Federal Court of Australia

Roberts-Smith v Fairfax Media Publications Pty Limited (No 30) [2022] FCA 266

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| File numbers: | NSD 1485 of 2018NSD 1486 of 2018NSD 1487 of 2018 |
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| Judgment of: | **BESANKO J** |
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| Date of judgment: | 23 March 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** — Interlocutory application by respondents for leave to issue Subpoena to give evidence to person known as Person 56 (respondents’ application) — where time within which respondents were to file and serve outlines of evidence fixed for 31 May 2019 — where no outline of evidence of Person 56 served at that time — where previous application issued by respondents and dated 15 March 2021, for leave to issue Subpoena to Person 56, refused including on basis that respondents unable to obtain outline of evidence of Person 56 — where trial adjourned in August 2021 due to COVID-19 pandemic — where respondents’ solicitor swore affidavit on respondents’ application deposing as a result of developments in trial up to that point, respondents decided to make further attempt to speak with Person 56 — email dated 1 September 2021 from respondents’ solicitors to counsel for Person 56 recording proffering of undertaking that if Person 56 agreed to speak with respondents with respect to mission to Darwan in September 2012, respondents would not make any submission at trial that Person 56 be required to give evidence with respect to mission to Fasil in November 2012 should Person 56 take objection to giving evidence under s 128 of *Evidence Act 1995* (Cth) — where Particulars of Truth contained in respondents’ Second Further Amended Defence include allegation that applicant executed Afghan adolescent during mission to Fasil — where evidence tendered on respondents’ application included internal memorandum of respondents’ solicitors recording understanding that Person 56 involved in alleged execution — where respondents received signed statement of Person 56 in October 2021, containing matters relating to mission to Darwan — whether provision of statement constitutes material change in circumstances to those pertaining at time 15 March 2021 application refused — whether arrangement between respondents and Person 56 and circumstances of disclosure of arrangement reason to refuse application — consideration of asserted prejudice to applicant of Subpoena being issued — whether applicant prejudiced by inability to cross-examine Afghan witnesses on matters contained in statement of Person 56 — leave to issue Subpoena granted**PRACTICE AND PROCEDURE** — Interlocutory application by Person 56 under r 24.15 of *Federal Court Rules 2011* (Cth) to set aside Subpoena to give evidence on ground that Subpoena oppressive or abuse of process — where Person 56’s solicitor affirmed affidavit exhibiting report of treating psychologist outlining negative impact on Person 56’s mental health of giving evidence at trial — consideration of legal test for setting aside Subpoena on mental health grounds — whether Person 56 mentally incapable of giving evidence at trial without unacceptable risk of serious mental harm, having regard to psychological evidence — application dismissed |
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| Legislation: | *Evidence Act 1995* (Cth) s 128*Federal Court of Australia Act 1976* (Cth) s 37AH*Federal Court Rules 2011* (Cth) r 24.15 |
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| Cases cited: | *Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church* [2016] NSWSC 1122*Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44*Capic v Ford Motor Company of Australia Limited (Late Evidence)* [2020] FCA 1117*Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588*Mandic v Phillis* [2005] FCA 1279; (2005) 225 ALR 760*R v Nona* [2015] ACTSC 175; (2015) 254 A Crim R 301*Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465*Roberts-Smith v Fairfax Media Publications Pty Limited (No 25)* [2021] FCA 1558 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 75 |
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| Date of hearing: | 25 February 2022 |
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| Counsel for the Applicant: | Mr A Moses SC with Mr M Richardson SC and 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 of Australia: | Ms K Stern SC with Mr J Edwards and Ms C Ernst |
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| Solicitor for the Commonwealth of Australia: | Australian Government Solicitor |
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| Counsel for Person 56: | Mr S Richter |

ORDERS

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|  | NSD 1485 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITHApplicant |
| 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-SMITHApplicant |
| 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-SMITHApplicant |
| 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: | besanko J |
| DATE OF ORDER: | 23 March 2022 |

THE COURT ORDERS THAT:

1. The respondents be granted leave to issue a Subpoena to give evidence to Person 56.
2. Person 56’s application to set aside the Subpoena to give evidence be refused.

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

REASONS FOR JUDGMENT

BESANKO J:

## Introduction

1. There are two Interlocutory applications before the Court. The first Interlocutory application is an application by the respondents for leave to issue a Subpoena to give evidence to Person 56. This application is opposed by the applicant. The second Interlocutory application is an application by Person 56 to set aside the Subpoena to give evidence should leave be granted. As filed, Person 56’s application sought orders that he be given leave to be heard on the respondents’ application for leave to issue a Subpoena to give evidence and that the respondents’ application be refused. The basis of Person 56’s application, according to his evidence, is the serious effect an obligation to give evidence would have on his mental health and his demanding personal circumstances. I suggested to the parties that Person 56’s application was more appropriately dealt with as an application to set aside the Subpoena to give evidence should leave be granted. Neither party nor Person 56 objected to that approach. Clearly, the second application need not be considered if the first application is refused. Nevertheless, in circumstances in which the trial is proceeding and the respondents are in the course of their case, it was convenient to hear the two applications together, rather than face the possibility of two hearings.
2. The background to the respondents’ application is as follows. On 13 February 2019, the Court made orders in relation to the service of outlines of evidence and the orders included an order that the respondents file and serve their outlines of evidence by 8 May 2019. On 22 May 2019, the parties agreed to vary the timetable to the effect that the respondents’ outlines of evidence were due to be served on 31 May 2019. Neither party served an outline of evidence for Person 56.
3. On 15 March 2021, the respondents filed and served an Interlocutory application for leave to issue Subpoenas to give evidence to additional witnesses, including Person 56. The application was supported by an affidavit sworn by Mr Peter Llewellyn Bartlett on 15 March 2021.
4. On 23 April 2021, I ordered that leave to issue a Subpoena to give evidence to Person 56 be refused. In my reasons, *Roberts-Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465, I explained the background to the application. I said (at [2]):

… The question of leave to issue a subpoena under r 24.01 of the *Federal Court Rules 2011* (Cth) would, in the ordinary case, be dealt with in chambers and, unless the Court specifically requested submissions, without submissions from the parties. The reason the question of leave is being dealt with by way of a formal application and after hearing from the parties, is that in this case the Court made an order for the filing and serving of outlines of evidence. The time within which that was to be done has well and truly expired. A further reason for the procedure adopted in this case is that the respondents do not propose to file outlines of evidence with respect to 9 of the 12 persons.

1. Later in those reasons, I explained the reasons I refused the application insofar as it concerned Person 56. I said (at [54]):

I have made orders in this case for the exchange of outlines of evidence. The purpose of an outline of evidence is to provide notice of the evidence to be given by the witness (see paragraph 7.2 of Defamation Practice Note (DEF–1)). The absence of an outline of evidence or, as in the case of Persons 24, 40, 41, 42 and 43, what I consider to be a sufficient equivalent, means that the applicant will not be given any notice of the evidence Person 56 may give. Indeed, as I understand it, the respondents do not know what evidence Person 56 is likely to give. It would be unfair to the applicant to allow the respondents to call Person 56 as a witness in those circumstances and I refuse the application insofar as it relates to Person 56.

1. The respondents’ present Interlocutory application is dated 28 October 2021. It is supported by an affidavit of Mr Bartlett sworn on 28 October 2021 (Bartlett No 1). A signed statement of Person 56 consisting of 24 paragraphs is annexed to the affidavit. Following the application, the applicant issued a Notice to produce documents. The applicant challenged a claim by the respondents for legal professional privilege in relation to a number of documents. That challenge was referred to another judge because of the possibility that the judge called upon to resolve the dispute would be required to examine the documents the subject of the claim for legal professional privilege. In *Roberts-Smith v Fairfax Media Publications Pty Limited (No 25)* [2021] FCA 1558 (*Roberts-Smith (No 25)*), Abraham J held that legal professional privilege had been waived with respect to various documents and the applicant was granted access to those documents.
2. The respondents produced the documents. By letter dated 2 February 2022, the respondents produced eight documents, or categories of documents, in response to a Notice to produce issued by the applicant on 23 December 2021. Those documents were tendered by the applicant on the present application together with certain letters which had passed between the solicitors for the respective parties. In addition, the applicant relied on an affidavit of Mr Paul Victor Svilans sworn on 21 January 2022.
3. The respondents filed a further affidavit affirmed by Mr Bartlett on 14 January 2022 (Bartlett No 2). At the hearing before me, the applicant sought leave to cross-examine Mr Bartlett. I granted leave to cross-examine and I have taken Mr Bartlett’s evidence in cross-examination into account.
4. The background to Person 56’s application is as follows. The Interlocutory application brought by Person 56 is dated 1 February 2022. It is supported by two affidavits of Ms Amy Dell Campbell Barber who is Person 56’s solicitor. One of the affidavits is of a formal nature and need not be further mentioned. The other affidavit has attached to it a report from Ms Ciara Mitchell, psychologist of “Critical Components”. The report is undated, but it is clear that it was provided between 11 January 2022 and 1 February 2022. The first paragraph of the report indicates its broad purpose:

As per your request dated 11th January 2022, I am writing this report to accompany your submission to the civil defamation trial brought by Ben Roberts-Smith against Fairfax Media, on behalf of [REDACTED], outlining the negative impact giving evidence at this trial would have on his mental health.

1. The respondents opposed the application to set aside the Subpoena if leave to issue the Subpoena is granted. They issued a Subpoena to produce documents to the Proper Officer of Critical Components WA Pty Ltd trading as Critical Components in which they sought production of the following documents:

1. All documents recording or referring to the “request dated 11 January 2022” referred to in paragraph 1 of the Report.

2. All documents recording or referring to instructions provided by Person 56 (or any lawyer or other person acting on his behalf) to Ms Mitchell concerning the preparation or content of the Report.

3. All documents provided by Person 56 (or any lawyer or other person acting on his behalf) to Ms Mitchell in connection with the preparation of the Report.

4. All documents recording or referring to a communication from Person 56 (or any lawyer or other person acting on his behalf) to Ms Mitchell in which Ms Mitchell was told words to the effect that the Report was to “accompany [Person 56’s] submission to the civil defamation trial brought by Ben Roberts-Smith against Fairfax Media, on behalf of [Person 56], outlining the negative impact giving evidence at this trial would have on his mental health”.

5. All drafts of the Report.

6. All working notes drafted by Ms Mitchell while preparing the Report.

7. All documents recording the “formal recognition” of P56’s mental health conditions by DVA, referred to in paragraph 2 of the Report.

8. All documents comprising Ms Mitchell’s clinical file for Person 56, including but not limited to:

a. any notes of the “sessions” described at paragraph 3 of the Report;

b. the “collateral file information” referred to at paragraph 3 and on the last page of the Report;

c. any notes or records of the “extensive contact with [Person 56]” referred to on page 2 of the Report;

d. any notes or records referring to the “legal proceedings” or “legal events” referred to on page 2 of the Report;

e. any notes or records of the “direct engagement with the client” referred to on the last of the Report;

f. any notes or records of “historic engagement with relevant key stakeholders” referred to on the last page of the Report.

A small bundle of papers was produced in response to the Subpoena to produce documents and tendered by the respondents at the hearing.

1. Person 56 applied for a non-disclosure order with respect to certain matters in the report relating to his mental health. I made an order at the hearing pursuant to s 37AH of the *Federal Court of Australia Act 1976* (Cth) as follows:

5. … there be no disclosure until further order of the three primary health conditions of Person 56, the date of onset of Person 56’s primary health conditions and the nature of the treatment of Person 56 at the direction of Ms Mitchell. This order is made having regard to the necessity to prevent prejudice to the proper administration of justice.

The information which is relevant to Person 56’s application and which is the subject of the non-disclosure order is set out in a Confidential Annexure to these reasons.

## Evidence of Person 56 as set out in the Statement of Person 56

1. The starting point is the evidence the respondents propose to adduce from Person 56 as set out in his statement which is signed by him and dated 26 October 2021. The statement deals with a mission to an Afghan village named Darwan on 11 September 2012. Before going to the statement, it is necessary to explain the context of the matters in the statement by reference to the respondents’ pleaded allegations. The following is a summary of the key allegations.
2. In the Second Further Amended Defence filed on 24 June 2021, the respondents’ Particulars of Truth in relation to the mission to Darwan are set out in paragraphs 93 to 117. The basic allegation is that the applicant and a number of soldiers, including members of the applicant’s patrol, were clearing compounds at the south-eastern end of the village. In one compound, they located and detained three fighting aged males. The detention of these males rendered each of them *hors de combat*. One of the males was an Afghan male named Ali Jan. The other two were Mohammed Hanifa Fatih and Mangul Rahmi. The three Afghan men, including Ali Jan, were handcuffed and questioned. The applicant questioned Ali Jan and Mohammed Hanifa. Towards the end of the interrogation, the applicant moved Ali Jan, who was still handcuffed, to outside the compound. He caused Ali Jan to be placed at the edge of a rocky cliff which was greater than 10 metres high and forced him into a kneeling position. The applicant then took a number of steps back before he moved towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. Ali Jan fell the full height of the cliff down to the creek bed. He was moved by two soldiers to the other side of the creek bed where there was vegetation. After he had been moved to that location, Ali Jan was shot multiple times in the presence of the applicant and Person 11. The respondents allege that the shots were fired by either the applicant or Person 11 (a soldier under the applicant’s command) or alternatively, by both the applicant and Person 11. The respondents allege that the shooting of Ali Jan was the result of an understanding or arrangement, amounting to an agreement between the applicant and Person 11 to ensure that Ali Jan was dead following the cliff kick. The respondents allege that the shooting of Ali Jan was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the applicant and Person 11 to kill Ali Jan. In paragraph 110(a) of the Particulars of Truth, the respondents allege that the applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a “spotter”.
3. In the course of submissions, counsel for the respondents made it clear that the respondents no longer allege that Person 56 was involved in the cover up of the alleged unlawful killing of Ali Jan. That position should be formalised by the respondents and a further Amended Defence should be filed.
4. The respondents allege that the applicant’s conduct with respect to Ali Jan breached Article 3 of the Third and Fourth Geneva Conventions (Common Article 3) in that his conduct constituted violence, cruel treatment and murder. They allege that the applicant’s conduct with respect to Ali Jan constituted murder or, in the alternative, that by his conduct with respect to Ali Jan, the applicant was complicit in and responsible for murder.
5. I turn now to Person 56’s statement. Person 56 states that he did selection for the SASR in 2009 and completed his reinforcement cycle in 2010. His first deployment to Afghanistan was in 2012 in Rotation 18. A few weeks into his deployment in Rotation 18, Person 56 became a member of the applicant’s patrol. The applicant was the patrol commander and the other members of the patrol were Persons 4, 11 and 56. Person 56 refers to the Darwan mission.
6. Person 56 refers to his patrol’s engagement with a “squirter” across the Helmand River. Person 56 says that after this event, the applicant’s patrol participated in the clearing of compounds moving towards the southern end of the village. He states that he went with his patrol and an interpreter all the way to the end of the compound set at the southern point of the village. This was at the point at which the compounds ended. He says there was a steep slope below the compounds at the end of the village, leading down to the dry riverbed.
7. Person 56 states that he does not recall any empty compounds in the last compound set. There were a number of people in the compounds that he entered in the final compound set, including a number of fighting aged males. He cannot recall if the patrol singled out certain individuals from the fighting aged males to detain. Person 56 states that the very last compound at the southern end of the village had a “lean to” attached to it, which was a thatch-roof area connected to the main compound. The applicant’s patrol located fighting aged males in this last compound, although Person 56 does not recall how many fighting aged males there were or precisely where in the compound they were found. He does not recall personally searching or questioning any fighting aged males or persons under control (PUCs) during the mission and states that he was not usually involved in the questioning of PUCs. It was usual for the applicant, as the patrol commander, to question PUCs taken by the patrol, although this was not always the case. After clearing the final compound at the southern end of the village, the patrol stayed in and around the last compound for a period of time waiting for the extraction call. Person 56 is not certain of the timing, but he believes that about 30 minutes before extraction, the applicant’s patrol, including Person 56, were still located in and around the last compound. At about that time, Person 56 says he was directed to go down to the flat ground below the compounds and to secure the helicopter landing zone. While he was not directly responsible for the interpreter during the mission, he was told to take the interpreter with him. He believes it was the applicant who gave him directions to go to the helicopter landing zone and to take the interpreter with him.
8. Person 56 left the compound vicinity and went to wait near a hut across a dry creek bed which was below the compounds. He met another SAS member there, but is unable to remember who that person was. He waited near the hut for the helicopters to arrive and he met up with his patrol again at the time the helicopters landed at the helicopter landing zone.
9. In his evidence in the trial, the applicant said that there were no fighting aged males in the southern most compound. The applicant stated that Bravo contacted him and requested the return of the interpreter and that Person 56 and the interpreter went back at a point where the patrol was in the middle of the compounds adjacent to the riverbed.
10. Person 56 says that he does not recall any significant embankment on the side of the dry creek bed closest to the helicopter landing zone. He believes he could step up rather than climb up onto the area on the other side of the dry creek bed. The applicant has said in his evidence at the trial that there was an embankment in this area in the order of a metre and-a-half or more and it was quite deep.
11. Person 56’s evidence is plainly relevant.
12. Person 56 does not refer to any other missions in his statement. In a memorandum dated 27 August 2021 from Mr Dean Levitan, a solicitor for the respondents, to Mr Bartlett, there is a statement with respect to a mission in Fasil that “[w]e believe that Person 56 and BRS are the two individuals responsible for the execution of the PUCs at Fasil”. In a record of a telephone conversation between Mr Levitan and counsel for Person 56, Mr Levitan is recorded as saying “[t]he two people killed were by BRS and a member of his patrol, which we now know to be your client”.
13. The mission to Fasil is part of the respondents’ Particulars of Truth. The heading to the relevant group of particulars is “Execution of an unarmed Afghan male on about 5 November 2012”. The concluding allegation in this group of particulars is that by his conduct with respect to the Afghan male, the applicant breached Common Article 3 in that his conduct constituted murder. There is a further plea that, in the circumstances, the applicant’s conduct with respect to the Afghan male constituted murder.

## The Respondents’ Application

1. The applicant submits that the respondents’ application should be refused. His first submission is that the application was previously refused and there has been no change in circumstances. He referred to the rule of practice that, in the case of an interlocutory application or order, the power to set aside, vary or discharge such orders will only be exercised where there is a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application (*Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 at 46–47).
2. The respondents submit that the change in circumstances is that they now have a statement from Person 56 and that the absence of such a statement was the decisive factor in the refusal of their previous application.
3. The respondents’ submission directs attention to the reasons they have now been able to secure a statement from Person 56. Is this circumstance the result of a change of attitude by Person 56 or something the respondents have done or both? If something the respondents have done, could and should that have been done earlier?
4. My assessment of the evidence is that there are three relevant factors to explain why the respondents now have the statement from Person 56.
5. First, a relevant factor is the delay in the progress of the trial caused by the COVID-19 pandemic. This gave the respondents additional time to persuade Person 56 to provide a statement.
6. Secondly, the break in the trial appears to have led the respondents to focus more closely on the evidence Person 56 may be able to give which would assist their case.
7. In paragraphs 9 and 10 of Bartlett No 1, the following appears:

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.

1. Thirdly, there was a more refined and developed formulation of the proposal by the respondents from that first put to Person 56’s counsel in early 2020 that they (the respondents) would not lead evidence from Person 56 which would incriminate him. The more developed and refined proposal is set out in an email from a solicitor for the respondents to counsel for Person 56 on 1 September 2021 and it is as follows:

As previously discussed, 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 [to] 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.
4. On 6 September 2021, counsel for Person 56 wrote to the solicitor for the respondents in the following terms:

I confirm that I have spoken with Mr [P56] 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.

1. Various phrases or terms were used by the parties to describe this arrangement, particularly the applicant who referred to it as an agreement, a deal or a side deal. There is no need for me to characterise the proposal in legal terms and I will refer to it as an arrangement.
2. Following the email from Person 56’s counsel dated 6 September 2021, the respondents’ legal representatives had a video conference with Person 56 and his legal representatives on 15 September 2021. The respondents’ legal representatives had a second video conference with Person 56 and his legal representatives on 5 October 2021. On 26 October 2021, the respondents’ solicitors received a signed statement of Person 56 setting out his evidence about the mission to Darwan.
3. In addition to the submission that there has been no change in the circumstances from the circumstances existing at the time I refused the previous application, the applicant submitted that there was a failure by the respondents to provide a proper explanation for the delay, and the grant of leave would cause prejudice to him.
4. The applicant referred to the following observations of Perram J in *Capic v Ford Motor Company of Australia Limited (Late Evidence)* [2020] FCA 1117 (at [22]):

… The Applicant requires therefore a grant of leave to rely upon the evidence. In cases where such an indulgence is sought it is incumbent upon the party seeking the indulgence to explain how the delay in its actions has come about. But a delay is a finite period of time and hence, like many things, has both a beginning and an end. Any explanation for the delay must generally wrestle with both of these ends, or at the very least acknowledge them. It must lay bare both why it is only now that the action is sought to be taken but also, and perhaps more importantly, why it was not taken when it should have been. Often the former will be reasonably obvious. Usually it is the latter which is of most discretionary significance. But both are important.

1. It is true that the four matters referred to in paragraph 9 of Bartlett No 1, set out above, were known to the respondents from the outset and, to varying degrees, the importance of those matters was appreciated by the respondents. Viewed from that perspective, there has been no change or material change in circumstances. However, as I have previously said, the respondents’ submission is that the change of circumstances is the provision of the statement of Person 56.
2. The applicant’s submission that the respondents have not provided a proper explanation for the delay focuses on paragraphs 9 and 10 of Bartlett No 1. Despite submissions to the contrary by the respondents, I agree with the observations of Abraham J in *Roberts-Smith (No 25)* (at [44]–[47]):

44 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.

45 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.

46 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.

47 I accept the applicant’s interpretation. It accords with the natural meaning of the words, in the context in which they appear.

1. It seems to me that the full explanation for the respondents’ application includes the arrangement referred to in the respondents’ email dated 1 September 2021. That is a matter which, having regard to the evidence, and as a matter of reasonable inference, was one of the reasons that Person 56 was prepared to meet with the respondents and provide a statement.
2. Counsel for the applicant said in the course of his submissions that the arrangement was “of concern”. He did not elaborate on this submission or observation. He submitted that the arrangement should be or should have been disclosed because it is capable of bearing upon the credibility of the witness. I agree, without making any observation as to the strength of the submission (which is a matter for final submissions), that the arrangement is capable of bearing on the credibility of the witness, in the sense of an inducement to give evidence.
3. Counsel for the applicant submitted that the respondents had made at least two representations to Person 56. First, as indicated in the file note recording the telephone conversation on 3 August 2021, the respondents had suggested to Peron 56’s counsel that fresh material had come to light regarding the mission in Darwan in 2012. It is true that in this respect Mr Bartlett was not able to identify the fresh material in the course of his cross-examination. Secondly, the applicant submitted that the respondents represented to Person 56 that they were going to subpoena him to give evidence. This was a misrepresentation because subpoenas are issued with the leave of the Court and leave to issue a Subpoena to give evidence to Person 56 had been refused on a previous occasion. I do not think that this second representation has been established. The respondents’ solicitors made it clear to counsel for Person 56 that they had sought leave to subpoena him, but that this was dismissed for various reasons.
4. In my opinion, the provision of a statement of Person 56 is a material change in circumstances. The absence of such a statement (or a sufficient equivalent) was decisive in terms of the previous refusal to grant leave. Therefore, the provision now of a statement is a material change in circumstances.
5. In my opinion, it would have been appropriate for the arrangement to have been disclosed at the outset as part of the explanation for the fact that the respondents have now secured a statement of Person 56. However, I do not consider the failure to do so is a sufficient reason to refuse the application. Person 56 is able to give relevant evidence as to an important matter. As to whether the respondents should have been able to put themselves in the position they are now in at an earlier point in time, I did not understand the applicant to submit that the arrangement should have been concluded earlier, but even if he had, that would not be a sufficient reason to refuse the application.
6. It seems to me that the decisive issue in the case of the respondents’ application is the issue of prejudice.
7. The applicant submitted that the prejudice to him was that he would wish to issue a Subpoena to the Department of Defence if Person 56 is to give evidence and historically, it has taken the Department of Defence considerable time before responding to Subpoenas in this matter. I do not consider that this is prejudice that cannot be alleviated by appropriate measures. There is no prejudice to the applicant as far as his own evidence is concerned. There is nothing in Person 56’s statement that was not put to the applicant in cross-examination. Furthermore, the applicant still has the right to call his full case in reply.
8. The principal focus of the applicant’s argument as to prejudice related to the Afghan witnesses who have already given evidence and been cross-examined. There is no suggestion by the respondents that they would be available to be recalled if that was considered necessary. I make it clear that in what follows, I am not making any assessment of the cogency of the evidence or whether I accept it. Those are matters to be addressed at the conclusion of the evidence.
9. The applicant claims that he has been denied the opportunity to test the anticipated evidence of Person 56 with the Afghan witnesses. The one (and only) example the applicant gives in relation to the evidence of Mohammed Hanifa Fatih and Mangul Rahmi is that he has been denied the opportunity to ask them whether the interpreter who they claim was present during their questioning was sent away at any time after, on their evidence, tactical questioning had concluded and prior to the alleged assault and murder of Ali Jan.
10. The first point to note about this submission is that neither version, that is, the interpreter was sent away after tactical questioning or he was not, is the applicant’s case. The applicant’s case is that the interpreter was sent back to Bravo well before the applicant’s patrol reached the last compound and that there were no fighting aged males in the last compound. Secondly (and relatedly), consistent with his case, the applicant put to Mohammed Hanifa and Mangul Rahmi that, in essence, they had made up their accounts (Mohammed Hanifa at T971, lines 41–42, T992, lines 43–44, T1008, lines 27–30, T1036, lines 4–5, and T1037–1038 particularly, that he did not see an interpreter on the day of the raid and that neither he nor any members of his family were in the southern compounds on the day of the raid; Mangul Rahmi at T1130–1131, particularly at T1130, lines 24–25 — that everything about the events of that day has been “made up”). Thirdly, assuming the point the applicant is making is that the forgone opportunity is not the loss of an opportunity to adduce evidence directly in support of his case, but rather to show an inconsistency between the evidence of the Afghan witnesses and the proposed evidence of Person 56, that opportunity seems very remote in light of Mohammed Hanifa’s evidence that the interpreter went away from Ali Jan (T959, line 44) and Mangul Rahmi’s evidence that he was taken to a place where he could not see Ali Jan or Mohammed Hanifa anymore (T1077, lines 1–3) and, more importantly, the opportunity is always there and open to be taken bearing in mind that it was the respondents’ case that the interpreter was sent away from the southern most compound with Person 56 at 10.45am with the EKIA reported at 11.09am (T484–486). It was open to the applicant to cross-examine the Afghan witnesses in a way which sought to show an inconsistency (or inconsistencies) between their evidence and this case.
11. The applicant claims that he has been denied the opportunity to ask Shahzada Fatih whether an interpreter accompanied by a soldier arrived at the hut prior to the arrival of the big soldier who spoke Pashto and clarify whether the big soldier who spoke Pashto was, in fact, the interpreter and to ask about the ethnicity of the “big solider” and confirm whether he was Pashtun or not. The applicant has not been denied an opportunity to ask about these matters. Furthermore, the applicant made a forensic decision to engage Shahzada Fatih, not at the level of specific matters, but by a fundamental challenge to his whole story (see, in particular, T1174–1175).
12. I do not consider the applicant will suffer any prejudice in terms of his approach to the Afghan witnesses should the respondents be permitted to adduce evidence from Person 56.
13. I grant leave to issue a Subpoena to give evidence to Person 56.

## Person 56’s Application

1. Person 56 applies to set aside the Subpoena to give evidence under r 24.15 of the *Federal Court Rules 2011* (Cth). He does so on the ground that, in the circumstances, the Subpoena is oppressive or an abuse of process. Person 56 claims that he is unwilling and unable to give evidence because of the various mental health conditions from which he suffers and, in this respect, he relies on Ms Mitchell’s report.
2. Person 56 lives in Western Australia. In addition to his own health problems, Person 56’s partner has a life-threatening illness. In her affidavit affirmed on 1 February 2022, his solicitor refers to the fact that he is the primary income earner and responsible carer for his young children and partner. She also refers to Western Australian border restrictions making it impossible, according to her affidavit, for Person 56 to travel interstate. Nothing was said in support of this assertion at the hearing on 25 February 2022 and a number of witnesses from Western Australia have given evidence since the hearing resumed in February 2022. In these circumstances, I infer that there are no longer any difficulties associated with Person 56 travelling to New South Wales to give evidence.
3. The balance of the solicitor’s affidavit draws on Ms Mitchell’s report and, in the circumstances, I can proceed straight to a summary of that report.
4. As I have said, to the extent I need to refer to the matters which are the subject of the non-disclosure order, I do so in the Confidential Annexure to these reasons.
5. An overview of Ms Mitchell’s report is as follows:
6. Ms Mitchell identifies the three primary health conditions of Person 56;
7. Ms Mitchell identifies the cause of these conditions as related to Person 56’s military service and, in particular, “his direct involvement in multiple combat operations and working in high-risk/hostile environments” and “exposure to multiple, significant and deleterious traumatic events”;
8. Ms Mitchell outlines the medical treatment, including therapy, instruction and management provided to Person 56 and outlines the symptoms and effects of his conditions;
9. Ms Mitchell expresses the opinion that Person 56’s involvement in legal proceedings to date has been extremely stressful and debilitating for him. The nature of the legal proceedings and Person 56’s involvement in them (e.g., witness to conduct or Person 56’s own conduct) are not identified. Ms Mitchell expresses the opinion that recent legal events (last 12 months) have significantly undermined Person 56’s mental health further and exacerbated his adverse symptomatology, including suicidal ideation behaviour. The recent legal events are not identified.

The medical notes produced in response to the Subpoena issued by the respondents do not contain any reference to Person 56 expressing suicidal ideation;

1. Ms Mitchell expresses the opinion that a requirement for Person 56 to give evidence in relation to his military service would adversely affect Person 56’s mental health and undermine his therapeutic intervention program. Ms Mitchell expresses the opinion that Person 56 should be exempt from having to give evidence due to the negative impact on his health by, among other things, undermining his “self-harm safety protocol”; and
2. Ms Mitchell then expresses the opinion that if Person 56 is required to give evidence, that “would significantly increase his risk of self-harm (due to his fragile mental health circumstances) and more than likely not, would result in self-harm behaviour/attempt (possible suicide completion)”.
3. Ms Mitchell does not identify the multiple, significant and deleterious traumatic events to which she refers and it is not known whether they include the events at the village of Darwan. On the face of it, neither party is suggesting unlawful or improper behaviour by Person 56 at Darwan. On the face of it, having regard to the contents of Person 56’s statement, the respondents would be limited to leading evidence from Person 56 in relation to events at Darwan. Nor is the nature of the “legal proceedings to date” or “recent legal events (last 12 months)” identified by Ms Mitchell and it is not known what they relate to, or if they have anything to do with the events of the mission to Darwan.
4. Person 56’s name is protected by the pseudonym and he will be entitled to have his counsel present during his evidence. If breaks are required during his evidence then, within reasonable limits, that can be accommodated. Should Person 56 be cross-examined about other missions, he will be entitled to claim the privilege against self-incrimination and should he be unwilling to give the evidence, he cannot be required to do so unless the Court is satisfied of the matters in s 128(4) of the *Evidence Act 1995* (Cth).
5. An important contextual matter is that Person 56 agreed to speak to the respondents about the mission to Darwan and did so. He signed a statement about those events which, on the face of it, is coherent and logical. At that point (i.e., 26 October 2021) he was willing and able to give the evidence. There is no evidence to indicate when, in the period from that date to his solicitor’s affidavit on 1 February 2022, he became unwilling to give evidence and considered himself unable to do so, or any explanation as to the circumstances in which that came about. Furthermore, there is nothing in the report of Ms Mitchell which sheds any light on these circumstances. Her report proceeds on the basis that there has not been any change in circumstances for some time.
6. I accept that Person 56 suffers from the three primary mental health conditions Ms Mitchell identifies. I accept that giving evidence in this trial would give rise to a risk that his mental health may be adversely affected and a risk that his therapeutic intervention program or treatment may be undermined. However, on the basis of such reasoning as there is in Ms Mitchell’s report and having regard to the contextual matters to which I have referred, I am not satisfied that the risk of self-harm or an attempt at self-harm is more likely than not.
7. The respondents submitted that Ms Mitchell’s report was not admissible because there was an absence of reasoning sufficient to establish that the opinions she expressed were based on her expertise as a psychologist. They referred to the following passage in the decision of the High Court in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588 (at [42] per French CJ, Gummow, Hayne and Crennan JJ, Kiefel J (as her Honour then was) and Bell J):

A failure to demonstrate that an opinion expressed by a witness is based on the witness’s specialised knowledge based on training, study or experience is a matter that goes to the admissibility of the evidence, not its weight. To observe, as the Court of Appeal did, that what Dr Basden said about the volume of respirable dust to which Mr Hawchar was exposed over time was “an estimate” that was “contestable and inexact” no doubt did direct attention to its worth and its weight. But more importantly, it directed attention to what exactly Dr Basden was saying in his evidence and to whether any numerical or quantitative assessment he proffered was admissible. And if, as the Court of Appeal observed, his opinion on that matter lacked reasoning, the absence of reasoning pointed (in this case, inexorably) to the lack of any sufficient connection between a numerical or quantitative assessment or estimate and relevant specialised knowledge.

(Citation omitted.)

1. The respondents submitted in the alternative that Ms Mitchell’s report should be given little weight.
2. I will admit Ms Mitchell’s report. Some parts of it are clearly admissible. I have rejected some of Ms Mitchell’s opinions for the reasons I have given. In my opinion, that is an appropriate way to deal with issues of admissibility and weight.
3. The parties were in dispute as to the correct legal test for setting aside a Subpoena to give evidence on the ground that giving evidence will adversely affect the mental health of the proposed witness. There is little authority on the point.
4. Person 56 submitted that establishing an adverse effect on a person’s mental health is sufficient, or it is sufficient to establish that the potential for harm to a person’s mental health is “on the cards”. I reject this submission.
5. Person 56 referred to *Mandic v Phillis* [2005] FCA 1279; (2005) 225 ALR 760, where a defendant in a sexual harassment case issued a Subpoena to produce documents to the alleged victim’s employer, in which he sought material dealing with the alleged victim’s psychological profile. The employer and the authors of the relevant material sought to have the Subpoena set aside. The Subpoena was set aside and one of the matters relied on by Conti J in doing so was the likely damage to the alleged victim if she gained access to a copy of the material without guidance from a qualified psychologist (at [23] and [55]). His Honour did not formulate a precise test for the circumstances in which a mental health condition may be of sufficient significance to lead to an order setting aside, in that case, a Subpoena to produce documents. It was, as his Honour put it, a further reason to exercise his discretion in favour of setting aside the Subpoena. With respect, I do not find this decision to be of assistance because the circumstances in that case were very different from the circumstances before me.
6. For their part, the respondents relied on cases which have examined situations in which the maker of a previous representation is “not available to give evidence about an asserted fact” within the exceptions to the hearsay rule. In *R v Nona* [2015] ACTSC 175; (2015) 254 A Crim R 301 (*Nona*), Refshauge J considered the meaning of “a person who made a previous representation [being] not available to give evidence about an asserted fact” within s 65(1) and for the purposes of s 65(3) of the *Evidence Act 2011* (ACT). The definition of a person “not available to give evidence” in cl 4(1)(c) of Pt 2 of the Dictionary to the *Evidence Act 2011* (ACT) was as follows (relevantly):

(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

…

(c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability …

The provisions in the *Evidence Act 1995* (Cth) are to similar effect.

1. Justice Refshauge in *Nona* referred to the comments of the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission concerning a person taken not to be available as follows (at [128]):

… the Commissions have retained the formula “mentally or physically unable”. To prevent abuse of the amendment and to prevent the amendment being applied to discriminate against persons wrongly, the proposed amendment now contains a qualification that the “inability” of the witness “cannot reasonably be overcome“. This is designed to exclude the possibility that (for example) a person unable to speak or hear but who can communicate in writing may be considered “physically unable” to testify: there will generally be reasonable measures for overcoming such difficulties.

8.35 As to mental inability, it is intended that such an amendment may facilitate, in at least some cases, the admission of the transcript of a complainant’s evidence in a retrial. Requiring the complainant to testify again may, depending on the circumstances of the case, do such emotional or psychological harm to the complainant that the complainant should be considered unavailable to give the particular evidence.

…

8.37 It is not intended that the amendment should lower the standard of unavailability generally. For instance, it is not intended that any person should be considered unavailable to give evidence simply by producing a medical certificate asserting that a person is mentally or physically unable to give evidence about a fact. A real mental or physical inability to testify must be shown. These are factual questions courts are well placed to consider on a case-by-case basis, looking to all the circumstances.

1. The judge in *Nona* formulated the test which he went on to apply as follows (at [144]):

In my view, the provision does permit the evidence to be given as proposed where the witness’s mental condition is such that he or she will suffer significant mental adverse consequences from giving the evidence. This is clear from the ALRC Report, especially at [8.37].

1. His Honour expressed his conclusions in the case before him in terms of the potential witnesses being mentally incapable of giving the evidence without an unacceptable risk of serious mental harm (see at [174], [187] and [194]).
2. I agree with the respondents’ submission that legal coherence means that the test of non-availability within the *Evidence Act 1995* (Cth) should be applied to an application to set aside a Subpoena to give evidence. It would be an odd result if the tests were different and there was a class of persons who could not be subpoenaed, but who were not “not available” for the purposes of the hearsay provisions in the *Evidence Act 1995* (Cth).
3. In *Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church* [2016] NSWSC 1122, Garling J addressed the availability or otherwise of a witness in a civil proceeding within s 63 of the *Evidence Act 1995* (NSW). His Honour emphasised the importance of focusing on whether there is an inability to give “the evidence” and of the need to consider carefully the particular circumstances of the case. His Honour said (at [32]–[34]):

32 In my view, where the issue is one of mental inability, the question for the Court is not whether the witness will give evidence which may not be accurate or reliable, or whether the witness may find it difficult to concentrate and give such evidence, or whether the witness, by reason of a mental impairment, can only give evidence for short periods of time. Rather, the question is simply whether the witness is mentally unable to give “*the evidence*”, being the hearsay evidence which is sought to be adduced.

33 The plaintiff’s case that she is mentally unable to give the evidence is not borne out by the evidence before me. Undoubtedly, the plaintiff faces a physical disability in giving evidence; her voice has a vibrato. As well, it is clear from the reports of Associate Professor Jones and Ms Borthwick that there are some questions which the plaintiff is unable to answer, and some questions which the plaintiff is able to answer but to which the plaintiff is not always able to give a rational answer.

34 However, the evidence from Associate Professor Jones is that the plaintiff was capable of giving him, with the assistance of an interpreter, a description of the circumstances of her accident. The description which Associate Professor Jones records is not an irrational or improbable one. It is consistent with the plaintiff’s case.

1. Person 56 appears able to give relevant evidence in this case. As I have said, I accept that giving evidence gives rise to a risk that Person 56’s mental health may be adversely affected and a risk that his therapeutic intervention program or treatment may be undermined. However, those matters, having regard to the relevant test, do not constitute a sufficient basis to set aside the Subpoena to give evidence.

## Conclusions

1. I grant leave to issue a Subpoena to give evidence to Person 56. I refuse Person 56’s application to set aside the Subpoena.

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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 Besanko. |

Associate:

Dated: 23 March 2022

CONFIDENTIAL ANNEXURE

[REDACTED]

SCHEDULE OF PARTIES

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