹⁹ That evidence was untrue: Mr Roberts-Smith knew that the AFP referrals concerned him through his contacts with Mr Keelty (see paragraph 88 above).

91. Mr Roberts-Smith denied that any part of his purpose in communicating with Persons 5, 11, 29 and 35 using encrypted apps on burner phones was to avoid detection by law enforcement agencies or the IGADF.²²⁰ He said his purpose was to avoid being compromised by the media.²²¹ That evidence is implausible. The tenor of Mr Roberts-Smith’s regular communications with the IGADF, and his meetings with Mr Keelty in June 2018, betray a deep concern that he was the subject of investigations by the IGADF and the AFP. It is unlikely that he was nevertheless content for his communications with witnesses and potential co-accused to be monitored by those very same law enforcement agencies.²²²
92. At one point, Mr Roberts-Smith suggested it would be futile to try and avoid detection through encrypted apps because he knew intelligence agencies can monitor them (the inference being that his only motive in using those apps could have been to avoid the media).²²³ That evidence was also untrue. Contrary to his evidence to this Court, Mr Roberts-Smith made a point of telling people that he used encrypted apps for the very reason that not even intelligence agencies can intercept communications conducted over them.²²⁴

15-17 August 2018: Mr Roberts-Smith commences proceedings and conceals material

93. On 15 August 2018, Mr Roberts-Smith filed and served his Statement of Claim in these proceedings. Two days later, Mr Roberts-Smith sent a series of emails to Ms Roberts. The emails contained photographs of Person 17’s Valium medication and diary notes taken by Mr Roberts-Smith on the night of the assault, and a screenshot of a text message from Person 17 to Mr Roberts-Smith sent on 6 April 2018.²²⁵ Shortly after receiving these photographs from Mr Roberts-Smith, Ms Roberts forwarded them to Ms Scott.²²⁶
94. Ms Roberts gave evidence that Mr Roberts-Smith sent these photographs to her because he wanted her to keep them in case they were ever needed.²²⁷ Mr Roberts-Smith said that he did not recall sending Ms Roberts those photos²²⁸ and he suggested that Ms Roberts went into the deleted folder of his emails and sent them to Ms Scott.²²⁹ The notion that Mr Roberts-Smith’s then-wife secretly accessed his emails, searched through his deleted

²¹⁷ Ex R-43, tab 10; Ex R-45.

²¹⁸ T.619/22-25 (BRS).

²¹⁹ T.619/30-31 (BRS)

²²⁰ T.616/16-22 (BRS).

²²¹ T.616/16-17 (BRS).

²²² T.620/7-9 (BRS).

²²³ T.606/45-47; T.621/1-3 (BRS).

²²⁴ T.620/36-T.621/6 (BRS).

²²⁵ Ex A-256.

²²⁶ Ex A-256.

²²⁷ T.1949.10-12 (ER).

²²⁸ T.819/22 (BRS).

²²⁹ T.820/11-12 (BRS).

items and decided to preserve particular images that Mr Roberts-Smith had taken of Person 17's belongings, is fanciful. The more plausible explanation is that in the days after commencing these proceedings, Mr Roberts-Smith was seeking to preserve material that he considered might be valuable to use against Person 17 but that he did not want to discover. This explanation is borne out by the fact that Mr Roberts-Smith attached the photographs of Person 17's diary notes to his outline of evidence in Reply, which he filed and served on 12 July 2019. The photographs of Person 17's diary contained extremely personal and private information and had no relevance to the case. The more probable inference is that Mr Roberts-Smith disclosed them at that point to embarrass Person 17.

95. Mr Robert-Smith's outline of evidence in Reply did not attach the other two images he sent to Ms Roberts on 17 August 2018, being the screenshot of a text message sent by Person 17 on 6 April 2018 and the photograph of the packet of Valium (although, for the reasons set out in the submissions concerning the assault of Person 17, Mr Roberts-Smith plainly had regard to the photograph of the Valium when he prepared his Outline). Evidently, Mr Roberts-Smith assessed that it would be beneficial to his case to deploy the photographs of Person 17's diary notes to embarrass her but that the other documents would not assist his case.

Mid-October 2018: BRS attempts to influence Person 14

96. On 9 October 2018, the Respondents filed their Defence in these proceedings. Just over a week later, on 17 October 2018, Person 29 contacted Person 14 and said he was calling on behalf of Mr Roberts-Smith as he wanted to speak with Person 14.²³⁰ Shortly afterwards, Person 14 received a text message from Mr Roberts-Smith in which he asked to meet. Person 29 said the purpose of the meeting was for them to "catch up" as "old comrades".²³¹ The truth is Mr Roberts-Smith wanted to meet Person 14 because he "had started proceedings against FFX and that they had used his name in their defence document".²³²
97. Person 14 and Mr Roberts-Smith met on 19 October 2018. Mr Roberts-Smith immediately showed Person 14 a paragraph of the Respondents' original defence relating to Chinartu.²³³ Mr Roberts-Smith suggested that Person 14 could prepare a statutory declaration confirming that he had not spoken to the Respondents and that the allegations in the Defence were untrue. Person 14 refused.²³⁴ He told Mr Roberts-Smith that paragraph was accurate and consistent with how he (Person 14) remembered the mission.²³⁵ According to Person 14, Mr Roberts-Smith did not deny the allegation. Instead, he responded by saying "so it's going to be like that, is it?".²³⁶ Mr Roberts-Smith's file note records him saying, "I don't remember that at all" and "you can't get in trouble for perjury if you legitimately don't remember."²³⁷
98. Person 14 then told Mr Roberts-Smith that he witnessed Mr Roberts-Smith "machine-gun"

²³⁰ T.1447/30-32 (P14).

²³¹ T.5563/23 (P29).

²³² Ex A-35.

²³³ Ex A-35; T.1448/11-15 (P14).

²³⁴ T.1448/24 (P14); Ex A-35.

²³⁵ Ex A-35; T.658/37-39 (BRS); T.1148/29 (P14)..

²³⁶ T.1448/33 (P14)

²³⁷ Ex A-35.

a man with a prosthetic leg during the W108 mission.²³⁸ Mr Roberts-Smith said "what do you mean, your team was not even with us" and suggested that Person 14's "patrol was on the other side of the compound" to where the engagement occurred.²³⁹ This was the same lie included in Person 5's 3-page letter to Mr Roberts-Smith about the IGADF. Person 14 made clear to Mr Roberts-Smith that he was not going to lie²⁴⁰ and that if he was subpoenaed, he would say what is contained in the Respondents' Defence.²⁴¹

November 2018: Mr Roberts-Smith's first IGADF interview and further collusion

99. On 3 November 2018, Person 29 sent an email to Mr Roberts-Smith with the subject line "108".²⁴² The email attached 3 images, each of which purported to be satellite imagery of the area around the W108 compound²⁴³ and contained red markings inserted by Person 29 indicating the location of the compounds, the vehicle drop-off point (VDOP) and the route from the VDOP to W108 and 109.²⁴⁴ The covering email from Person 29 said "*I don't know whether this is totally correct but I think it matches up. 108 and 109 sorta look different but close. Thoughts*".²⁴⁵ Person 29's markings were completely wrong.²⁴⁶
100. Mr Roberts-Smith said that at the time, he was "right in the process" of preparing his outline of evidence in Reply.²⁴⁷ That was wrong. His Outline in Reply was not filed and served until July 2019. The more probable inference is that in early November 2018, Mr Roberts-Smith was communicating with Person 29 in preparation for his upcoming IGADF interview, which was to occur later that month.
101. Person 29's and Mr Roberts-Smith's recollection of the W108 mission at the time was still poor. Mr Roberts-Smith candidly acknowledged that they were "trying to work out what was going on with W108"²⁴⁸ and "to work out what actually happened."²⁴⁹ Person 29 similarly stated that he sent the marked-up images to Mr Roberts-Smith because Mr Roberts-Smith asked Person 29 for his recollections of that mission.²⁵⁰ Even if innocent, this process, contaminated both of their recollections.
102. In the following days, there was a material spike in the data usage on 7-8 November 2018.²⁵¹ While Mr Roberts-Smith said the spike could mean that he was talking to anybody during that period (and not necessarily Persons 5, 11, 29 and 35), he accepted that the spike in the data usage on the prepaid phones was likely because he was concerned about his upcoming interview with the IGADF.²⁵² Mr Roberts-Smith offered no positive alternative as to who or about what he was speaking.

²³⁸ Ex A-35 .

²³⁹ Ex A-35.

²⁴⁰ Ex A-35; T.1451/36-38 (P14).

²⁴¹ T.660/2-4 (BRS).

²⁴² Ex R-43, tab 15.

²⁴³ T.647/1-4 (BRS).

²⁴⁴ Ex R-43, tab 15, page 2-4; T.647/5-12 (BRS).

²⁴⁵ Ex R-43, tab 15, page 1.

²⁴⁶ T.5568/5 (P29); T.647/17 (BRS).

²⁴⁷ T.647/27 (BRS).

²⁴⁸ T.648/32 (BRS).

²⁴⁹ T.648/41 (BRS).

²⁵⁰ T.5502/18-19 (P29).

²⁵¹ Ex R-187, page 6.

²⁵² T.662/17-18 (BRS).

103. Immediately after his interview with the IGADF on 28-29 November 2018, Mr Roberts-Smith asked Ms Scott to purchase two new prepaid sim cards for him. Those sim cards were activated on 3 December 2018.²⁵³ There was a significant spike in the data usage on those two new sim cards on 5-6 December 2018.²⁵⁴ Mr Robert-Smith said he asked for the two additional sim cards because he routinely swapped them over.²⁵⁵ Given the timing, this was unlikely to be part of a routine process. The most probable inference is that Mr Roberts-Smith wanted new SIM cards to minimise the possibility of his communications being intercepted.

June – July 2019: further collusion with Persons 5 and 29 regarding W108

104. Mr Roberts-Smith filed and served his Outlines of Evidence in Reply on 12 July 2019. By this time, Mr Roberts-Smith was in possession of the Respondents' Outlines of Evidence, which were filed and served on 31 May 2019. He had detailed information about the Respondents' case theory on W108, including the anticipated evidence of Person 14.

105. On 29 June 2019, Mr Roberts-Smith emailed a Dropbox link to Person 29,²⁵⁶ which contained a video of the bomb being dropped on the W108 compound on 12 April 2009.²⁵⁷ He and Person 29 then spoke about the W108 video²⁵⁸ for the purpose of looking at what happened at the compound.²⁵⁹ Mr Robert-Smith obtained this video footage from a USB he was sent in the mail.²⁶⁰ Mr Roberts-Smith said that he did not recall why he was sending the W108 video to Person 29 at that time.²⁶¹ However, Person 29 acknowledged that he was likely sent the video was to refresh his memory²⁶² because "there was still a whole lot of doubt and misunderstanding" about the W108 mission.²⁶³

106. On 3 July 2019, Mr Roberts-Smith sent Person 29 an email titled "W108.copy" attaching a PowerPoint document containing an aerial photograph of the W108 that had been marked up by Mr Roberts-Smith.²⁶⁴ The meta data of the document reveals that Person 5 was the author.²⁶⁵ Mr Roberts-Smith made markings on the document before sending to Person 29 so as to indicate a number of important features about the W108 compound and the mission, including the purported entry point, breach point, the field walls, the tunnel entrance and "the dead insurgent". This was just over one week before the outlines of evidence were filed.

107. On 7 July 2019, Person 29 visited Mr Roberts-Smith's home. They looked at documents on Mr Roberts-Smith's laptop, including "an image of a white building that was an aerial shot", while "describing what was going on around the building".²⁶⁶ The photograph they were

²⁵³ Ex R-188.

²⁵⁴ Ex R-187, page 3.

²⁵⁵ T.657/4-5 (BRS).

²⁵⁶ Ex R-43, tab 16.

²⁵⁷ T.665/7-9 (BRS).

²⁵⁸ T.665/17-19 (BRS); T.5510/7-8 (P29).

²⁵⁹ T.665/37 (BRS).

²⁶⁰ T.665/15 (BRS).

²⁶¹ T.665/25 (BRS).

²⁶² T.5509/32-33 (P29).

²⁶³ T.5509/35-39 (P29).

²⁶⁴ Ex R-204, page 1-2; T.666/18-20 (BRS).

²⁶⁵ Ex R-204, page 3.

²⁶⁶ T.1937/42-47 (ER).

looking at on Mr Robert-Smith's laptop was the aerial image of W108.²⁶⁷

108. Mr Roberts-Smith initially denied he had these documents when preparing his outline. He said "I didn't have the initial image or images of 108 when I did my outline. I'm sure of it. Because we had trouble trying to work it out. That was the whole point."²⁶⁸ He only conceded he was wrong after being shown a copy of his email to Person 29 on 3 July 2019 (a week and a half before his Outlines were served).²⁶⁹ Mr Roberts-Smith then sought to distinguish between a discussion with his witnesses about what happened at W108, on the one hand, and on the other hand, a discussion about the W108 evidence *in this case*.²⁷⁰ That is a distinction without a difference. Irrespective of the purpose, their evidence was being further contaminated by this process.

June - July 2019: collusion concerning Person 12

109. Prior to the filing of outlines of evidence, Mr Roberts-Smith also colluded with Person 35, Person 32, Person 27 and Person 39 on a false story that Person 12 was not present at Chinartu on 12 October 2012 because he was removed months earlier after shooting a dog and injuring an Australian patrol commander. We address this earlier in our submissions at paragraphs 51 to 89 of Section VII.

October 2019: deficient discovery begins

110. On 24 September 2019, the Respondents and Mr Roberts-Smith agreed on categories of discovery.²⁷¹ On 23 October 2019, Mr Roberts-Smith served a sworn affidavit setting out a list of discoverable documents in his possession (**First Discovery Affidavit**) in which 63 documents were discovered.²⁷² 31 were newspaper articles already in the possession of the Respondents, or documents relating to Mr Roberts-Smith's claimed lost earnings.²⁷³ Only 32 documents were relevant to substantive issues.²⁷⁴
111. On 6 November 2019, the Respondents' solicitors wrote to Mr Roberts-Smith's solicitors and queried why Mr Roberts-Smith had not discovered any correspondence with individuals on whose behalf he had filed outlines of evidence.²⁷⁵ On 11 November 2019, Mr Roberts-Smith's solicitors, on his instructions,²⁷⁶ responded stating that Mr Roberts-Smith does not retain communications sent or received by him.²⁷⁷ That was not correct.
112. At the time of swearing his First Discovery Affidavit, and the 6 November 2019 communication from his lawyers, Mr Roberts-Smith had in his possession at least the following documents and communications sent or received by Mr Roberts-Smith with people on whose behalf outlines of evidence were filed and served:

²⁶⁷ T.1937/45-47 (ER).

²⁶⁸ T.680/16-18 (BRS).

²⁶⁹ T.680/30-31 (BRS).

²⁷⁰ T.665/40 (BRS).

²⁷¹ Ex R-43, tab 19, pages 1-4.

²⁷² T.688/13-14 (BRS).

²⁷³ T.67210-11 (BRS).

²⁷⁴ T.67213-14 (BRS).

²⁷⁵ T.672/16-18 (BRS); Ex R-43, tab 19, pages 5-6.

²⁷⁶ T.672/26-27 (BRS).

²⁷⁷ Ex R-43, tab 19, page 7; T.672/25 (BRS).

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- (a) The USBs Mr Roberts-Smith had received in the mail which included hundreds of discoverable photographs, videos and other mission-related documents.
- (b) The three-page statement prepared by Person 5 and sent to Mr Roberts-Smith on 15 June 2018, which provided details about Person 5's interview with the IGADF.²⁷⁸
- (c) An email from Person 29 with the subject line "108", dated 3 November 2018, containing a map of the area around W108 marked up and edited by Person 29.²⁷⁹
- (d) A video of the bomb being dropped on the W108 compound on 12 April 2009, which Mr Roberts-Smith sent to Person 29 on 29 June 2019.²⁸⁰
- (e) An email from Mr Roberts-Smith to Person 29, dated 3 July 2019, containing a photograph of the W108 compound that had been marked-up and edited. The meta data of the document revealed that it was created by Person 5.²⁸¹

113. Mr Roberts-Smith's explanation for giving deficient sworn discovery was that he did not understand it was ongoing and he did not understand "how detailed it was".²⁸² That explanation should be rejected. The documents set out at paragraph 111 were already in his possession at the time he gave sworn discovery in October 2019. It is irrelevant whether Mr Roberts-Smith knew that discovery was ongoing. He had no evident difficulty locating and producing documents that were supportive of his case, such as documents used in support of his claimed lost earnings, and documents relating to his award citations.

114. Moreover, Mr Roberts-Smith *knew* the documents were relevant because he used some of them to explain to his lawyers how W108 looked,²⁸³ and "when talking to some of the guys, to explain how we went into the building and who was where".²⁸⁴ Mr Roberts-Smith acknowledged with respect to the W108 images, "it was about, from my perspective, dealing with the defo, these proceedings, so I thought I was entitled to leave it with the lawyers".²⁸⁵ No explanation was provided by Mr Roberts-Smith – or his lawyers – as to why obviously relevant material was not discovered despite being used by them to prepare for the case.

115. The documents Mr Robert-Smith concealed were eventually disclosed to the Respondents through third parties. The communications Mr Roberts-Smith had with Person 5 about the IGADF Inquiry, and with Person 29 about W108, were all produced by Ms Roberts in response to a subpoena issued by Mr Roberts-Smith on 20 May 2021.

December 2019: BRS's second IGADF interview and further collusion

116. On 2 to 4 December 2019, Mr Roberts-Smith had his second interview with the IGADF Inquiry.²⁸⁶ Immediately after his interview, Mr Roberts-Smith telephoned his then-wife, Ms Roberts, and asked her to ring Person 29 from her phone and to provide Person 29 with

²⁷⁸ Ex R-43, tab 10.

²⁷⁹ Ex R-43, tab 15.

²⁸⁰ Ex R-43, tab 16.

²⁸¹ Ex R-43, tab 17.

²⁸² T.671/24-25 (BRS).

²⁸³ T.321/41-42 (BRS).

²⁸⁴ T.321/43-45 (BRS).

²⁸⁵ T.322/6-8 (BRS).

²⁸⁶ T.669/2 (BRS).

the address of a hotel in Sydney and a time that he was to meet Mr Roberts-Smith there that night, and not to ask any questions.²⁸⁷ Later that night, Mr Roberts-Smith had dinner with Person 29, and with Ms Allen, his solicitor.²⁸⁸

117. Mr Roberts-Smith said he had dinner with Person 29 because he "hadn't seen him in a long time, because he had been posted from Perth to New South Wales".²⁸⁹ The truth is they met (at the hotel and the dinner) because Mr Roberts-Smith had significant new information about the direction of the IGADF Inquiry. The more probable inference is that Mr Roberts-Smith met with Person 29 that night to discuss the investigation. That was of significant interest to Person 29 given he had an IGADF interview in January 2020.²⁹⁰
118. In the following weeks, Mr Roberts-Smith flew around the world meeting with his key witnesses. On 6 December 2019, Mr Roberts-Smith flew to New Zealand and met Person 35.²⁹¹ Mr Roberts-Smith then flew to the United States, where he met Person 5.²⁹² While Mr Roberts-Smith was with Person 5, an article was published in the *Sydney Morning Herald* alleging that the AFP had launched a war crimes investigation into the execution of an unarmed man with a prosthetic leg at W108.²⁹³ Person 5 said he and Mr Roberts-Smith would have discussed the article.²⁹⁴ On 27 December 2019, Person 29 visited Mr Roberts-Smith's home on the Sunshine Coast.²⁹⁵ In early January 2020, Mr Robert-Smith flew to Perth to meet with Person 11.²⁹⁶
119. In the four weeks following his second IGADF interview, Mr Roberts-Smith crossed the globe to meet with his four key witnesses in this case. It cannot be coincidence. The more probable inference is that he chose to visit these four men because they were the cornerstones of his defence to the IGADF proceeding and the allegations in this case. In any event, whether or not some or all of those trips were initially organised for a different purpose, the fact is that within a short time of his second IGADF interview Mr Roberts-Smith had met in person with those four key witnesses, and discussed the allegations with them.

March 2020: finding the USBs

120. In the lead up to Mr Roberts-Smith's and Ms Roberts's separation, Ms Roberts had suspected that Mr Roberts-Smith had been hiding money because she knew that he had been withdrawing cash on a regular basis.²⁹⁷ On 16 March 2020, while Ms Scott was staying at Ms Roberts's home, Ms Roberts said to Ms Scott, "He [Mr Roberts-Smith] used to be out in the garden burying things". Ms Roberts and Ms Scott went to the location where Ms Roberts had seen Mr Roberts-Smith burying things, which was in the garden to the side of the home office. Ms Roberts saw a rock placed underneath the hose reel. Ms Roberts and Ms Scott moved the rock and the hose reel, dug down about 30 centimetres using a pitchfork

²⁸⁷ T.1938/19-21 (ER); T.1939/32-38 (ER).

²⁸⁸ T.669/4-6 (BRS); T.5570/15-16 (P29).

²⁸⁹ T.668/9-10 (BRS).

²⁹⁰ T.5570/22 (P29).

²⁹¹ T.668/25-28 (BRS); T.5288/19-20 (P35).

²⁹² T.668/39-40 (BRS); T.5019/46-47 (P5).

²⁹³ Ex R-205.

²⁹⁴ T.5021/46 (P5).

²⁹⁵ T.669/10-11 (BRS).

²⁹⁶ T.669/15-16 (BRS); T.669/37-38 (BRS).

²⁹⁷ T.1949/31-34 (ER).

and found a clear lunch box that had pink tabs on it. Ms Roberts opened the lunchbox and saw that it contained four or five USBs that had been double bagged in snap lock bags.²⁹⁸ Ms Roberts gave the USBs to Ms Scott, who downloaded the contents onto her laptop. They then put the USBs back into the snap-lock bags in the lunchbox and reburied them.²⁹⁹

June 2020: Mr Roberts-Smith recovers the USBs

121. At 7:53am on 5 June 2020, Mr Roberts-Smith emailed Ms Roberts requesting access to their former matrimonial home between 2:30-3:00pm that day to retrieve material for their Family Court matter.³⁰⁰ Ms Roberts responded to Mr Roberts-Smith confirming that she will provide him access to the home at 2:30pm. Her email said, "I have packed most of your personal belongings (all bar files in the cabinet) from the office and placed most of it in the garage as the girls needed the space for homeschooling. You will see the packing boxes in there."³⁰¹
122. At about 2:00pm, Ms Roberts telephoned Ms Scott to tell her Mr Roberts-Smith was coming. Ms Roberts said Mr Roberts-Smith was coming to pick up some files, to which Ms Scott responded, "do you think they're the file files?". Ms Roberts understood that to be a reference to the USB material that Ms Scott and Ms Roberts had found in March 2020.³⁰² Ms Roberts hung up the phone, went to the area in the garden where Ms Roberts and Ms Scott had reburied the USBs in March 2020, and took photos of that area.³⁰³ Those photos were taken at 2:06pm on 5 June 2020 and show a rock placed under a hose reel.³⁰⁴
123. About 5 or 10 minutes later, Mr Roberts-Smith arrived at the house.³⁰⁵ Ms Roberts let Mr Roberts-Smith onto the property. While he was at the property, Mr Roberts-Smith was outside the house and Ms Roberts was inside, and so she could not see what he was doing, other than for a brief period when he was in the office.³⁰⁶
124. At 2:32pm, immediately after Mr Roberts-Smith left the house, Ms Roberts went back to the same area in the garden she had been earlier and took more photos.³⁰⁷ The photos taken at 2:32pm show the rock had been moved and a small new hole had appeared in the ground underneath where the rock had previously been located.
125. Mr Roberts-Smith denies that he buried the USBs in a lunchbox in his back garden. He says that he kept the USBs in a Tupperware container in his desk in his study at his former matrimonial home.³⁰⁸ He says that he retrieved the USBs from his desk in the study in June 2020 when he was attending his former matrimonial home to pick up his children.³⁰⁹ The Court should reject Mr Roberts-Smith's denial for the following reasons.
126. *First*, Mr Roberts-Smith could not have retrieved the USBs from his desk drawer in his study

²⁹⁸ T.1950/5-19 (ER).

²⁹⁹ T.1950/21-24 (ER).

³⁰⁰ Ex R-43, tab 20, page 1; T.674/20-22 (BRS).

³⁰¹ Ex R-112.

³⁰² T.1952/32-47 (ER).

³⁰³ T.1953/1-5 (ER).

³⁰⁴ Ex R-43, tab 21.

³⁰⁵ T/1953/25-26 (ER).

³⁰⁶ T.1953/7-10 (ER).

³⁰⁷ T.1953/16-17 (ER); Ex R-43, tab 22.

³⁰⁸ T.322/10-16 (BRS).

³⁰⁹ T.322/29-32 (BRS).

in June 2020. Ms Roberts had packed up the contents of the office months earlier because their daughters were being home-schooled at the time and one of their daughters was using that desk.³¹⁰ On 23 February and 10 March 2020, while packing the study, Ms Roberts took several photographs of the contents of the desk drawers. There are no USBs visible in the photographs of the desk drawers.³¹¹ After taking the photographs, Ms Roberts packed them into a box and put them in the garage.³¹² On 5 June 2020, on the morning of his visit, Ms Roberts expressly told Mr Roberts-Smith that she had "packed most of your personal belongings (all bar files in the cabinet) from the office and placed most of it in the garage."³¹³

127. *Secondly*, shortly after Mr Roberts-Smith left the property, Ms Roberts sent the photographs that she had taken to Ms Scott. Then, at 3:30pm, Ms Roberts texted Ms Scott, "it's got to be the photos",³¹⁴ which was a reference to the photos that Ms Scott had downloaded onto her laptop in March that year.³¹⁵ Later that day, at 8:57pm, Ms Roberts texted Ms Scott, "maybe he is going to Sydney and knew he had to get the lunchbox before we sold."³¹⁶ The reference to the lunchbox is plainly a reference to the lunchbox containing the USBs.
128. *Thirdly*, Mr Roberts-Smith knew he was the subject of an ongoing IGADF investigation³¹⁷ and an investigation by the AFP. He was taking precautions to avoid being monitored, including using burner phones and encrypted apps. Leaving USBs containing highly sensitive and classified operational material in an accessible desk draw is inconsistent with the level of secrecy that Mr Roberts-Smith displayed in other facets of his life.
129. Mr Roberts-Smith fiercely resists the suggestion that the USBs were buried in his backyard. Irrespective of whether they were buried in the backyard or kept in the desk drawer, the USBs were in Mr Roberts-Smith's custody or control since late 2018 or 2019. He plainly knew of them (having both asked for them and then collected them on 5 June 2020). They were in his physical possession on and from 5 June 2020. Yet none of the discoverable material on those USBs was disclosed when it ought to have been. An inference of deliberate concealment should be drawn either way.

The Second and Third Discovery Affidavits

130. On 13 July 2020, just five weeks after retrieving the USBs, Mr Roberts-Smith filed and served his **Second Discovery Affidavit**.³¹⁸ On 12 August 2020, Mr Roberts-Smith served a further affidavit accompanying a Further Amended List of Documents (**Third Discovery Affidavit**).³¹⁹ In both affidavits, he swore that he had made reasonable enquiries as to the existence and location of discoverable documents, and that to his knowledge, he had no further documents in his control that are discoverable.
131. Those declarations were not true. Mr Roberts Smith had not disclosed any of the material

³¹⁰ T.1951/5-9 (ER).

³¹¹ Ex R-113.

³¹² T.1952/9-11 (ER).

³¹³ Ex R-112.

³¹⁴ Ex R-114, page 1.

³¹⁵ T.1954/43-44 (ER).

³¹⁶ R114, page 3.

³¹⁷ T.674/16-18 (BRS).

³¹⁸ Ex R-43, tab 23.

³¹⁹ Ex R-43, tab 25.

set out at paragraph 112 or any discoverable documents contained on the USBs that he retrieved on 5 June 2020. The USBs contained thousands of photographs, videos and other mission-related documents, which Mr Roberts-Smith has accepted were discoverable.³²⁰

132. Mr Roberts-Smith initially gave evidence that he believed he had made reasonable enquiries, but then accepted he had not.³²¹ He said he was going through a divorce and was trying to work out where he would live.³²² That explanation ought not be accepted. Mr Roberts-Smith had left the matrimonial home 6 months earlier. Moreover, he had lawyers to assist him to comply with his obligations. The more probable inference is that Mr Roberts-Smith deliberately or recklessly concealed the material on the USBs to deprive the Respondents of any advantage that they might have obtained from having access to it.

The Fourth Discovery Affidavit

133. On 23 December 2020, Mr Roberts-Smith swore another affidavit to accompany a Further Amended List of Documents (**Fourth Discovery Affidavit**).³²³ At that time, Mr Roberts-Smith discovered five documents: three of which related to the IGADF Inquiry and two of which were affidavits prepared for Mr Roberts-Smith's Family Court proceedings.
134. Again, Mr Roberts-Smith swore that he had made reasonable enquiries as to the existence of discoverable documents and that to the best of his knowledge, he had no further documents to discover. However, Mr Roberts Smith again failed to discover either the documents outlined at paragraph 112 above or any discoverable material on the USBs.
135. That non-disclosure occurred despite Mr Roberts-Smith having moved the contents of the USBs onto his laptop in around late 2020.³²⁴ Their existence must have been fresh in his mind given that process of transferring between devices. Yet again, the more probable inference is that the failure to disclose them was deliberate or reckless, not inadvertent.

December 2020 – April 2021: non-production of Person 17 material

136. On 15 December 2020, the Respondents issued a Notice to Produce seeking, in substance, all photographs taken by Mr Roberts-Smith at the Hotel Realm on or around 28 March 2018; and any video or videos taken of Person 17 on around 6 March 2018.³²⁵
137. On 4 February 2021, Mr Roberts-Smith's solicitors produced two screenshots of photographs of Person 17 asleep in bed in the hotel room on the night of 28 March 2018. No other documents were produced. Mr Roberts-Smith did not produce the video taken of Person 17 outside Greenslopes Hospital on 6 March 2018, despite it being on the USBs that he retrieved on 5 June 2020³²⁶ and consolidated onto his laptop in late 2020.³²⁷
138. On 12 April 2021, the Respondents served an outline of evidence of Ms Danielle Scott. Ms Scott's outline of evidence annexed copies of the emails sent by Mr Roberts-Smith to

³²⁰ T.676/10-12 (BRS).

³²¹ T.675/32-40 (BRS).

³²² T.675/42-676/8 (BRS).

³²³ Ex R-43, tab 27.

³²⁴ T.683/20-21 (BRS).

³²⁵ Ex R-74, page 1.

³²⁶ T.681/5-11 (BRS).

³²⁷ T.683/20-21 (BRS).

Ms Roberts on 17 August 2018 (see paragraphs 93-95 above).³²⁸ It was apparent from those emails that Mr Roberts-Smith had additional documents in his possession, including the photograph of the Valium packet, that were responsive but had not been produced in response to the Respondents' Notice to Produce dated 15 December 2020.

139. On 15 April 2021, the Respondents queried why Mr Roberts-Smith had failed to produce documents responsive to the NTP.³²⁹ Finally, on 30 April 2021, Mr Roberts-Smith produced the photos taken of belongings in Person 17's handbag on the night of 28 March 2018 the video covertly taken of Person 17 at Greenslopes Hospital. Mr Roberts-Smith's solicitors said the failure to produce the photographs earlier was due to "inadvertent error on the part of this firm".³³⁰ The nature of the "inadvertence" (and the point in time at which the reason for non-production was attributable to the solicitors' inadvertence as opposed to their client's own conduct) was not explained in that letter or in evidence. The explanation, such as it is, needs to be considered in the context of Mr Roberts-Smith having sent these photographs to his wife's email address two days after commencing proceedings in an obvious attempt to conceal them, and the fact that they showed that no tablets had been removed from the packet (contrary to what Mr Roberts-Smith said in his outline of evidence).
140. As for the Greenslopes Hospital video, Mr Roberts-Smith's lawyers said it was stored on the USBs and Mr Roberts-Smith was unaware he had it until after he received Ms Scott's outline of evidence on 12 April 2021.³³¹ That explanation should not be accepted. The more probable inference is the video was concealed because it reflected poorly on Mr Roberts-Smith. It showed he used a private investigator to follow Person 17 and determine whether she had an abortion. The non-disclosure is consistent with Mr Roberts-Smith's pattern of withholding from production any documents that he perceived did not assist his case.

March / April 2021: intimidation of Person 40

141. In early 2021, Person 40 was subpoenaed to give evidence following judgment in *Roberts-Smith (No 12)*. At the time, Person 40 was working closely with Person 29 running a parachute training course for the unit.³³² A few weeks after receiving the subpoena, Person 29 said to Person 40 out of the blue, "RS knows that you're going to be a witness for this defamation case ... You don't – you don't have to be a witness. You know, if you speak to RS's lawyers, they will get you to sign some sort of a piece of paper, and you won't have to act as a witness."³³³ Person 40 was very surprised and responded, "Yes. Okay." Person 29 said, "If you don't, he will see you in court", referring to Mr Roberts-Smith.³³⁴
142. This was a brazen attempt to influence Person 40 not to give evidence in the proceeding. Person 29 sought to use his position to influence a witness to change his account and not to give evidence because he anticipated that Person 40's evidence would be adverse to Mr Roberts-Smith's interests. The Court should infer that the approach was made to

³²⁸ Ex A-256.

³²⁹ Ex R-74, page 13.

³³⁰ Ex R-74, page 15.

³³¹ Ex R-74, page 15.

³³² T.3270/15-25 (P40).

³³³ T. 3270/15-27 (P40).

³³⁴ T.3270/27-29 (P40).

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Person 40 on Mr Roberts-Smith's behalf. Person 29 had clearly spoken with Mr Roberts-Smith about Person 40: that is why he said, "RS knows that you're going to be a witness for this defamation case". In addition, both the approach and the suggested solution (that Mr Roberts-Smith's lawyers could get him to "sign some sort of a piece of paper) is materially identical to Mr Roberts-Smith's approach to Person 14 back in October 2018.

143. The attempt was unsuccessful. It nevertheless gives rise to material adverse inferences that should be drawn against both Mr Roberts-Smith and Person 29. We address these below.

April 2021: non-production of USBs and deletion of laptop

144. On 11 April 2021, Nine broadcast a 60 Minutes episode that alleged that Mr Roberts-Smith had buried a number of USBs in his backyard.³³⁵ On 12 April 2021, the Respondents' solicitors wrote to Mr Roberts-Smith's solicitors enclosing Outlines of Evidence on behalf of Ms Roberts and Ms Danielle Scott. The letter asked a series of questions about the USBs and why they had not been discovered.³³⁶ On 15 April 2021, having not received a response from Mr Robert-Smith's solicitors, the Respondents issued a Notice to Produce to Mr Roberts-Smith, calling for, *inter alia*, all USB drives taken by the Applicant from his former home on 5 June 2020, and any copies of the contents of those USBs.³³⁷
145. On 17 April 2021, Mr Roberts-Smith copied the USB material, which he had saved on his laptop, onto a new USB and arranged for the new USB to be delivered to his solicitors.³³⁸ That same day, Mr Roberts-Smith erased the hard drive on his laptop.³³⁹ He did not save a copy of the USB material to the cloud, save for his company financial documents.³⁴⁰ Mr Roberts-Smith said he wiped his laptop because he was trading it in.³⁴¹ He did so with a non-standard practice known as zero wiping. It ensures that no data can ever be recovered.³⁴² Mr Roberts-Smith zero-wiped his laptop despite an explicit preservation request by the Respondents. There are only two reasonable explanations for his conduct: (a) the laptop contained additional material he did not want to discover; or (b) the laptop would reveal the meta data of the material on the USBs including who sent them to him. Both inferences are consistent with a deliberate attempt to conceal.
146. On 30 April 2021, Mr Roberts-Smith's solicitors provided a written explanation for Mr Roberts-Smith's failure to discover the USBs. The reason was said to be "inadvertence."³⁴³ This was the second claim of inadvertence on the same day: the first being the "inadvertence" of not producing the Person 17 photographs (see paragraph 139 above).
147. However, Mr Roberts-Smith gave a different explanation in evidence. He said he "was aware that there was W108 imagery on there, but I felt we were using it for the – for our side lawyers in the proceeding."³⁴⁴ The use of the word "but" is significant in this context. It makes clear

³³⁵ Ex A-76; Ex A-77.

³³⁶ Ex R-43, tab 28, page 1-2.

³³⁷ Ex R-43, tab 28, page 6.

³³⁸ T.684/29-36 (BRS).

³³⁹ Ex R-43, tab 28, page 17; T.685/5-6 (BRS).

³⁴⁰ Ex R-43, tab 28, page 17.

³⁴¹ T.685/11-17 (BRS); Ex R-43, tab 28, page 17.

³⁴² Ex R-43, tab 30, page 9.

³⁴³ Ex R-43, tab 28, pages 9-10 (paragraph j).

³⁴⁴ T.677/29-32 (BRS).

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that Mr Roberts-Smith *knew* there was relevant material on the USBs, “but” he wanted his lawyers alone to have the advantage of using it. How and why this material was not disclosed in a timely manner, despite both Mr Roberts-Smith and his lawyers knowing about it, has never been adequately explained. The more probable inference is that it was deliberate.

148. On 13 May 2021, the Respondents issued a Notice to Produce seeking, *inter alia*, the Applicant's laptop which he used to consolidate the material from the USBs, and a copy of the meta data for each of the documents that had been itemised in the Applicant's List of Documents of 30 April 2021. The covering letter reiterated a request for an explanation and details as to his possession and destruction of the USBs.³⁴⁵
149. On 21 May 2021, Mr Roberts-Smith's solicitors responded to the Respondents' solicitors. *First*, it was said that only a "relatively small proportion of the documents on the USBs ought to have been discovered".³⁴⁶ This was wrong. Mr Roberts-Smith conceded during his evidence that there were hundreds, if not thousands, of documents in his possession that were responsive to the categories of discovery that were not discovered.³⁴⁷
150. *Secondly*, it was said that "none of the documents are adverse to our client's interests, nor can it be said that it is likely they will have any material impact on his Honour's determination of the issues on justification".³⁴⁸ This was also wrong. The USBs contained at least the following documents which will bear on the factual disputes in the case, and which would not otherwise have been available:
- (a) Photograph of Epic 1's patrol room door during the 2010 rotation (Ex R-200).
 - (b) Photograph of Mr Roberts-Smith and Person 12 on 5 October 2012 (Ex R-39).
 - (c) Photograph of Chinartu taken from a helicopter on 12 October 2012 (Ex R-39).
 - (d) Photograph of Person 35 and Person 123 in August 2012 (Ex R-167).
 - (e) Photograph of Mr Roberts-Smith's patrol on 17 October 2012 (Ex R-135).
151. *Thirdly*, it was said that the reason that the documents were not discovered in October 2019 was “simple inadvertence”, that Mr Roberts-Smith reviewed the contents of the USBs when he received them and he “considered that the material was either irrelevant or of peripheral relevance to the issues in the litigation”.³⁴⁹ This explanation cannot be true. Most obviously, several documents had “W108” or “W108” in their file name. Further, Mr Roberts-Smith sought out this imagery because “I needed imagery to try and demonstrate to the legal team what it was like in Afghanistan and what we were doing over there.”³⁵⁰ The very purpose of requesting the documents was for use in connection with litigation. Even if he thought they were of “peripheral” relevance, they had to be disclosed.
152. Formal discovery was not the end of the USB saga. While Mr Roberts-Smith discovered the contents of the USBs in a Supplementary List of Documents on 30 April 2021, he withheld

³⁴⁵ Ex R-43, tab 28, pages 11-12.

³⁴⁶ Ex R-43, tab 28, page 13.

³⁴⁷ T.676/10-12 (BRS); T.677/12-18 (BRS).

³⁴⁸ Ex R-43, tab 28, page 13.

³⁴⁹ Ex R-43, tab 28, page 15.

³⁵⁰ T.649/32-38 (BRS).

production of the material on the basis that the documents contained national security information within the meaning of the *National Security (Criminal and Civil Proceedings) Act 2004* (Cth). Accordingly, Mr Roberts-Smith issued a 38D Notice. As a matter of procedure, once a 38D Notice has been issued, the issuing party must make the relevant documents available to the Commonwealth to determine a suitable means of production.

153. By 7 June 2021, the first day of the trial, the Respondents had still not received the USB material. The reason soon became clear. Senior Counsel for the Commonwealth, Ms Stern, revealed that Mr Roberts-Smith had not provided the material to the Commonwealth, despite the Commonwealth requesting the documents “on a couple of occasions”.³⁵¹ This further delay was inexcusable; particularly given the pattern of non-disclosure that led to this point. It was a matter of minutes to place the material on a USB and hand it to the Commonwealth. The further delay has never been explained. It cannot reasonably be put down to more “inadvertence”. The more probable inference is that it was deliberate.

June 2021: belated disclosure of the Person 5 letter and Person 5/29 collusion email

154. On 3 June 2021, in response to a subpoena issued by Mr Roberts-Smith, Ms Roberts produced several documents including Person 5’s statement about his IGADF interview³⁵² and a marked-up copy of an image of the W108 compound that Mr Roberts-Smith sent to Person 29 in July 2019.³⁵³ The marked-up copy of the image of the W108 compound produced by Ms Roberts was the same document that Ms Roberts had seen Person 29 and Mr Roberts-Smith talking about at Mr Roberts-Smith’s home in July 2019 in preparation of their Outlines of Evidence.³⁵⁴ These important documents would not have come to the attention of the Respondents but for Ms Roberts’s production in response to a subpoena.
155. During cross-examination of Mr Roberts-Smith on 24 June 2021, the Respondents called for any communication between Mr Roberts-Smith and his lawyers conveying the Person 5 statement.³⁵⁵ On 25 June 2021, Mr Roberts-Smith produced a document in answer to that call.³⁵⁶ The document was substantively redacted on the basis of privilege.³⁵⁷ Mr Roberts-Smith subsequently abandoned his claim and the entire chain was produced.³⁵⁸ The material over which privilege had been claimed was the fact that Bruce McWilliam was party to the correspondence, and that Mr Roberts-Smith was expecting a complaint letter from Person 11. On no view should either of those matters been withheld.

C. Witness contamination and collusion

Legal principles

156. In *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731 at [30], Sheller JA (McColl JA and Windeyer J agreeing) emphasised the importance of witnesses not discussing evidence and the potential consequences that follow. That case concerned witnesses who attended a joint

³⁵¹ T.44/24-30 .

³⁵² T.1944/15-19 (ER).

³⁵³ T.1945/21-25 (ER).

³⁵⁴ T.1945/24-26 (ER).

³⁵⁵ T.642/20-21 (BRS).

³⁵⁶ T.811/46-47.

³⁵⁷ T.812/1-5.

³⁵⁸ T.856/4-7.

teleconference. By parity of reasoning, the same principle applies to this case:

It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with others and particularly not with other potential witnesses. For various reasons, witnesses do not always abide by those instructions and their credibility suffers accordingly. In the present case, it is hard to see that the intention of the teleconference with witnesses discussing amongst themselves the evidence that they would give was for any reason other than to ensure, so far as possible, that in giving evidence the defendant's witnesses would all speak with one voice about the events that occurred. Thus, the evidence of one about a particular matter which was in fact true might be overborne by what that witness heard several others say which, as it happened, was not true. This seriously undermines the process by which evidence is taken.

157. Where evidence has come into existence with direct or indirect collaboration, the credit of the witness may be worthless.³⁵⁹ Contamination or collusion will also undermine the ability of any one witness' evidence to corroborate the evidence of another.³⁶⁰

Collusion between Mr Roberts-Smith and Persons 5, 29 and 35 regarding W108

158. The evidence set out above reveals collusion between Mr Roberts-Smith, Person 5, Person 29 and Person 35 on an extraordinary scale. Their communications were detailed, frequent and clandestine. They were conducted generally either face to face or over encrypted apps on burner phones. The more probable inference in all the circumstances is that Mr Roberts-Smith, Person 5, Person 29 and Person 35 were colluding to update each other on the IGADF investigation and produce a consistent false account – at least on the main points (“no one came out of the tunnel” for example) - that could be delivered in this case and before the IGADF inquiry.
159. At the outset, Mr Roberts-Smith's recollection of those missions was "quite vague" and he had no independent recollection of parts of the mission (see paragraph 41). As recently as July 2019, there was "still a whole of doubt and misunderstanding" among Mr Roberts-Smith's key witnesses. Yet from those initially vague recollections, each of Mr Roberts-Smith, Person 5 and Person 29 gave evidence in this case professing to have an independent, detailed, recollection of the W108 mission. The juxtaposition of the early uninformed exchanges on W108, against the detailed recollections each witness professed to have on the witness stand, starkly illustrates the extent of the contamination and collusion.
160. Even if their purpose was innocent, their evidence should still be given no weight. Their individual accounts have been discussed, blended, blurred, and reconstructed to such a degree that the Court cannot be satisfied that any individual witness' recollection is his own. In a short period of time in May and June 2018, Mr Roberts-Smith spoke with at least Persons 5, 11, 29 and 35 (see paragraph 41). Person 5 spoke with Persons 29, 35, 38 and 52 (see paragraph 43). Mr Roberts-Smith met with Persons 11 and 29 in person (see paragraph 44). Person 5 and Mr Roberts-Smith discussed the W108 mission "step by step" as though it was a "debrief" to remind themselves "about what happened on 108" (see

³⁵⁹ *Seamez v McLaughlin* [1999] NSWSC 9 at [40]; *Rosebanner Pty Ltd v Energy Australia* (2009) 223 FLR 460 at [327]-[334].

³⁶⁰ *Victory Projects Pty Limited & Anor v AAA Self Storage Pty Limited & Ors* [2016] NSWSC 1758 (Black J) at [6]-[7].

paragraph 41). Already, the collusion and contamination had reached a point of no return. As the witnesses “stepped through” the mission to remind themselves of what happened, there is no way of knowing which piece of information originated from which person, or how honest or accurate it was.

161. The Court of Appeal in *Perisher Blue* made clear that witnesses should not discuss their evidence with others, “particularly not with other potential witnesses”. If they do, “their credibility suffers accordingly”. In this case, the extraordinary level of collusion and the certainty of contamination should result in the Court placing no weight on the evidence of these witnesses or using them as corroboration on any contested issue concerning W108.

Collusion between Mr Roberts-Smith and Person 11 concerning Darwan

162. A similar point may be made about Mr Roberts-Smith and Person 11’s interactions concerning Darwan. Their communications were also detailed, frequent and clandestine. Mr Roberts-Smith had a practice of seeing Person 11 in person. He visited Person 11 in Perth the day after the first Darwan articles were published, in Perth less than a week before his IGADF interview, in Sydney the night before and after his IGADF interview, and then again in Perth shortly after Mr Roberts-Smith’s own second IGADF interview. The evidence is that they spoke about Person 11’s IGADF interview (see paragraph 76-80). The more probable inference in all the circumstances is that Mr Roberts-Smith and Person 11 were colluding to update each other on the IGADF investigation and produce a consistent false account – at least on the main points (“there was no one in the final compound”, for example) - that could be delivered in this case and before the IGADF inquiry. Moreover, even if the purpose of the discussions was innocent, the evidence still cannot be given any weight for the reasons set out at paragraphs 160 and 161.

Collusion between Mr Roberts-Smith and Persons 27, 32, 35 and 39 concerning Person 12

163. The Respondents rely on their submissions at Section VII (paragraphs 51-89) concerning the Person 12 lie. The conduct was deliberate, it was dishonest, and it should result in the Court placing no weight on the evidence of Mr Roberts-Smith, Person 32, Person 35 or Person 39.
164. The Person 12 lie underscores why Mr Roberts-Smith’s evidence must be treated with extreme caution if not rejected outright. In his sworn answer to interrogatories, Mr Roberts-Smith said he “recalled” being told at a meeting that Person 12 was removed. He acknowledged then in cross-examination that he never had any such recollection; he was repeating something told to him by Person 35. Mr Roberts-Smith’s willingness to say under oath that he had a “recollection” of an event – when that was not true – illustrates the corrosive effect of the collusion and contamination between Mr Roberts-Smith and his witnesses. The Respondents were fortunate that documents produced by the Department of Defence convincingly rebutted this lie. It may easily not have been so. The number of times when other such “recollections” have been given in evidence as first-hand accounts, without being exposed, will never be known.

D. Consciousness of guilt

165. Certain conduct of a person accused of misconduct may be relied upon as circumstantial

evidence indicative of a consciousness of guilt. Such conduct includes attempts to influence the evidence of other witnesses, the telling of a deliberate lie, and destruction or concealment of evidence.

166. Conduct evidencing consciousness of guilt may be characterised legally as an admission by conduct³⁶¹ or circumstantial evidence from which an adverse inference of guilt may be drawn.³⁶² In a civil case, it is sufficient for a lie to be accepted as an admission of guilt if that is the *more probable* inference to be drawn.³⁶³

Legal principles

Interference with witnesses and destruction and concealment of evidence

167. In *Kuhl v Zurich Financial Services Australia Pty Ltd* (2011) 243 CLR 361; [2011] HCA 11, the High Court said:

Depending on the circumstances, when a party lies, or destroys or conceals evidence, or attempts to destroy or conceal evidence, or suborns witnesses, or calls testimony known to be false, or fails to comply with court orders for the production of evidence (like subpoenas or orders to answer interrogatories), or misleads persons in authority about who the party is, or flees, the conduct can be variously described as an implied admission or circumstantial evidence permitting an adverse inference.

168. It is thus well established that attempts to suborn or intimidate witnesses, to present false evidence, or to conceal or destroy evidence, is conduct from which a consciousness of guilt may be inferred.³⁶⁴ The principle underlying the use of such evidence was explained by Mullighan J in *R v Liddy* (2002) 81 SASR 22, including, at [243], by quoting from the decision in *R v Watt* (1905) 20 Cox CC 852 at 853:

[The principle is] that the conduct in the litigation of a party to it, if it is such as to lead to the reasonable inference that he disbelieves his own case, may be proved and used as evidence against him. The principle is well stated by Sir Alfred Wills ... in his edition of his father's work upon circumstantial evidence:

'Amongst the most forcible of presumptive indications may be mentioned all attempts to pollute or disturb the current of truth and justice or to prevent a fair and impartial trial, by endeavours to intimidate, suborn, bribe, or otherwise tamper with ... witnesses, ... the concealment, suppression, destruction, or alteration of any article of real evidence; any of which acts clearly brought home to the prisoner, or his agents, are of a more prejudicial effect, as denoting on his part a consciousness of guilt, and a desire to evade the pressure of facts tending to establish it.'

169. Mullighan J went on to make clear (again at [243]):

Conduct of this nature is not confined to suborning a witness once a trial has commenced. The conduct may occur before the trial just as an inference that a lie was told due to a consciousness of guilt may be drawn from a lie told before the commencement of litigation.

³⁶¹ *Edwards v The Queen* (1993) 178 CLR 193 per Deane, Dawson and Gaudron JJ at 209; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [82]; *R v Boscanio* [2020] QCA 275 per Sofronoff P (Morrison JA and Brown J agreeing) at [30]; *Leung v State of Western Australia* [2020] WASC 81 at [50].

³⁶² *R v Liddy* (2002) 81 SASR 22 per Mullighan J at [90]; *The State of Western Australia v Yerkovich* [2004] WASC 62 at [134]; *R v Boscanio* [2020] QCA 275 per Sofronoff P (Morrison JA and Brown J agreeing) at [30].

³⁶³ *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [88].

³⁶⁴ See, e.g., *The State of WA v Yerkovich* [2004] WASC 62 at [132] ff and the authorities there collected.

Deliberately giving false evidence

170. In *Amalgamated Television Services v Marsden* [2002] NSWCA 419, the NSW Court of Appeal held in the context of a defamation proceeding that deliberately false evidence is a matter which goes to credit and may also be evidence of a consciousness of guilt.³⁶⁵
171. Similarly, in *TCN Channel Nine Pty Ltd v Pahuja* (2019) 371 ALR 691, Payne JA stated that “a lie told by a plaintiff in the context of a defamation hearing (whether in or out of court), if told in consciousness of guilt, may constitute evidence against the plaintiff.”³⁶⁶
172. The fact that a party has given a deliberately false account, and recognises that the truth would not assist its case, may also lead to an inference of consciousness that its case is unfounded.³⁶⁷ There are circumstances in civil proceedings where an inference can be drawn from false testimony that the truth would be harmful to the case.³⁶⁸
173. The High Court’s decision in *Edwards* is the leading authority on what constitutes a lie of the kind that could be used as evidence of guilt.³⁶⁹ In *R v Lane* (2011) 221 A Crim R 309, Simpson J distilled the principles from *Edwards*: i) the lie must be deliberate; ii) the lie must be related to a material matter; iii) the motive for the lie must be the realisation of guilt and a fear of the truth; and iv) and the statement said to constitute a lie must be clearly shown to be a lie by admission or by evidence.³⁷⁰ These are principles of universal application.³⁷¹

The totality of the conduct must be considered

174. In *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 at 233-234, Mahoney JA considered the nature of circumstantial evidence required to prove fraud in the context of defamation proceedings. His Honour accepted that certain matters relied on by the defendant to establish an inference of guilt were capable of innocent explanation. However, his Honour observed that the Court could not assess each explanation in isolation:

If evidence to prove that the plaintiff has done a particular thing that consisted of only one matter and that matter was capable of explanation... then the matter adduced in evidence might prove slight and might be insufficient evidence to justify an inference of guilt. But where the evidence consists of several matters, each, in the sense to which I have referred, admissible as probative of guilt then the basis for inference of guilt becomes stronger. For as was said recently, in a different context, circumstantial evidence ‘works by cumulatively, in geometrical progression, eliminating other possibilities’: *Director of Public Prosecutions v Kilbourne* [1973] AC at 729 at 758. Whether ‘geometric progression be correct’, the probative force of circumstantial evidence may become greater as the individual items of evidence, each pointing, as Wigmore says, plausibly or probably towards the fact probandum, increase in number.

³⁶⁵ *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 per Beazley, Giles and Santow JJA at [772].

³⁶⁶ *TCN Channel Nine Pty Ltd v Pahuja* (2019) 371 ALR 691 at [83].

³⁶⁷ *Mayall Australia Pty Ltd v Ciba-Geigy (Aust) Ltd; Chong v CC Containers* (2015) 49 VR 402; [2015] VSCA 137 at [181]; *Li v Herald & Weekly Times* (2007) ATR 87; [2007] VSC 109 at [305].

³⁶⁸ *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640; [1975] HCA 63 per Gibbs J at [5]; *Bird v Bird (No 4)* [2012] NSWSC 648 at per Rein J at [46].

³⁶⁹ *Edwards v The Queen* (1993) 178 CLR 193 per Deane, Dawson and Gaudron JJ at 209.

³⁷⁰ *R v Lane* (2011) 221 A Crim R 309; [2011] NSWCCA 157 at [56].

³⁷¹ *FTZK v Minister for Immigration and Citizenship* (2012) 211 FCR 158 at [133] this aspect of the Full Federal Court decision was not displaced by the High Court on appeal see *FTZK v Minister for Immigration and Border Protection & Anor* (2014) 88 ALJR 754 at [92] in which the High Court endorses and adopts the test from *Edwards*.

175. Accordingly, when considering the inferences which may be drawn from Mr Roberts-Smith's conduct, and any innocent explanations that may be advanced for that conduct, the Court should consider the weight of the united force of all the circumstances put together.³⁷²

Witness intimidation

176. Since late 2017, Mr Roberts-Smith has engaged in four known attempts to influence witnesses not to give evidence against him, or to change evidence they had already given to the IGADF inquiry. He identified individuals who he thought would harm (or had harmed) his interests with the IGADF Inquiry, and later, these proceedings. He then targeted those individuals through unlawful or improper conduct to intimidate or persuade them not to give evidence adverse to his interests.

177. The *first* attempt was the campaign against Person 6 in 2017, which had the purpose (or a purpose) to "scare the others" (see paragraphs 3-19). The *second* was the sending of threatening letters to Person 18 to make him recant evidence Mr Roberts-Smith thought he had given to the IGADF. Relatedly, Mr Roberts-Smith wrote, but ultimately did not send, letters to Person 1 (see paragraphs 50-75). The fact that this occurred before this trial commenced is irrelevant: *R v Liddy* (2002) 81 SASR 22 at [243]. The conduct still demonstrates his consciousness of guilt of the matters about which Person 18 could give evidence (relevantly, about W108). The *third* was the approach to Person 14 and suggesting that he could sign a statutory declaration confirming that the allegations in the Respondents' defence were untrue (see paragraphs 96-98). The *fourth* was the very similar approach to Person 40, through Person 29, that Person 40 could get out of giving evidence for the Respondents if he contacted Mr Roberts-Smith's lawyers and signed something (see paragraphs 141-143).

178. Each attempt is evidence of consciousness of guilt. That is the more probable inference when all four attempts are considered collectively. The Court should rely on this conduct as admissions against interest which prove the truth of the Respondents' allegations concerning W108 (where Person 6, Person 18, Person 14 and Person 40 were all present); Chinartu (where Person 14 was present); and the bullying of Person 1.

Deliberately giving false evidence

179. The Respondents submit that Mr Roberts-Smith told deliberate lies on material facts when he gave the following evidence:

- (a) Person 6's patrol was located on the southern side of W108 (for the reasons set out in Section IV).
- (b) No Afghan males came out of the tunnel at W108 (for the reasons set out at Section IV).
- (c) EKIA 56 and EKIA 57 at W108 were killed while armed and moving outside the north-east corner of the W108 compound (for the reasons set out in Section IV).

³⁷² *Belhaven and Stenton Peerage* per Lord Cairns cited in *Chamberlain v R* (1983) CLR 353 and *R v Steven Wayne Hiller* (2007) 233 ALR 634 at [48]; *R v Boscanio* [2020] QCA 275 per Sofronoff P (Morrison JA and Brown J agreeing) at 33.

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- (d) Mr Roberts-Smith is unaware of the identity of the SASR soldier who killed EKIA 56 (for the reasons set out at Section IV).
- (e) Mr Roberts-Smith dragged the body of EKIA 57 from out in the open to the location in which it was photographed (for the reasons set out in Section IV).
- (f) Mr Roberts-Smith's change of evidence concerning whether the body of EKIA 56 was moved (for the reasons set out at Section IV).
- (g) The body of EKIA 56 was located outside the W108 compound (for the reasons set out in Section IV).
- (h) At Darwan, Mr Roberts-Smith kicked the body of an insurgent down an embankment on the other side of the Helmand River (for the reasons set out in Section VI).
- (i) There were no Afghan fighting-aged males found in the end compound at Darwan (for the reasons set out in Section VI).
- (j) Person 56 was not present at the end compound in Darwan, having been sent back earlier with the interpreter (for the reasons set out in Section VI).
- (k) There was no interpreter, no Person 47 and no military working dog in the end compound at Darwan (for the reasons set out in Section VI).
- (l) EKIA 4 at Darwan was a spotter engaged in the cornfield (for the reasons set out Section VI).
- (m) The Person 12 lie (for the reasons set out at Section VII).
- (n) Mr Roberts-Smith did not make a false complaint against Person 6 in late 2017 for the purpose of "scaring" Person 6 and "others".
- (o) Mr Roberts-Smith did not send threatening letters to Person 18 in June 2018.
- (p) Mr Roberts-Smith's evidence that he did not speak with Person 11 about the substance of Person 11's IGADF interviews in September 2017 or June 2018.
- (q) Mr Roberts-Smith did not speak with Person 5 about the substance of Person 5's IGADF interview on 8 May 2018.

180. In each instance, the lie was deliberate and relates to a material fact. The more probable inference in each instance is that Mr Roberts-Smith's motive for the lie is the realisation of guilt and a fear of the truth. That is the more probable inference when all the falsehoods are considered collectively. The Court should rely on this conduct as admissions against interest which prove the truth of the Respondents' allegations concerning W108 and Darwan.

Destruction and concealment of relevant material

181. Throughout the course of these proceedings, Mr Roberts-Smith has destroyed and concealed relevant material. The material (to the extent it has eventually been sourced from a third party or belatedly disclosed) has invariably been adverse to Mr Roberts-Smith's interests: see paragraphs 110 to 115, 120 to 129, 136 to 140, and 144 to 155. In particular:

- (a) He failed to disclose and produce W108-related documents sent to him Person 29 in November 2018 (paragraph 99) and in July 2019 (paragraph 106).

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- (b) He failed to disclose the detailed statement prepared by Person 5 about Person 5's interview with the IGADF (paragraph 81). Mr Roberts-Smith then sought to prevent disclosure of the covering email he sent to Mr O'Brien and Mr McWilliam on the basis of a baseless privilege claim (see paragraphs 155-155).
 - (c) He concealed documents relating to Person 17 by sending them to Ms Roberts for safe-keeping and out of reach of any discovery obligations (paragraph 93).
 - (d) He concealed USBs received from his friends containing hundreds of relevant and discoverable documents, including documents ultimately deployed by in the proceedings which would not have been otherwise obtained (paragraphs 144-153).
 - (e) When challenged on his non-production of the USBs and asked to preserve all metadata and copies of the USBs, Mr Roberts-Smith zero wiped the hard drive on his laptop, where critical meta data would likely have been available (paragraph 145).
182. Mr Roberts-Smith concealed these numerous disclosure failures through the production of four affidavits of discovery in October 2019 (paragraph 111), July 2020 (paragraph 130), August 2020 (paragraph 130) and December 2020 (paragraph 133). Each of those affidavits contained a verification paragraph that Mr Roberts-Smith either positively knew to be untrue, or at least was reckless as to its truth.
183. The explanation repeatedly given by Mr Roberts-Smith's lawyers in correspondence (but never in sworn evidence) was "inadvertence". That might excuse one incident. It cannot reasonably excuse the pattern of repeated failures. The only explanation for this persistent and pervasive concealment and destruction of documents was to deliberately deprive the Respondents of relevant material. One only needs to ask rhetorically: how would the case have unfolded if the Person 5 statement or the Person 29 emails concerning W108 had not been produced? Cross-examination of Mr Roberts-Smith on collusion with his witnesses would have looked materially different, and Mr Roberts-Smith may have made no concessions confident in the knowledge that he could not be contradicted.
184. The Court should rely on Mr Roberts-Smith's disclosure failures as implied admissions that can be used against him to provide the truth of the Respondents' case, including but not limited to W108 (to which the Person 5 statement and the Person 29 emails were directed) and the Person 17 assault allegation.

Totality of the conduct

185. Collectively, the united force of all the circumstances put together³⁷³ - the collusion, the lies, the witness intimidation, and the destruction and concealment of relevant material - leads to an irresistible inference of consciousness of guilt against Mr Roberts-Smith. The Court should rely on this conduct as admissions against interest to find in the Respondents' favour on the ultimate issue: that the Respondents' allegations in its defence are true, and Mr Roberts-Smith's case is unfounded.

³⁷³ *Belhaven and Stenton Peerage* per Lord Cairns cited in *Chamberlain v R* (1983) CLR 353 and *R v Steven Wayne Hiller* (2007) 233 ALR 634 at [48]; *R v Boscanio* [2020] QCA 275 per Sofronoff P (Morrison JA and Brown J agreeing) at 33.

SECTION XIV: CONTEXTUAL TRUTH

1. The defence of contextual truth only arises for determination if the Court finds that the Respondents have failed to establish the substantial truth of one or more of the imputations found to be conveyed by either the Group 2 articles or the Group 3 articles.

A. The Contextual Imputations are conveyed***Contextual imputations from Group 2 articles: Imputations 2 and 3***

2. A consequence of Imputation 1 being conveyed to the ordinary reasonable reader is that the Group 2 articles would also be understood by the ordinary reasonable reader to convey the general contextual Imputations 2 and 3. Any reasonable reader, with their knowledge of worldly affairs, would understand that a soldier who murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him was a person who also broke the moral and legal rules of military engagement and is therefore a criminal, and who disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan. The conduct is so serious that even one count of it is sufficient to convey a general allegation to the ordinary reasonable reader.¹ This conclusion would be reinforced if any of Imputations 4, 5 or 6 are also found to have been conveyed.
3. There can be no serious dispute that Imputations 2 and 3 each differ in substance from each of Imputations 1, 4, 5 and 6 so as to be “other imputations” conveyed “in addition to” the Applicant’s imputations.

Contextual imputations from Group 3 articles: Imputations 2 and 3

4. If any of Imputations 9, 10, 11 or 14 are found to have been conveyed by the Group 3 articles, it follows that Imputations 2 and 3 would also be conveyed to the ordinary reasonable reader as contextual imputations. Any reasonable reader would understand that a soldier who authorised the execution of an unarmed Afghan, or who assaulted or authorised the assault of an unarmed Afghan, was a person who also broke the moral and legal rules of military engagement and is therefore a criminal, and who disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan. This is particularly so in relation to Imputation 9 for the reasons set out in paragraph 2 above.
5. Imputations 2 and 3 each clearly differ in substance from each of Imputations 7 to 14 so as to be “other imputations” conveyed “in addition to” the Applicant’s imputations.

B. The Contextual Imputations are substantially true

6. For the reasons set out above, the Respondents contend that each of Imputations 2 and 3 are substantially true. The Respondents rely upon Mr Roberts-Smith’s conduct in respect of the W108, Darwan, Chinartu and Fasil missions as discussed above. If the Court finds that Mr Roberts-Smith engaged in the conduct alleged in respect of even one of those missions, it inevitably follows that each of the Contextual Imputations are substantially true.

¹ Cf *New South Wales v Deren* [1999] NSWCA 22; *Fairfax Media Publications Pty Ltd v King* [2015] NSWCA 172 at [14].

The conclusion is overwhelming if the Court is satisfied that Mr Roberts-Smith committed or authorised more than one unlawful killing.

C. There is no further harm

Group 2 Articles

7. Each of the imputations alleged to be conveyed by the Group 2 articles principally relate to an allegation of murder: either the alleged murder of Ali Jan at Darwan (Imputation 1), or one of the alleged murders at W108 (Imputations 4, 5 and 6).
8. Thus, in the event the Court is not satisfied of one of those murders, or is not satisfied of an integer of one of the imputations, the issue will be whether Mr Roberts-Smith's reputation was further harmed by the publication of the false imputation, in the context of the true facts.
9. In undertaking the balancing exercise required by sub-section 26(b) of the *Defamation Act*, the Court is required to weight the facts, matters and circumstances relied upon in support of the substantial truth of the contextual imputation, rather than the terms of the imputation itself². Those facts relate to one or more unlawful killings. Thus, the Court will be required to determine whether there is room for any further harm to Mr Roberts-Smith's reputation from the publication of a false allegation of murder (or some other lesser integer of an imputation), in the context of findings that Mr Roberts-Smith has engaged in one or more other counts of murder. The answer, with respect, must be no. If Mr Roberts-Smith is found to have unlawfully killed, or authorised the unlawful killing of even one PUC, then his reputation is obliterated and there is no room for further harm.

Group 3 Articles

10. The position is even more stark in relation to the Group 3 Articles. With the exception of Imputation 9, each of the other imputations relate to conduct which is on any view less serious than murder. Imputations 7 and 8 related to an allegation of domestic violence, Imputations 10, 11 and 14 relate to allegations of assaults of PUCs (or authorisation of an assault on a PUC) and Imputations 12 and 13 relate to threatening and intimidatory conduct towards junior soldiers. If it is established that it is true that Mr Roberts-Smith unlawfully killed, or authorised the unlawful killing of one or more PUCs there is no scope for his reputation to suffer any more damage from these lesser allegations.
11. It is misconceived to treat the allegation in Imputations 7 and 8 as different to the allegations of unlawful killings in Afghanistan, or as relating to a different 'sector' of Mr Roberts-Smith's reputation. First, the public reputation Mr Roberts-Smith enjoyed was borne from and was intrinsically linked with his military service and reputation. It was not a reputation that stood alone. Secondly and moreover, whilst it is true that Imputations 7 and 8 relate to Mr Roberts-Smith's domestic conduct (both in the sense of it is his conduct in a private relationship and also in Australia), the two sets of conduct bear an uncanny similarity: both relate to violent conduct towards a vulnerable person whom he has a duty (legal and moral) to not assault. Both involve an attempted cover-up. The only difference is one assault was committed against his girlfriend, and the other conduct was committed against Afghan persons under

² See Section III, paragraph 10 above.

confinement.

12. If Imputation 9 is found not to be substantially true, the same analysis applies as set out in paragraph 9 above.
13. For these reasons, if necessary, the Court should find that the defence of contextual truth has been established in respect of the Group 2 and the Group 3 articles.

SECTION XV: DAMAGES AND OTHER RELIEF

1. The Respondents' submissions in relation to damages and other relief will be addressed in their submissions in reply.

Nicholas Owens

Lyndelle Barnett

Christopher Mitchell

Counsel for the Respondents

24 June 2022

SCHEDULE – ARTICLE GROUPS

GROUP 1

MCO	Article	Exhibit
Fairfax proceedings		
1 (SOC [4])	Article published in <i>The Sydney Morning Herald</i> on 9 June 2018 entitled "SAS's Day of Shame" and "Troops kept 'kill board': SAS's day of shame"	A2; (copy at A1, T43 (pp155-159))
2 (SOC [6])	Article published on the SMH website on 8 June 2018 entitled "Abdul's brother went out to buy flour. He never came home"	A1, T40 (pp 78-102)
The Age proceedings		
1 (SOC [4])	Article published in <i>The Age</i> on 9 June 2018 entitled "SAS's Day of Shame" and "Did the SAD kick a cuffed man off cliff?"	A5; (copy at A1, T44 (pp160-164))
2 (SOC [6])	Article published on The Age website on 8 June 2018 entitled "Abdul's brother went out to buy flour. He never came home"	A1, T41 (pp 103-128)
The Federal Capital Press Proceedings		
1 (SOC [4])	Article published on the Canberra Times website on 8 June 2018 entitled "Abdul's brother went out to buy flour. He never came home"	A1, T42 (pp 129-154)

GROUP 2

MCO	Article	Exhibit
<i>Fairfax proceedings</i>		
3 (SOC [8])	Article published in <i>The Sydney Morning Herald</i> on 10 June 2018 entitled "Special Forces Rookie 'blooded' by executing an unarmed man"	A3; (copy at A1, T47 (pp184))

4 (SOC [10])	Article published on the SMH website on 9 June 2018 entitled " <i>Special forces rookie 'blooded' by executing an unarmed man</i> "	A1, T45 (pp 165-173)
<i>The Age proceedings</i>		
3 (SOC [8])	Article published in <i>The Age</i> on 10 June 2018 entitled " <i>Blood ties</i> "	A6; (copy at A1, T48 (pp185-187))
4 (SOC [10])	Article published on The Age website on 9 June 2018 entitled " <i>Special forces rookie 'blooded' by executing an unarmed man</i> "	A1, T46 (pp 174-183)
<i>The Federal Capital Press Proceedings</i>		
2 (SOC [6])	Article published in <i>The Canberra Times</i> on 10 June 2018 entitled " <i>S.A.S rookie told to shoot unarmed man</i> "	A8; (copy at A1, T50 (pp196-197))
3 (SOC [8])	Article published on the Canberra Times website on 10 June 2018 entitled " <i>Special forces rookie 'blooded' by executing an unarmed man</i> "	A1, T49 (pp 188-195)

GROUP 3

MCO	Article	Exhibit
<i>Fairfax proceedings</i>		
5 (SOC [12])	Article published in <i>The Sydney Morning Herald</i> on 11 August 2018 entitled " <i>War hero fires back over abuse claims</i> " and " <i>Beneath the bravery of our most decorated soldier</i> "	A4; (copy at A1, T58 (pp280-283))
6 (SOC [14])	Article published on the SMH website on 10 August 2018 entitled " <i>Beneath the bravery of our most decorated soldier</i> "	A1, T55 (pp 213-234)

<i>The Age proceedings</i>		
5 (SOC [12])	Article published in <i>The Age</i> on 11 August 2018 entitled " <i>The cracks in a war hero's façade</i> ", " <i>Beneath the bravery</i> " and " <i>Beneath lauded soldier's bravery</i> "	A7; (copy at A1, T59 (pp284-287))
6 (SOC [14])	Article published on The Age website on 10 August 2018 entitled " <i>Beneath the bravery of our most decorated soldier</i> "	A1, T56 (pp 235-357)
<i>The Federal Capital Press Proceedings</i>		
4 (SOC [10])	Article published on the Canberra Times website on 10 August 2018 entitled " <i>Beneath the bravery of our most decorated soldier</i> "	A1, T57 (pp 258-279)