Roberts-Smith v Fairfax Media Publications Pty Limited (No 25) [2021] FCA 1558

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| File numbers: | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 14 December 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for leave to inspect, uplift and copy documents – legal professional privilege – whether privilege has been waived – whether conduct of respondents is consistent with the maintenance of the privilege – where documents sought are relevant to the respondents’ application for leave to issue a subpoena to a witness to give evidence – privilege waived – leave granted |
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| Cases cited: | *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475  *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 2)* [2011] FCA 1057; (2011) 283 ALR 299  *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30  *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; (2006) 151 FCR 341  *Council of the New South Wales Bar Association v Archer* [2008] NSWCA 164; (2008) 72 NSWLR 236  *DSE (Holdings) Pty Ltd v Intertan Inc* [2003] FCA 384; (2003) 127 FCR 499  *Goldberg v Ng* [1995] HCA 39; (1995) 185 CLR 83  *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1  *New South Wales v Betfair Pty Ltd*[2009] FCAFC 160;(2009) 180 FCR 543  *Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 23)* [2021] FCA 1460 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Other Federal Jurisdiction |
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| Number of paragraphs: | 75 |
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| Date of hearing: | 29 November 2021 |
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| Counsel for the Applicant: | Mr A Moses SC with Mr P Sharp |
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| Solicitor for the Applicant: | Mark O’Brien Legal |
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| Counsel for the Respondents: | Mr N Owens SC with Ms L Barnett and Mr C Mitchell |
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| Solicitor for the Respondents: | MinterEllison |
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| Counsel for the Commonwealth: | Ms C Ernst |
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| Solicitor for the Commonwealth: | Australian Government Solicitor |

ORDERS

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|  | | NSD 1485 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | FAIRFAX MEDIA PUBLICATIONS PTY LIMITED (ACN 003 357 720) (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1486 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE AGE COMPANY PTY LIMITED (ACN 004 262 702) (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1487 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LIMITED (ACN 008 394 063) (and others named in the Schedule)  First Respondent | |

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| order made by: | Abraham J |
| DATE OF ORDER: | 14 December 2021 |

THE COURT ORDERS THAT:

1. The respondents are to produce to the Court, Documents 1, 2, 3 and 17 in the respondents’ First Objection Schedule, responsive to the Notice to Produce issued by the applicant on 5 November 2021.
2. The applicant is granted leave to inspect, uplift and copy the following documents:
   1. Documents 1, 2, 3 and 17 (in unredacted form) in the respondents’ First Objection Schedule; and
   2. Document 12 (in unredacted form) in the respondents’ Third Objection Schedule (being in response to the subpoena issued to Person 56).
3. The respondents are to pay the applicant’s costs of this application, to be agreed or assessed.

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

REASONS FOR JUDGMENT

ABRAHAM J:

1. Mr Ben Roberts‑Smith VC MG is a former soldier who was deployed on multiple occasions to Afghanistan. In August 2018, Mr Roberts‑Smith commenced proceedings in this Court seeking damages for alleged defamatory publications by Fairfax Media Publications Pty Ltd, The Age Company Pty Ltd, The Federal Capital Press of Australia Pty Ltd and certain journalists. The publications are alleged to have carried a number of imputations concerning the conduct of Mr Roberts‑Smith whilst serving in Afghanistan. The alleged imputations include that Mr Roberts‑Smith broke the moral and legal rules of military engagement and that he is therefore a criminal. By their defence, the respondents claim to be able to justify the imputations, a matter on which they bear the onus of proof. The substantive hearing commenced on 7 June 2021, and the applicant’s case in chief has closed. The hearing has been adjourned as a result of difficulties which have arisen as a consequence of Covid-19 restrictions.
2. The applicant served a notice to produce on the respondents on 5 November 2021 and 11 November 2021 respectively, following the filing by the respondents on 28 October 2021 of an application for leave to issue a subpoena to Person 56, a potential witness, to give evidence at the hearing. That application is yet to be heard.
3. On 10 November 2021, in response to the 5 November notice, the respondents served on the applicant an objection schedule claiming legal professional privilege and relevant documents comprising, two emails and an email chain between their solicitors and counsel acting for Person 56. On 12 November 2021, the respondents served an updated objection schedule (First Objection Schedule).
4. On 15 November 2021, the respondents served an objection schedule on the applicant in response to the 11 November notice (Second Objection Schedule).
5. The applicant also issued a subpoena to Person 56 dated 11 November 2021, to which documents have been produced. One of those documents included is an email from Sean Richter (the legal representative for Person 56) to Anthony Reilly, of the Department of Defence, dated 5 August 2021. The respondents were given first access to the documents. As a result, the respondents make a claim for legal professional privilege over part of that email, as reflected in their objection schedule served on 24 November 2021 (Third Objection Schedule). To date, the 5 August email has only been produced to the applicant in a redacted form. The applicant seeks an unredacted copy of that document.
6. On 15 November 2021, the applicant filed an interlocutory application seeking access to certain documents over which the respondents claim are privileged.
7. The applicant seeks access orders to the following documents:
8. documents which are responsive to categories 1, 2 and 3 of the 5 November notice, as identified in the First Objection Schedule, and over which legal professional privilege is claimed (identified as Documents 1 and 2 in the First Objection Schedule);
9. an unredacted copy of an email between Dean Levitan, a solicitor for the respondents, and Mr Richter dated 1 September 2021 (identified as Document 17 in the First Objection Schedule);
10. an unredacted copy of an email between Mr Richter and Mr Reilly dated 5 August 2021 (identified as Document 12 in the Third Objection Schedule); and
11. any other documents described by the respondents in their objection schedules to the extent that those documents record such communications between the respondents and Person 56 in relation to the arrangement or understanding relating to Person 56’s attendance at the hearing to give evidence or otherwise concern or touch upon the arrangement or understanding.
12. The applicant accepts that the documents enumerated in the respondents’ objection schedules are privileged. The issue for determination is whether that privilege has been waived over the documents in question. I note that the applicant is no longer seeking access to documents over which privilege is claimed in connection with the notice to produce dated 11 November 2021.
13. For the reasons below, privilege has been waived in respect to Documents 1, 2, 3 and 17 in the First Objection Schedule and Document 12 in the Third Objection Schedule. I also consider that privilege has been waived in respect of Document 3 in the First Objection Schedule.

## Material relied on

1. The applicant read an affidavit of Paul Victor Svilans, his solicitor, dated 15 November 2021, which generally annexed the notices to produce and the schedule of objections, the subject of this application (Svilans Affidavit). It details the interactions between the parties in respect to the notices to produce. The affidavit was admitted subject to paragraph [6] and the annexure referred to therein.
2. The Svilans Affidavit included correspondence from the respondents dated 10 November 2021 which enclosed an objection schedule and two emails over which the respondents accepted privilege has been waived by virtue of Peter Bartlett’s affidavit of 28 October 2021 (October Bartlett Affidavit). That correspondence also enclosed an email chain which was partly redacted and over which the respondents elected to partially waive privilege (included in the email chain is a redacted copy of the email of 1 September 2021).
3. The applicant also tendered a bundle of documents, which was admitted (subject to one sentence which appears in the copy of the transcript of the hearing on 18 November 2021). The tender bundle contained, inter alia, two affidavits of Mr Bartlett, solicitor for the respondents, including the October Bartlett Affidavit, which was filed by the respondents in support of their application for leave to issue a subpoena to Person 56, and another dated 15 March 2021, which had been relied on by the respondents in connection with an earlier application for leave to issue subpoenas to certain witnesses (including Person 56) and amend their defence (March Bartlett Affidavit).
4. Given the significance of the October Bartlett Affidavit to the submissions, it is appropriate to recite it in full:

1. I am a partner of MinterEllison and am the lawyer for the Respondents in these proceedings. I am authorised to swear this affidavit on behalf of the Respondents.

2. Nothing in this affidavit or its annexure is intended to waive any client legal or legal professional privilege. To the extent that any part of this affidavit may be construed as a waiver of privilege, I withdraw and do not rely on that part of the affidavit.

3. I make this affidavit in support of an application dated 28 October 2021 for leave to issue a subpoena to Person 56 to attend and give evidence in these proceedings.

**Background**

4. On 13 February 2019, the Court made orders in relation to the service of outlines of evidence. The orders included that the Respondents serve their outlines of evidence by 8 May 2019.

5. On 22 May 2019, the parties agreed to vary the timetable, with the effect that the Respondents' outlines were due to be served on 31 May 2019.

6. On 15 March 2021, the Respondents filed and served an application for leave to issue subpoenas to attend to give evidence to additional witnesses, including Person 56 (March Application). The March Application was supported by an affidavit sworn by me on 15 March 2021 (March Affidavit).

7. On 23 April 2021, Justice Besanko refused the Respondents leave to issue a subpoena to Person 56 to attend and give evidence in these proceedings.

**Communication with Person 56**

8. In the March Affidavit, I gave evidence that:

(a) As at the date of the March Affidavit, the Respondents (or their legal representatives) had not spoken to Person 56;

(b) that Dean Levitan, the solicitor with the day-to-day conduct of the matter on behalf of the Respondents, had made multiple attempts to speak with Person 56, including by contacting Person 56's legal representative, Sean Richter, in excess of eight times between February 2020 and the date of the March Affidavit, but that Person 56 had not agreed to speak to the Respondents or their legal representatives (see paragraph 29 of the March Affidavit); and

(c) the Respondents did not possess sufficient information at that time to enable them to serve an outline of the evidence they anticipate Person 56 would give.

9. The Applicant’s oral evidence, and the evidence of the three Afghan Witnesses, emphasised to me the extent to which Person 56 would be able to give evidence about key matters in dispute in relation to the mission in Darwan on 11 September 2012 including:

(a) whether there were fighting aged males in the last compound set;

(b) whether there was an interpreter with the Applicant’s patrol when they reached the last compound set;

(c) at about what time/point in the mission Person 56 and the interpreter left the patrol; and

(d) whether there was a steep embankment on the edge of the dry river bed closest to the helicopter landing zone.

10. As a result, following the evidence of the Applicant and the three Afghan Witnesses, I, together with other members of the Respondents’ legal team, decided that a further attempt should be made to see if Person 56 would speak to the Respondents’ legal representatives about the Darwan mission in particular. That is to say, it was determined that the Respondents would only seek to ascertain if Person 56 would speak to us about the Darwan mission, and no other mission or issue in dispute between the parties.

11. I am informed by Mr Levitan, and believe, that:

(a) From 3 August 2021, Mr Levitan made further attempts to arrange for the Respondents' legal representatives to speak with Person 56 directly about the mission in Darwan, including during telephone conversations with Mr Richter on 3 August 2021, 6 August 2021 and 26 August 2021.

(b) On 6 September 2021, Mr Richter informed Mr Levitan that Person 56 would be prepared to speak directly with the Respondents' legal representatives about the mission in Darwan.

(c) On 15 September 2021, the Respondents' legal representatives had a video conference with Person 56 and his legal representatives.

(d) On 5 October 2021, the Respondents' legal representatives had a second video conference with Person 56 and his legal representatives.

(e) On 26 October 2021, Mr Levitan received a signed statement of Person 56 setting out his evidence about the mission in Darwan. Person 56's signed statement is annexed hereto and marked PLB-1.

1. I note that the October Bartlett Affidavit was admitted on this application on a limited basis only, as evidence of what Mr Bartlett asserts are the reasons for seeking leave to issue a subpoena to Person 56 at this stage.
2. The tender bundle also included the subpoena issued by the applicant to Person 56, the documents produced by Person 56 over which no claim or only a partial claim of privilege has been made by the respondents and correspondence between the parties.
3. The respondents read two affidavits of Mr Bartlett dated 19 November 2021 (First November Bartlett Affidavit) and 25 November 2021 (Second November Bartlett Affidavit), deposing to the making and basis of the claims for legal professional privilege in respect to documents relevant to the notices to produce and the subpoena to Person 56.

## Legal principles

1. There was no dispute between the parties that the documents sought are privileged, the issue is one of waiver.
2. The principles relevant to a claim for legal professional privilege were summarised in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 23)* [2021] FCA 1460 at [37]-[46] and it is unnecessary to repeat them here. As with the application there considered, this application is governed by the common law: see for example *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 2)* [2011] FCA 1057; (2011) 283 ALR 299 at [6]–[9].
3. Given the focus of this application, it is appropriate to expand upon the principles that are relevant to waiver of privilege.
4. In *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 (*Mann*), the plurality explained the rationale and approach at [28]-[29] as follows (citations omitted):

At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege…

Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege… What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

1. When considering whether a waiver of privilege has occurred, each case must be assessed on its own facts: *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; (2006) 151 FCR 341 (*Rio Tinto*) at [45], [61]. As explained at [45]:

Where, as here, one party alleges that another has impliedly waived legal professional privilege, a court is bound to analyse the acts or omissions of the privilege holder that are said to be inconsistent with the maintenance of the privilege. In concluding that the Commissioner had waived the privilege in the eight contested documents, the docket judge in fact applied the “inconsistency” principle of *Mann*, as he was obliged to do: see *Rio Tinto (2)* at [20]. Plainly enough, the inquiry that it mandates focuses on the facts of the particular case. It follows that other cases in which implied waiver has been considered provide limited guidance unless they arise out of similar facts.

1. In *DSE (Holdings) Pty Ltd v Intertan Inc* [2003] FCA 384; (2003) 127 FCR 499 (*DSE*), Allsop J (as his Honour then was) observed at [58] (emphasis in the original):

…the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the confidential communication or which necessarily lays open the *confidential communication* to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication.

1. And see *Rio Tinto* at [61]:

Both before and after *Mann*, the governing principle required a fact-based inquiry as to whether, in effect, the privilege holder had directly or indirectly put the contents of an otherwise privileged communication in issue in litigation, either in making a claim or by way of defence…

1. Inconsistency may arise if the privilege holder makes assertions about its state of mind and there are likely to have been confidential communications which affected that state of mind: *Council of the New South Wales Bar Association v Archer* [2008] NSWCA 164; (2008) 72 NSWLR 236 at [48]. The question, however, is not whether a party has put their state of mind in issue but whether or not the privilege holder made an assertion as part of their case that lays open the privileged documents to scrutiny, with the consequence that an inconsistency arises between the making of the assertion and the maintenance of privilege: *Rio Tinto* at [65].
2. Finally, in the circumstance where a party has claimed privilege over part of a document only, where there has been partial disclosure, the observations in *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30 (*AWB (No 5)*) at [164]-[165] are relevant:

[164] Turning to the scope of any imputed waiver, it is well established that a voluntary disclosure of privileged documents can result in a waiver of privilege over those documents and associated material. The test applied to determine the scope of any waiver of associated material is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter: *Maurice* at 482 and 484 per Gibbs CJ, 488 per Mason and Brennan JJ, and 498-499 per Dawson J.

[165] In *Maurice*, Gibbs CJ said (at 482):

… Similarly, where a party disclosed a document which contained part only of a memorandum which dealt with a single subject-matter, and then read the document to the judge in the course of opening the case, it was held that privilege was waived as to the whole memorandum: *Great Atlantic Insurance Co v Home Insurance Co* [[1981] 1 WLR 529]. In that case Templeman LJ said:

… the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in court it cannot be erased.

The same test must be applied in deciding whether the use in legal proceedings of one document impliedly waives privilege in associated material. In *Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation [No 2]* Mustill J dealt with this question and suggested the following test:

… where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.

1. All that said, questions of waiver are matters of fact and degree: *Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 at [49]. The applicant bears the onus in establishing waiver: *New South Wales v Betfair Pty Ltd*[2009] FCAFC 160;(2009) 180 FCR 543 at [54].

## Submissions

### Applicant’s submission

1. The applicant summarised the context in which this application arises, which relevantly includes that the respondents, on 28 October 2021, made a second application for leave to issue a subpoena to Person 56. The first application occurred before the hearing commenced and was refused in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465 (*Roberts-Smith (No 12)*). The principal reason for the refusal was that the respondents were unable to provide any indication of the evidence that Person 56 would give: *Roberts-Smith (No 12)* at [53]-[54]. The applicant submitted that at that time the evidence from the respondents was that there had been repeated attempts to contact Person 56 but he had refused to speak to them. The applicant submitted that the evidence is that Person 56 was a member of the applicant’s patrol in 2012, and in the second further amended defence, the respondents allege he was involved in the cover-up of the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. He is also potentially caught by the allegation in the second further amended defence, that the applicant or a member of his patrol unlawfully killed an Afghan adolescent and covered up the killing by using a throwdown at Fasil on 5 November 2012. In that context, it was submitted that the respondents appear to have reached a deal with Person 56 to the effect that if Person 56 gives evidence in relation to Darwan, he will not be asked any questions that might incriminate him in other matters. It is submitted that the deal is the real reason this witness is sought to be called now and not because something new had been learnt from the evidence. That is, it was determined that the respondents would seek to ascertain if Person 56 would give evidence about the Darwan mission only and not any other issue in dispute between the parties. This is in a context where the applicant’s evidence in relation to Darwan was known to the respondents before the hearing began and has not changed.
2. The applicant also highlighted the timing of this application, which was made after the applicant completed evidence in June 2021, and after the Afghan witnesses gave evidence in in July 2021.
3. It was submitted that the respondents on the application for leave to issue the subpoena will be required to explain the timing of the application and the circumstances in which it is made. To that end, the October Bartlett Affidavit, is said to be relevant. The applicant places particular reliance on [8]-[10] recited above which, the applicant submits, involves an assertion about the respondents’ state of mind to approach Person 56 and to secure his agreement to give evidence on a limited basis in respect to Darwan. It was submitted that the relevant inconsistency giving rise to waiver has occurred by the respondents’ disclosure of, and reliance upon, their reasoning process in Mr Bartlett’s affidavit as an explanation as to why their application is being made at this stage of the proceedings. The respondents have, therefore, waived privilege over any confidential communications with their lawyers which are likely to have affected the respondents’ state of mind or which are material to the formation of that state of mind, including communications that informed the respondents’ disclosed reasoning process concerning the decision to approach Person 56 at this time. This submission is directed to Documents 1 and 2 of the First Objection Schedule.
4. The applicant submitted that privilege also has been waived by the respondents, producing two emails as a result of the October Bartlett Affidavit, and the voluntary production of the email chain which contains the partially redacted email of 1 September 2021.
5. In respect to the redacted email of 1 September 2021, the applicant submitted that Mr Bartlett deposes that the redacted portion is not necessary to properly understand the balance of the email that has been disclosed, but he has not suggested it relates to a different subject matter, which might provide a justifiable basis for severance. To deny the applicant access to this material would deprive him (and the Court) of the opportunity to be satisfied that the whole of the material relating to the scope of the arrangement or understanding has been disclosed, not just a portion of it.
6. The applicant submitted that the waiver by the respondents entitles them to any other documents described by the respondents in their objection schedules to the extent that those documents record such communications between the respondents and Person 56 in relation to the arrangement or understanding relating to Person 56’s attendance at the hearing to give evidence or otherwise concern or touch upon the arrangement or understanding (with the latter phrase being emphasised). It was submitted that the respondents’ election to waive privilege in respect of the existence of an arrangement or understanding means that it would be inconsistent and unfair to the applicant for the respondents to assert privilege in relation to other documents referring to or touching upon the same subject matter, citing *Goldberg v Ng* [1995] HCA 39; (1995) 185 CLR 83 at 96.
7. As to the redacted email of 5 August 2021, which was produced by Person 56 in answer to a subpoena, the applicant’s submission is that waiver occurred when Mr Richter sent the email to Mr Reilly, and there was an express waiver in providing all but the redacted portion to the applicant.

### Respondents’ submission

1. The respondents do not accept that there has been a waiver to the extent claimed by the applicant. They submitted that in any event, the only document described in the objection schedules which concerns, or otherwise touches upon, the arrangement or understanding in relation to Person 56’s attendance at the hearing to give evidence, is the email of 1 September 2021 in the First Objection Schedule (and documents 5 and 9 in the Third Objection Schedule which record the same communication), which has already been produced to the extent it falls within the description. It was initially submitted that the balance of the documents described in each of the objection schedules do not record communications between the respondents and Person 56 concerning the arrangement or understanding, nor do they “otherwise concern or touch upon the arrangement or understanding”. However, in oral submissions the respondents accepted that if a broader view is taken, such that documents which simply mention or describe these matters may fall within scope, then Documents 1 and 2 would also be relevant. It was submitted that it depends on the meaning of “touch and concern”.
2. As to Documents 1 and 2, it was submitted that no inconsistency arises between the October Bartlett Affidavit which notes that a decision was made to make a further attempt to speak to Person 56, and the maintenance of confidentiality in communications between the respondents and their lawyers. Paragraphs [9] and [10] of the October Bartlett Affidavit do not refer to, disclose or make any assertion about the contents of any confidential communication between the respondents and their lawyers, and the contents of those communications have not been put in issue. It does not disclose the reasons for the decision. It was also submitted that the argument proceeds on an incorrect construction of [9] and [10] of the October Bartlett Affidavit as [9] simply identifies the key topics in relation to Darwan that Person 56 could have been expected to give evidence upon and in [10], the reference to the evidence of the applicant and the three Afghan witnesses is to provide a temporal reference to the decision, not a causal one. Understood in this way, the only “state of mind” disclosed is the decision. The affidavit does not disclose the reasons for the decision, the advice given in relation to the decision, or the instructions given. The respondents’ conduct in including only the fact of the decision in the affidavit is consistent with the maintenance of confidentiality in these matters and their communications with their lawyers. It was submitted that this is reinforced by [2] which makes it clear that it was not Mr Bartlett’s or the respondents’ intention to waive any legal professional privilege (and that to the extent there is any inadvertent waiver by reason of some part of the affidavit, the relevant portion is withdrawn).
3. As to Document 17, the email of 1 September 2021, it was submitted that the redacted part of the email refers to other confidential communications between the respondent’s solicitor and Mr Richter, in respect of which a claim for legal professional privilege is maintained, and does not concern or touch upon the arrangement of understanding. The part of the email that is redacted is not required to enable a proper understanding of the part of the 1 September email that has been disclosed.
4. The respondents submitted that the only matters over which privilege has been waived are the communications relevant to understanding the limitations or relevant circumstances upon which Person 56 agreed to speak to the respondents, which are communications that pass between the respondents and Person 56 or his representatives. The respondents’ internal consideration of how to get Person 56 to agree to give evidence, any proposals for so doing, legal advice to the respondents about any such options and the relative merits of different options, have not been waived.
5. As to the email of 5 August 2021, it contains confidential communications between the respondents and Person 56’s lawyer, which he was not authorised to disclose.

## Consideration

1. There are four issues to be determined: *first,* the submission directed to Documents 1 and 2 which is dependent on a consideration of the October Bartlett Affidavit; *second*, the balance of the redacted email of 1 September 2021; *third,* the balance of the redacted email of 5 August 2021; and *fourth,* if privilege has been waived over any other documents in the objection schedules which “concern or touch upon the arrangement or understanding” as to the basis on which Person 56 is to give evidence. As noted above at [7], the first three documents (Documents 1, 2 and 17) relate to the notice to produce dated 5 November 2021. The fourth document (Document 12) relates to the subpoena issued to Person 56.
2. I observe at the outset that the respondents have accepted that, as a result of the October Bartlett Affidavit, they have waived privilege in respect to two emails between Mr Richter and Mr Levitan. As a consequence, those emails were produced to the applicant. It is also accepted by the respondents that the production of Document 17 constitutes a voluntary waiver of privilege, in so much of that email as has been produced.

### Documents 1 and 2

1. Documents 1 and 2 are identified in the First Objection Schedule as confidential email communications between the respondents and their lawyers made for the dominant purpose of providing legal advice in connection with the proceedings.
2. As is apparent from the submissions recited above, this application arises in a context where the documents sought are said to be relevant to the respondents’ application for leave to issue a subpoena to Person 56 to give evidence, given the particular circumstances in which that application is made.
3. Those circumstances are accurately described by the applicant in his submission, to which no challenge was made. Of particular note is the timing of the application (being after the applicant and the Afghan witnesses have completed their evidence), that this is a second such application where the first was refused on 23 April 2021, in *Roberts-Smith (No 12),* and that it is apparent this new application is made in a context where some arrangement has been reached between the respondents and Person 56 as to the extent of the content of his evidence to be led by them. This is all in a context where the respondents were required to serve outlines of evidence for their witnesses by 31 May 2019.
4. Against that background it may readily be accepted that, as the respondents require leave to issue the subpoena, it will be incumbent on them, inter alia, to provide an explanation as to how the application has come about at this stage of the trial.
5. It is to that end that the October Bartlett Affidavit, which was filed by the respondents in support of their application for leave, is plainly directed.
6. There is a dispute between the parties as to the meaning to be attributed to the October Bartlett Affidavit, in particular [9] and [10]. Put succinctly, on the one hand, the applicant submitted that the respondents’ reasoning process is provided in Mr Bartlett’s affidavit as an explanation as to why their application is being made at this stage of the proceedings. On the other hand, the respondents submitted that those paragraphs refer only to the fact of the decision having been made and any reference to the applicant’s and the Afghan witnesses’ evidence is purely temporal.
7. I accept the applicant’s interpretation. It accords with the natural meaning of the words, in the context in which they appear.
8. Paragraphs [9] and [10] are not to be considered in isolation, but rather, the affidavit must be read as a whole and in the context of the purpose for which this affidavit was filed. Even more obviously so here where [10] begins with the phrase “[a]s a result”, which clearly refers to what was stated in the preceding paragraph.Based on a natural meaning of the words in [9] and [10], the respondents’ submission that the references therein to the applicant and the Afghan witnesses’ evidence are merely temporal, cannot be accepted.
9. Mr Bartlett has exposed his state of mind and reasoning process in [9], which led to the decision referred to in [10], that the respondents should make another attempt to speak to Person 56, but would only seek to ascertain if Person 56 would give evidence about the Darwan mission and no other issue in dispute, as an explanation for the timing of the application for leave. Mr Bartlett refers to his state of mind about the evidence, that the evidence “emphasised” to him what Person 56 *would* be able to give evidence about, and what was done as a result. I note that no explanation is provided as to what aspects about the evidence led to such awareness occurring at this stage of the proceeding. From [10], it is apparent that the respondents’ legal team provided advice to the respondents that a further attempt should be made to see if Person 56 would talk to them about the Darwan mission in particular. The respondents then made a forensic decision to approach Person 56 only on that limited basis, which they acted on. The affidavit of Mr Bartlett, in particular [9] and [10], is then being deployed by the respondents to advance their application as to why leave to issue a subpoena to Person 56 should be granted at this late stage of the proceedings. It is being relied on in circumstances which invite scrutiny: *DSE* at [58]; *Rio Tinto* at [61]. Paragraphs [9] and [10] of Mr Bartlett’s affidavit constitutes disclosure of the privileged communication between the respondents’ legal team and the respondents.
10. In oral submissions, the respondents articulated their submission (in part) as follows:

…it is no different to the very common situation in litigation where a party either does something, that everything that is done in court – I mean, for example, I stand up and say I’m going to call Witness X. It is obvious, with respect, that that is being done usually having – as a result of the product of some legal thinking and some legal advice having gone into it. When a party says, “I want to do something,” or “I’m going to do something,” or “I did something,” that doesn’t effect a waiver and it doesn’t mean that all of the advice and all of the thinking and all of the instructions which underlie whatever it is that has been done or whatever the decision is that has been communicated is – that there’s a general waiver in relation to those matters.

1. Although as a general proposition that is correct, the analogy is inapt. Contrary to the respondents’ submission, it is not just the fact of legal advice having been given, but content of that advice, is disclosed. The submission pays no regard to the terms of [9] and [10], nor the purpose for which the affidavit is relied on and the nature of the application. It also ignores the circumstances in which this application was made.
2. I note that in the circumstances, the respondent’s reliance on [2] of the October Bartlett Affidavit, where Mr Bartlett states that he does not intend to waive any legal professional privilege, does not assist. What brings about waiver is inconsistency in conduct by the respondents, and where such inconsistency is established, privilege is waived, even though that consequence may not reflect the subjective intention of the party who has lost the privilege: *Mann* at [29]; *Rio Tinto* at [74]. I note in this context that despite [2] of Mr Bartlett’s affidavit, in his affidavit of 19 November 2021, he accepts that his October affidavit waived privilege in respect to other documents (being two emails), and the documents were accordingly produced.
3. The respondents’ First Objection Schedule, given the categories of documents sought by the notice to produce, reflects that Documents 1 and 2 record the communications between the respondents and their lawyers concerning the decision to approach Person 56 after the applicant and the Afghan witnesses had ceased giving their evidence. I note also that although the respondents submitted that there was no waiver of privilege, they did not suggest Documents 1 and 2 were not relevant to this submission, or that if privilege was waived, that Documents 1 and 2 are not the relevant documents to which access would be given.
4. I am satisfied there is an inconsistency between the content of [9] and [10] of Mr Bartlett’s affidavit and the use to which it is to be put by the respondents, and the maintenance of their claim for privilege over Documents 1 and 2, such as to constitute an implied waiver of legal professional privilege.
5. As a consequence, the applicant should have access to the documents in categories 1, 2 and 3 of the notice to produce issued by the applicant on 5 November 2021, being Documents 1 and 2 identified in the First Objection Schedule.

### Document 17 (Email of 1 September 2021)

1. This document comprises an email from the respondents’ solicitor, Mr Levitan, to Mr Richter, lawyer for Person 56. The email contains redactions. In summary, as noted above, the applicant contended that there is an express waiver of privilege by the respondents and he is entitled to the remainder as it is associated material in which privilege has been impliedly waived. The respondents accept they have voluntarily waived privilege in respect of the unredacted material in this email. In the First November Bartlett Affidavit at [8], Mr Bartlett deposes:

The redacted part of the 1 September Email refers to other confidential communications between Mr Levitan and Mr Richter. The Respondents maintain a claim for legal professional privilege in respect of those other communications, and privilege is maintained over the redacted part of the 1 September Email in order to prevent a waiver of other communications. The part of the email that is redacted is not required to enable a proper understanding of the part of the 1 September Email that has been disclosed (or the 6 September 2021 response).

1. The test applied to determine the scope of any waiver of associated material is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter: *AWB (No 5)* at [164] citing *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475 at 482, 484, 488 and 498–499. That is, whether the production of the document impliedly waives privilege in associated material. I observe that Mr Bartlett does not suggest that the redacted passages relate to some other subject matter though it is said that the redacted passages do not concern or touch upon the arrangement with Person 56.
2. Moreover, in so far as the respondents depose that the redacted part of the email is not necessary to enable a proper understanding of the disclosed aspect, I note that in *AWB (No 5)*, Young J observed at [167]:

AWB relied upon the way in which the principle was formulated by the Court of Appeal in *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524 (at [121]):

A reference in one letter of advice to an earlier letter of advice does not expose the latter to scrutiny by the other party to litigation merely because legal professional privilege is waived in relation to the former: implied waiver is not so generous a doctrine. As we apprehend it, where legal professional privilege is waived in relation to one piece (or part) of advice, the privilege is impliedly waived in relation to another if — and only if — that other is necessary to a proper understanding of the first. As established by the High Court (at least since *Mann v Carnell*) the test in such cases is whether it would be “inconsistent” for a party to rely upon, and so to waive legal professional privilege in respect of, the one without also being taken to have waived privilege in respect of the other.

It is no doubt correct that a mere reference to the existence of legal advice in a disclosed document will not be regarded as a waiver of its contents, albeit a different conclusion would follow if the gist, substance or conclusion of the legal advice is voluntarily disclosed. But, with great respect to their Honours, the proposition concerning waiver of associated material is expressed too narrowly and in a way that is not consistent with the test propounded by the High Court in *Maurice*. The principle propounded by the Court of Appeal may work adequately enough in some circumstances, particularly where privilege is sought to be maintained over one part of a single piece of legal advice, but in other circumstances it will not give effect to the principles explained in *Maurice*.

1. The email of 1 September 2021, in redacted form, is in the following terms:

Dear Sean

XXXXXXX XXXXXXXXXXXXXX XXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXX XXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXX

XXXXXXXXXXX we understand that your client can give relevant evidence in relation to two missions the subject of these proceedings: (a) a mission to Darwan on 11 September 2012 (**Darwan**); and (b) a mission to Fasil on 5 November 2012 (**Fasil**). If your client agrees to speak with us about Darwan and agrees not oppose an application to call him as a witness, we undertake that we will adopt the following position if your client objects under s 128 of the Evidence Act 1995 (Cth) to giving particular evidence in relation to Fasil, or evidence on Fasil generally:

1. we agree not to oppose a submission by your client under s 128(1)(a) that the evidence may tend to prove that he has committed an offence against or arising under Australian law;

2. we agree not to oppose a submission by your client under s 128(2) that there are reasonable grounds for the objection; and

3. if the Court determines that there are reasonable grounds for such an objection, and your client does not willingly give the evidence with the protection of a certificate issued under s 128(3)(b)(i), we agree not to ask the Court to require your client to give the evidence under s 128(4) of the Evidence Act.

Please let me know if you would like to discuss any aspect of the above.

Kind regards

Dean

1. It records an agreement between the respondents and Person 56 as to the basis on which he would not oppose an application by the respondents to call him to give evidence.
2. The response from Mr Richter, lawyer for Person 56, emailed on 6 September 2021, was relevantly as follows:

I confirm that I have spoken with XXX and he is prepared to go forward on the basis as set out in your email of 1 September 2021, provided that your client does not object to a section 128 application in relation to all aspects of his Afghanistan service other than Darwan.

He is prepared to meet with you and/or your counsel, provided that it is outside of his working roster - he currently works 8 days on/8 days off and is currently working.

I will be available to speak by telephone tomorrow morning.

1. Having regard to what was voluntarily waived and given the context in which this issue arises, namely reliance by the respondents on the agreement with Person 56 at this time, to explain the circumstances of their application for leave to issue the subpoena, it would be inconsistent for privilege to be maintained over the remainder of the document.

### Document 12 (Email of 5 August 2021)

1. This email is between Mr Richter and Mr Reilly, of the Department of Defence, dated 5 August 2021.
2. The respondents have redacted one sentence of the email. The basis for doing so is articulated in the Second November Bartlett Affidavit at [9(d)], as follows:

Part of document 12 discloses a confidential communication between the Respondents' solicitor, Mr Levitan, and Person 56's legal representative, Mr Richter, made for the dominant purpose of the Respondents being provided with professional legal services relating to these proceedings. The Respondents did not authorise Mr Richter to disclose the contents of that communication.

1. The email, inter alia, purports to be an explanation by Mr Richter to Mr Reilly as to what has been a recent contact by the respondents’ solicitors, with the consequence they are now back to “square 1” because it is likely that Person 56 is to be subpoenaed.
2. Again, the legal issue is the same that is posed in respect to the email of 1 September 2021, discussed above, and is to be decided in the factual context already described. The redacted portion relates to a communication with the respondents, as is apparent from the passage recited above. I note that Mr Bartlett does not suggest that Mr Richter was informed that the communication was confidential.
3. I have inspected this document. The redacted material would fall within the scope of the waiver by the respondents, described in more detail below.

### Remaining documents

1. The applicant submitted that the voluntary waiver referred to at [7] and [8] of the First November Bartlett Affidavit, constitutes an issue waiver, which extends to any other communication referred to in the objection schedules between the respondents and Person 56 concerning this arrangement or understanding. As a consequence, the imputed waiver covers all of the other documents in the objection schedules to the extent that those documents record such communications or otherwise concern or touch upon the arrangement or understanding. While not accepting the breadth of the waiver, the respondents initially contended that only Document 17 (the email of 1 September 2021) falls within that description, but it was accepted at the hearing that, depending on the meaning of “concern or touch upon”, Documents 1 and 2 might also be within scope.
2. As noted above, the email of 1 September 2021 provided information as to the existence of the arrangement or understanding.
3. The same issue arises in respect to these documents, as addressed in respect to the email of 1 September 2021. It relates to the scope of the waiver.
4. In the circumstances, such waiver necessarily includes those documents that record such communications or otherwise concern or touch upon the arrangement or understanding. As noted above, the respondents originally contended that only the email of 1 September 2021 fell within that description. That reflects an unduly narrow interpretation of what documents might be said to “concern or touch upon” the terms of the agreement. It, in effect, confines it to the terms of the agreement. The concept of associated material, that is material concerning or touching on the agreement, is broader than merely the terms of the understanding or agreement. To restrict the scope of the waiver in the manner sought would enable the respondents who seek to rely on the existence of the understanding or agreement, and timing thereof, to obtain an unfair advantage, given that the applicant would be deprived of any opportunity to scrutinise the assertions.
5. In that context, since the application for leave was filed, the respondents have provided to the applicant two emails between Mr Richter and Mr Levitan when it became apparent privilege had been waived as a consequence of the October Bartlett Affidavit. Those emails are dated 26 February 2020 and 26 October 2020, which reflect that Person 56 was not prepared to give evidence. At the same time, the respondents provided to the applicant the email of 1 September 2021, voluntarily waiving privilege as to the terms of the understanding or arrangement.
6. Given the nature of the application, and the use to be made of the material already disclosed, the waiver goes beyond recording the terms of the agreement and includes the circumstances associated with its making. This would necessarily include documents reflecting on steps taken to broker the agreement and its timing (which includes earlier attempts to have Person 56 give evidence, even if unsuccessful). Such documents concern or touch upon the arrangement or understanding. In the circumstances of this case, such documents are associated with the existence and terms of the understanding or arrangement which underpins the timing of the application for leave.
7. It was necessary to inspect the documents to determine which, if any, fall within the scope of what has been waived. I am satisfied, as the respondents indicated, Documents 1, 2 and 17 fall within the description, although those documents have been addressed separately above. Inspecting the documents confirmed the conclusions referred to above. However, in addition, the email of 3 March 2021, being Document 3 in the First Objection Schedule which relates to category 7, also falls within the scope. It follows that privilege has also been waived in respect to that document.

## Conclusion

1. For the reasons above, privilege has been waived in respect to Documents 1, 2 and 17 in the First Objection Schedule, as well as Document 12 in the Third Objection Schedule. I also consider that privilege has been waived in the email of 3 March 2021, which is Document 3 in the First Objection Schedule. Accordingly, I grant the applicant access to these documents.

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| I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 14 December 2021

**SCHEDULE OF PARTIES**

|  |  |
| --- | --- |
|  | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
| Respondents |  |
| Second Respondent: | NICK MCKENZIE |
| Third Respondent: | CHRIS MASTERS |
| Fourth Respondent: | DAVID WROE |