Federal Court of Australia

Roberts-Smith v Fairfax Media Publications Pty Limited (No 32) [2022] FCA 419

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| File numbers: | NSD 1485 of 2018NSD 1486 of 2018NSD 1487 of 2018 |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 22 April 2022  |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application to produce and for leave to inspect, uplift and copy documents – legal professional privilege – whether the documents are not protected by privilege because they were made in the furtherance of a fraud – where the respondents allege certain witnesses to be called by the applicant colluded in respect to aspects of their evidence to be given at trial – whether the respondents have relied on admissible evidence capable of establishing a prima facie case of fraud – consideration of the status of outlines of evidence in defamation proceedings – where outlines of evidence found to be inadmissible in relation to this application – application dismissed  |
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| Legislation: | *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 38B |
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| Cases cited: | *Attorney-General (Northern Territory) v Kearney* [1985] HCA 60; (1985) 158 CLR 500*AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30*Carter v Managing Partner, Northmore Hale Davy & Leake* [1995] HCA 33; (1995) 183 CLR 121*Commissioner of the Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501*Kang v Kwan* [2001] NSWSC 698*Kuwait Airways Corporation v Iraqi Airways Company (No 6)* [2005] EWCA Civ 286; [2005] 1 WLR 2734*R (Hallinan Blackburn Gittings & Nott (a firm) v Crown Court at Middlesex Guildhall* [2004] EWHC 2726; [2005] 1 WLR 766*R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141*Roberts Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465*Roberts-Smith v Fairfax Media Publications Pty Limited (No 15)* [2021] FCA 1461*Roberts-Smith v Fairfax Media Publications Pty Limited (No 23)* [2021] FCA 1460*Roberts-Smith v Fairfax Media Publications Pty Limited (No 25)* [2021] FCA 1558*Roberts-Smith v Fairfax Media Publications Pty Limited (No 33)* [2022] FCA 420 *Southern Equities Corporation Ltd (in liq) v Arthur Anderson & Co* (1997) 70 SASR 166 |
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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: | 69 |
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| Date of hearing: | 8 April 2022  |
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| Counsel for the Applicant: | Mr A Moses 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 and Mr C Mitchell |
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| Solicitor for the Respondents: | MinterEllison |
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| Counsel for the Commonwealth: | Mr J Edwards  |
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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-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: | Abraham J |
| DATE OF ORDER: | 22 April 2022 |

THE COURT ORDERS THAT:

1. The respondents’ interlocutory application dated 25 March 2022 is dismissed.

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

REASONS FOR JUDGMENT

ABRAHAM J:

1. 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 substantive hearing, which commenced on 7 June 2021, is currently proceeding before Besanko J, with the respondents having recently closed their case. The applicant’s case in reply has recently commenced.
2. On 14 March 2022, the respondents issued the applicant a notice to produce in the following terms:

1. All documents referring to, evidencing or relating to any communication between:

a. Person 27 and any other person(s) (including but not limited to the Applicant and/or any lawyer(s) or other person(s) acting on behalf of the Applicant); and/or

b. the Applicant and any other person(s) (including but not limited to any lawyer(s) or person(s) acting on behalf of the Applicant),

which refers to or relates to the information set out in paragraph [30] of the Outline of Evidence of Person 27 filed on or about 12 July 2019 (namely, “I recall that early in our deployment, in about late July/early August 2012, the Commander of the NDS, Person 12, was removed from participating in missions with the SASR after he shoot at a dog and the bullet ricocheted hitting another Patrol Commander in the leg”), including but not limited to any communication relating to the Outline of Evidence of Person 27 filed on or about 12 July 2019 or any draft outline of evidence of Person 27.

2. All documents referring to, evidencing or relating to any communication between:

a. Person 32 and any other person(s) (including but not limited to the Applicant and/or any lawyer(s) or other person(s) acting on behalf of the Applicant); and/or

b. the Applicant and any other person(s) (including but not limited to any lawyer(s) acting on behalf of the Applicant),

which refers to or relates to the information set out in paragraphs [19], [26(a)] (second sentence) and/or [26(b)] of the Outline of Evidence of Person 32 filed on or about 12 July 2019 (namely, “I recall that early on in our deployment, I believe around the end of July 2012, Person 12 was stood down as Commander of the NDS soldiers following an incident during a mission in which an Australian Patrol Commander was hit by shrapnel from a bullet fired by Person 12”), including but not limited to any communication relating to the Outline of Evidence of Person 32 filed on or about 12 July 2019 or any draft outline of evidence of Person 32.

3. All documents referring to, evidencing or relating to any communication between:

a. Person 35 and any other person(s) (including but not limited to the Applicant and/or any lawyer(s) or other person(s) acting on behalf of the Applicant); and/or

b. the Applicant and any other person(s) (including but not limited to any lawyer(s) acting on behalf of the Applicant),

which refers to or relates to the information set out in paragraphs [49], [50] and/or [51] of the Outline of Evidence of Person 35 filed on or about 12 July 2019 (namely, “…I was about 4-5 metres away from Person 12 when I saw that he was preparing to shoot one of the dogs. Before I could stop him, he shot the dog. The bullets went through the dog, into the door behind the dog, and shrapnel hit another Australian Patrol Commander's leg, who had just entered the compound”), including but not limited to any communication relating to the Outline of Evidence of Person 35 filed on or about 12 July 2019 or any draft outline of evidence of Person 35.

4. All documents referring to, evidencing or relating to any communication between:

a. Person 39 and any other person(s) (including but not limited to the Applicant and/or any lawyer(s) or other person(s) acting on behalf of the Applicant); and/or

b. the Applicant and any other person(s) (including but not limited to any lawyer(s) acting on behalf of the Applicant),

which refers to or relates to the information set out in paragraphs [13], [15] to [18] and/or [20] or [21] of the Outline of Evidence of Person 39 filed on or about 12 July 2019 (namely, “I recall that on or about 31 July 2012, Person 12 was removed from command of the NDS due to an incident on a mission where Person 12 acted dangerously and a Patrol Commander ended up with shrapnel in his leg”), including but not limited to any communication relating to the Outline of Evidence of Person 39 filed on or about 12 July 2019 or any draft outline of evidence of Person 39.

1. On 22 March 2022, the applicant served on the respondents an objection schedule claiming legal professional privilege over items 1 to 20A. By their application dated 25 March 2022, the respondents seek production of those documents concerning the preparation and filing of outlines of evidence of Persons 27, 32, 35 and 39 (witnesses expected to be called by the applicant in these proceedings) asserting that privilege has been displaced because there is an overwhelming prima facie case that each document was created in furtherance of a fraud.
2. Orders pursuant to s 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) have previously been made, the most recent version being on 7 April 2022, which dictates the manner in which certain information must be handled in these proceedings. To enable the parties to advance their positions it was necessary to conduct part of this application in closed court. The summary of the submissions in these reasons is of those made in open court.
3. In summary, the respondents allege that the fraud or deception is the preparation and filing of five outlines of evidence anticipated to be given by the applicant and Persons 27, 32, 35 and 39, and sworn answers to interrogatories by the applicant, to the effect that Person 12 was removed from Rotation 18 around 31 July 2012 and, therefore, could not have been in Darwan on 11 September 2012 or Chenartu on 12 October 2012. Suffice to say the applicant challenges that assertion. I note that there is no suggestion by the respondents that the documents would not otherwise be privileged, but for the fraud allegation (subject to the separate application in respect to Person 27 which is addressed in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 33)* [2022] FCA 420 (*Roberts-Smith (No 33)*).
4. This application was heard together with the separate application in relation to Person 27, which is addressed in *Roberts-Smith (No 33).*
5. For the reasons below, the respondents’ application is dismissed.

## Material relied on

1. In support of their application, the respondents read an affidavit of Peter Llewellyn Bartlett, solicitor for the respondents, dated 25 March 2022 and tendered Exhibit PLB-1. The respondents also relied on an open court tender bundle and a closed court tender bundle.
2. The applicant provided to the Court some discrete passages from the trial transcript in relation to the respondents’ opening address and the applicant’s cross-examination.

## Factual context

1. Given the nature of the claim, it is appropriate to outline the relevant chronology of events.
2. On 9 October 2018, the respondents filed the first iteration of their defence in these proceedings. In the particulars of truth, the respondents alleged that Person 12 was present with the applicant during the murder of a person under control (PUC) at Darwan on 11 September 2012 and the murder of a PUC on a mission which took place on or about 12 October 2012 in Khaz Oruzgan (also referred to as Chenartu).
3. On 31 May 2019, the respondents filed outlines of evidence that they anticipated their witnesses would give in the proceedings. The outline of evidence of Person 13 indicated that Person 12 and the applicant were involved in the murder of a PUC at Darwan. Persons 13 and 14’s outlines of evidence indicated that Person 12 and the applicant were involved in the murder of a PUC at Khaz Oruzgan on 12 October 2012.
4. In July 2019, the applicant filed outlines of evidence for witnesses he intended to call in reply to the respondents’ defence and outlines of evidence. The outlines of evidence for five witnesses foreshadowed that each of those witnesses could give evidence that Person 12 shot a dog and was, therefore, removed from the command of the Afghan National Army unit (NDS) embedded with the Special Air Services Regiment (SASR), and from the deployment entirely, several weeks before the Darwan and Chenartu missions. In October 2019, the applicant also served sworn answers to interrogatories to the same effect.
5. On 8 September 2020, the respondents amended their defence to remove the allegation that Person 12 had any involvement with the murder of a PUC at Darwan. The allegation concerning Person 12 at Chenartu remains part of the respondents’ case.

## Legal principles

1. 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 expanded upon in respect to waiver of privilege in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 25)* [2021] FCA 1558 at [18]-[26]. It is unnecessary to repeat them here.
2. However, it is necessary to address the principles relating to what is often referred to as an “exception” to legal professional privilege, where a communication was created in furtherance of a fraud or other illegal purpose.
3. In *Commissioner of the Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501 (*Propend*), the High Court considered, inter alia, the level of proof required to displace a claim of legal professional privilege on the basis that the communication was created in furtherance of a fraud. On that, Brennan CJ at 514 observed (citations omitted):

In determining whether a claim of legal professional privilege can be upheld, it is open to the party resisting the claim to show reasonable grounds for believing that the communication effected by the document for which legal professional privilege is claimed was made for some illegal or improper purpose, that is, some purpose that is contrary to the public interest. I state the criterion as "reasonable grounds for believing" because (a) the test is objective and (b) it is not necessary to prove the ulterior purpose but there has to be something "to give colour to the charge", a "prima facie case" that the communication is made for an ulterior purpose. The purposes that deny the protection of privilege for a communication (whether documentary or oral) between a client and the client's solicitor or counsel include the furthering of the commission of an offence.

When a party in curial proceedings is seeking to rebut a claim of privilege by asserting that the communication with the legal adviser was made for an ulterior purpose, the evidence of ulterior purpose must be admissible in those proceedings. It is not sufficient to rely on the information laid before the justice who issued the warrant. The informant is not necessarily a witness and, if he or she is a witness, the admissible evidence is what is then deposed to, not a statement made to or before the issuing justice. In the present case no admissible evidence was tendered, although Davies J at first instance recorded that counsel for the parties were content that he "should have regard to" the sworn information laid before the issuing justice.

1. Dawson J at 521-522 observed (citations omitted):

The cases make it plain that those seeking to exclude legal professional privilege do not have to prove that the communication in question was in furtherance of a crime or fraud. In *Bullivant v Attorney-General (Vict)*, which was a case of fraud, the Earl of Halsbury LC said: "you must have some definite charge either by way of allegation or affidavit or what not." In *O'Rourke v Darbishire* Viscount Finlay said: "there must be, in order to get rid of privilege, not merely an allegation ... of a fraud, but there must be something to give colour to the charge." That test was accepted in *Attorney-General (NT) v Kearney* by Gibbs CJ, with whom Mason and Brennan JJ agreed. Gibbs CJ added the further words of Viscount Finlay:

"The statement [ie the allegation of fraud] must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact ... The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications."

In requiring less than proof of an allegation of crime or fraud to displace legal professional privilege, the law has made a compromise in the public interest between the competing principles which require, on the one hand, the availability of all relevant evidence and, on the other, the protection of professional confidence. It has done so in favour of the availability of all relevant evidence by placing the threshold for the displacement of the privilege a considerable distance short of proof of the allegation of crime or fraud. No doubt that is so because it is in the public interest that the law should not countenance even the possibility of legal professional privilege being raised as a cloak to hide criminal or fraudulent activities.

1. As the applicant contended, Dawson J’s observations at 522 on whether admissible evidence was required to establish the existence of a crime or fraud were not part of the majority, although the observations referred to above as to the rationale behind the exception and the standard of proof required to displace a claim for privilege, are consistent with those of other members of the Court: see Toohey J at 534, Gaudron J at 546, McHugh J at 556 and Gummow J at 575.
2. To establish a prima facie case of fraud or other illegal purpose so as to displace a claim of privilege, it is necessary for the party seeking to do so, to rely on admissible evidence: *Propend* per Brennan CJ at 514, Gaudron J at 547, McHugh J at 556 and Gummow J at 572.
3. As mentioned above, while this is often referred to as an “exception” to legal professional privilege, it is not an exception at all as the illegal objective of the communication prevents the communication from becoming the subject of privilege, such that privilege never attaches: *Propend* at 556; *Carter v Managing Partner, Northmore Hale Davy & Leake* [1995] HCA 33; (1995) 183 CLR 121 (*Carter*) at 163; *Attorney-General (Northern Territory) v Kearney* [1985] HCA 60; (1985) 158 CLR 500 (*Kearney*) at 513.
4. Although this exception is classically described as relating to fraud or crime, the extent of its application is not so confined. For example, as is apparent from the passage recited above, Brennan CJ referred to the exception as relating to “some illegal or improper purpose”. In *Kearney*, Gibbs CJ (with whom Mason and Brennan JJ agreed) stated at 515 that “legal professional privilege will be denied to a communication which is made for the purpose of frustrating the processes of the law itself, even though no crime or fraud is contemplated”, citing *R v Bell; Ex parte Lees* [1980] HCA 26; (1980) 146 CLR 141 at 159 per Murphy J. In *Southern Equities Corporation Ltd (in liq) v Arthur Anderson & Co* (1997) 70 SASR 166 (*Southern Equities*), Doyle CJ addressed the issue of the breadth of this exception, considering, inter alia, *Kearney*, *Carter* and *Propend*. His Honour concluded at 174:

I conclude from this reference to authority that the claim of privilege will fail only if there is material raising an arguable case that the relevant communications were made for the purpose of furthering or assisting a crime or fraud, and that fraud in this context embraces a range of legal wrongs that have deception, deliberate abuse of or misuse of legal powers, or deliberate breach of a legal duty at their heart. It is not enough, I consider, that one could simply say that a transaction constituted sharp practice, or fell below the normal standard of commercial probity. It is not enough, I consider, that one would regard a transaction on which advice was sought as artificial, or as deliberately structured to take advantage of the law on a topic. In light of the authorities, one cannot be more precise than that.

1. This reflects that the exception has been applied so as to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest. It has been applied with sufficient flexibility to reflect the public policy considerations which underpin its application: *Kearney* at 514-515.
2. To establish this exception, it is not necessary to show the lawyer in question is involved; they may be ignorant of the purpose of the communication but the communication is nonetheless, not privileged: *Southern Equities* at 174; *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30 at [214].
3. The applicant referred to two English authorities to support the submission that the fraud exception may not apply where the subject matter of the alleged illegality is an issue in the proceedings. The first is *R (Hallinan Blackburn Gittings & Nott (a firm)) v Crown Court at Middlesex Guildhall* [2004] EWHC 2726; [2005] 1 WLR 766 (*Hallinan*), where Rose LJ (with whom Leveson J agreed) said at [25]:

It is a truism that whether material is legally privileged depends on the circumstances of the particular case. In order to defeat a claim to legal professional privilege, it will not be appropriate, for example in a case where an alibi has been raised, to seek to analyse the issues which are likely to arise in the criminal investigation or trial which gives rise to the initial privilege. To do so, as it seems to me, would be to put the cart, in the form of analysis of the issues, before the horse, that is the trial. Where, however, there is evidence of specific agreement to pervert the course of justice, which is freestanding and independent, in the sense that it does not require any judgment to be reached in relation to the issues to be tried, the court may well be in a position to evaluate whether what has occurred falls within or without the protection of legal professional privilege as explained in *R v Cox and Railton* (1884) 14 QBD 153.

1. The second is *Kuwait Airways Corporation v Iraqi Airways Company (No 6)* [2005] EWCA Civ 286; [2005] 1 WLR 2734 at 2746, which considered *Hallinan*. There, Longmore LJ (with whom Ward LJ agreed), referring to *Hallinan*, observed at [29]:

This authority shows that the mere fact that litigation has begun does not prevent the application of the fraud exception to legal professional privilege. But it also shows that the exception may not apply if what is in issue is merely an issue in the proceedings, e.g. a denial of having committed a crime or (as discussed in the *Hallinan* case) an assertion of an alibi or telling a lie to a solicitor about the side of the road on which one is driving. The fraud exception is more likely to apply if the evidence of criminality is freestanding and independent.

1. These cases simply reflect that an application made invoking the fraud exception is to be resolved on the circumstances of the particular case. It reflects on the fact that, depending on the issue, there may not be the necessary factual foundation for an application until the conclusion of the trial which is to resolve the relevant issue. As recognised in those cases, the fact that litigation has begun does not prevent the application of this exception.

## Submissions

### Respondents’ submission

1. As explained above, the respondents contend that the fraud is the preparation and filing of five outlines of evidence anticipated to be given by the applicant and Persons 27, 32, 35 and 39, and sworn answers to interrogatories by the applicant, to the effect that Person 12 was removed from Rotation 18 around 31 July 2012 and, therefore, could not have been in Darwan on 11 September 2012 or Chenartu on 12 October 2012. The applicant addressed the legal principles which they submitted applied in this application.
2. Against that background the respondents contended that the prima facie standard of fraud is comfortably satisfied in this case for the following five reasons.
3. *Firs*t, it is inherently implausible that five people would independently and innocently have the same detailed but erroneous memory of Person 12 being removed on 31 July 2012 after shooting a dog and injuring a SASR member. None of the witnesses claim to have difficulty in recalling who Person 12 was, at least to the extent that he was the NDS commander embedded with the SASR. It was submitted that the evidence was wrong as a different soldier, not a commander, shot the dog and a different Afghan commander was in command of the NDS at the time of the incident (Person 12 was not yet part of the deployment on that date). The sheer number of witnesses who purportedly had the same recollection makes falsity and collusion, rather than innocent error or mistake, the obvious explanation.
4. *Second*, the purpose for which the foreshadowed evidence was to be adduced was submitted to support a finding of falsity. It undermined the respondents’ case that Person 12 was involved with the applicant in war crimes at Darwan and Chenartu. The outlines each expressly cite Person 12’s supposed removal on 31 July 2012 as the reason why he could not have been at Darwan and/or Chenartu. It may be inferred that the applicant, and the witnesses “if they approved the outlines in their filed form, understood that to be purpose of the evidence”. It otherwise has no apparent relevance to any other issue in the proceeding.
5. *Third*, the significance of the foreshadowed evidence to the applicant’s case in reply supports a finding of falsity. If the deception had not been exposed, and the false evidence been adduced and accepted by the trial judge, the evidence would have been a complete answer to the respondents’ case on Darwan (as initially pleaded) and Chenartu.
6. *Fourth*, the roles and responsibilities of Persons 27, 32 and 35 in dealing with the NDS soldiers on Rotation 18 make it particularly unlikely that any one of them, let alone all three, could innocently have had a detailed but erroneous memory. Persons 27, 32 and 35 routinely supervised the Afghan soldiers, worked closely and went on numerous missions with them and would have known who the Afghan commanders were and whether one of them was removed for disciplinary reasons.
7. The respondents detailed the aspects of the outlines of evidence relied on in support of that submission.
8. In respect to Person 27, the respondents referred to paragraph [30] of his outline of evidence of which it was submitted that it was inherently unlikely Person 27 had such a genuine, but erroneous, recollection. In relation to Person 32, the respondents referred to paragraphs [19], [26(a)] and [28(b)] which, they submitted, demonstrated that Person 32 understood that the purpose of his evidence concerning Person 12 was to give him an alibi for the Darwan and Chenartu missions which would undermine the respondents’ case. The respondents submitted Person 32 cannot have genuinely, but mistakenly, held any such recollection. In respect to Person 35, the respondents referred to paragraphs [46], [49], [51], [52] and [67] of his outline of evidence, which they submitted, were false and demonstrate Person 35 knew the purpose of the evidence was to give Person 12 an alibi for the missions. Again it was submitted that Person 35 cannot have genuinely held such recollections and it is implausible that he was mistaken. In respect to Person 39, he was the 2 SASR Squadron Executive Officer during Rotation 18. The respondents referred to paragraphs [13] and [15]-[18] of his outline of evidence, which they contended were false, and that the witness could not genuinely have held such recollections.
9. *Fifth*, it was submitted that the fraudulent or deceptive purpose may be inferred from concessions made by the applicant in his evidence. He accepted in cross-examination that his outline of evidence and answers to interrogatories identifying Person 12 as the person who had shot the dog and been removed, were entirely the product of discussions he had with Persons 35 and 68, and what he had been told by “everyone in [Person 31’s] team”. He accepted that he had discussions with Person 35 about the content of his outline of evidence, and what it would say about Person 12.
10. The respondents submitted that the applicant’s explanation was false and that he knowingly put forward false information in his outline and sworn answers to interrogatories. It was submitted that this Court need not decide whether the evidence given to Besanko J was false, because even if his explanation is true, and he did rely on information provided to him in 2019 by Persons 35 and 68 (and other members of Person 31’s team), the contents of his outline and his answer to interrogatories are still false. The applicant has admitted that he did not have a “recollection” of these events. It was deliberately deceptive to pretend otherwise. The deception was expanded by discussing with (at least) Person 35 the content of the evidence that they would give on this topic.
11. The respondents submitted, that it is entirely within the power of the applicant to explain what they submit are otherwise clear inferences and the applicant has chosen not to do so. It was submitted the Court can take that into account in assessing the sufficiency of the material it relies on, citing *Kang v Kwan* [2001] NSWSC 698 (*Kang*) at [37] relying on Gaudron J in *Propend* at 546. Further, the applicant has not suggested that the evidence of the witnesses will be anything other than in accordance with the outlines that have been filed. There have been no amended outlines filed, nor any notification that certain paragraphs will not be led.

### Applicant’s submission

1. The applicant submitted that this application “is based on surmise and conjecture of a case theory that the respondents have propounded as an issue in the substantive proceedings in circumstances where they have yet to cross-examine, let alone put allegations to Persons 27, 32, 35 and 39”.
2. The applicant submitted that the respondents treat the outlines as if they are the witnesses’ evidence, when they are not. The applicant referred to *Propend*, where the Court concluded that if a person wishes to dispel privilege on this basis, they must do so based on evidence in admissible form: at 514, 547, 566, 572, 593. He submitted that the contention lacks a proper evidentiary basis. The applicant submitted the application is premature.
3. The allegation to which this matter is directed relates to a pleading in which it is alleged by the respondents that on or about 12 October 2012 during a mission in Khaz Oruzgan the applicant said to Person 13 (an interpreter) to tell Person 12, a member of the NDS, to shoot an Afghan male. The respondents are not calling Persons 12 or 13 to give evidence in the proceedings. Whether Person 12 was present on that mission is an issue to be determined in the proceedings. The accuracy and reliability of the documentation/evidence relied upon by the respondents in relation to the identification of Person 12 is in issue in the proceedings. The person who was responsible for preparing the documentation is not being called to give evidence. The reliability and accuracy of the documentation is a matter which the trial judge will need to resolve.
4. It was submitted that the Court should decline to apply the fraud exception as it will require the Court to make findings about issues that are to be determined in the trial including whether the applicant and Persons 27, 32, 35 and 39 conspired to taint evidence. Any determination that there has been a prima facie fraud would be unfair to those witnesses who are not parties to this application; they have not yet given evidence in the trial and the allegation has not yet been put to them. It was submitted that it would be inappropriate for the Court to make such a finding based only upon unsigned outlines of anticipated evidence prepared without the benefit of the materials subsequently produced by the Department of Defence (Defence) shortly prior to the commencement of the hearing in June 2021, which may or may not have been the subject of explanation in the outlines of evidence.
5. It was submitted that mistake may be an obvious explanation for the anticipated evidence recorded in the outlines of the applicant and Persons 27, 32, 35 and 39 especially where the Defence materials that are relied upon by the respondents were not available to the applicant and Persons 27, 32, 35 and 39 at the time their outlines were prepared. Such a mistake about the identity of the soldier who was removed from the NDS is understandable given that contemporaneous Defence records appear to contain errors concerning the identity of Person 12. It was submitted that the respondents’ submissions invite the Court to make a finding about whether Person 12 was removed from the NDS during 2012. Although that proposition was conceded by the applicant during his evidence, and may ultimately not be the subject of any real dispute, the applicant’s witnesses in reply have not given their evidence and it would be premature and inappropriate for the Court to make any such determination about that issue. The applicant submitted even if the Court were to find, on this interlocutory application, that Person 12 was not removed from the NDS during the 2012 deployment, it does not logically follow that the respondents have established that the applicant and Persons 27, 32, 35 and 39 deliberately concocted a false story about Person 12’s removal from the NDS. The respondents’ assertion that the “foreshadowed evidence is now known to be untrue” does not establish that the foreshadowed evidence was deliberately false, nor does it provide “reasonable grounds for believing that the communication effected by the document for which legal professional privilege is claimed was made for some illegal or improper purpose”. The submission that it is inherently improbable that five witnesses would have the same innocently mistaken recollection is based on nothing more than conjecture and surmise.
6. The applicant submitted that the Court cannot infer a fraudulent or deceptive purpose from his evidence and the only rational inference that may be drawn is that he was mistaken when he suggested, in his outline of evidence, that Person 12 had been removed from duty.
7. It was submitted that the respondents’ contention that the roles and responsibilities of Persons 27, 32 and 35 in dealing with the NDS soldiers on Rotation 18 make it particularly unlikely that any one of them could not have an innocently mistaken memory invites the Court to make a finding about a matter, the level of contact between Persons 27, 32 and 35 and the NDS during the 2012 deployment and their supposed familiarity with Person 12, which can only be dealt with at trial based on admissible evidence rather than based upon outlines of anticipated evidence. This case is distinguishable from *Hallinan*, where there was freestanding and independent evidence of a specific agreement to pervert the course of justice.

### Respondents’ reply

1. The respondents submitted that the applicant’s reliance on the fact that the outlines were filed before the Defence material was available does not support his submission, but undermines it. The respondents accepted that the outlines are not the evidence of the witnesses. The outlines are direct evidence of what the witnesses have told the applicant’s lawyers will be the evidence they are likely to give in the proceedings. The respondents submitted that the application is not premature, and that on the applicant’s submission it would require the fraud to be proved before privilege is dispelled, which, they submitted, was inconsistent with authority. Accordingly, the respondents do not need to exclude the possibility that an innocent mistake may have occurred; the question is, looked at as a whole, whether in taking into account the capacity of the respondents to bring forward evidence and the capacity of the applicant to deny evidence, the requisite prima facie standard has been met.

## Consideration

1. It may be readily accepted that if it is established that there is a prima facie case of witnesses having colluded to give inaccurate or false evidence on a matter of significance in proceedings, that conduct could fall within the fraud exception, so as to defeat a claim of privilege. It may also be readily accepted, that the topic on which it is alleged in this application that the collusion occurred, namely, that Person 12 shot a dog, as a result of which he was removed from the rotation, and on that basis he could not have been present at the Darwan and/or Chenartu missions, is capable of being of significance. Although the incident itself does not form part of the pleadings and if correct, in isolation may be considered as side wind, its use to provide Person 12 with an alibi for the Darwan and Chenartu missions, is significant.
2. The issue is whether the respondents have established a prima facie case of fraud. That involves considering the material relied on by the respondents, determining what is admissible evidence, and what, if any, inferences are to be drawn.
3. As explained above, in *Propend* the majority of the High Court concluded that to establish a prima facie case of fraud or other illegal purpose so as to displace a claim of privilege, it is necessary for the party seeking to do so, to rely on admissible evidence.
4. The foundation of the respondents’ submission on this application is the outlines of evidence filed by the applicant in the substantive proceedings, in respect to the applicant and Persons 27, 32, 35 and 39.
5. The applicant contended the outlines are not admissible evidence, which is what is required to displace a claim of privilege on this basis. It was submitted that as a result, this application is premature.
6. This submission directs attention to the status of an outline of evidence.
7. The Defamation Practice Note (DEF-1) in this Court records that “[w]hen evidence-in-chief is to be led orally and outlines of evidence are to be exchanged, the outlines are to provide notice of the evidence to be given by the witness and, without the leave of the Court, are not to be the subject of cross-examination or be tendered as a prior statement of the witness”. As Besanko J observed in *Roberts Smith v Fairfax Media Publications Pty Limited (No 12)* [2021] FCA 465 (*Roberts-Smith (No 12)*) at [54], “[t]he purpose of an outline of evidence is to provide notice of the evidence to be given by the witness”. As accepted by the respondents, the outlines are not the evidence of the witnesses, as that is what is given orally in the hearing. The outlines are not statements of the witnesses, and unlike statements and affidavits, they are not adopted by the witness in advance of the hearing as accurate (either as to the content of any anticipated evidence or as accurately recording what they may have disclosed to a lawyer).
8. This case illustrates that, although one might expect it to be so, it does not necessarily follow that because an outline has been filed, its contents have been approved by the witness. For example, it is apparent that the respondents have filed outlines of evidence from witnesses without having spoken to them, basing the outlines on material they have sourced from elsewhere: see for example *Roberts-Smith v Fairfax Media Publications Pty Limited (No 15)* [2021] FCA 1461 at [85]-[86]. It can be inferred that the respondents considered that approach available and appropriate given the status and purpose of an outline of evidence. Indeed, in respect to some of the witnesses to be called by the respondents, the trial judge concluded that it was unnecessary to file outlines of evidence as the applicant was sufficiently on notice of the anticipated evidence by other means: *Roberts-Smith (No 12)* at [54].
9. Moreover, fundamentally concerning is that the respondents base their submission in this application on the outlines of evidence of these witnesses where, in respect to the separate application relating only to Person 27, they submitted that they do not know whether his outline as filed does reflect what is to be his evidence. In respect to Person 27, the respondents put a case of fraud so as to displace privilege, inter alia, on the basis that Person 27 has told the applicant’s solicitor that he is not giving evidence in accordance with the outline, but that the outline has been filed by the applicant regardless. That aspect of the respondents’ claim of fraud in respect to Person 27 is premised on the respondents establishing a prima facie case that his outline was filed by the applicant knowing that it does not reflect the witness’ anticipated evidence: *Roberts-Smith (No 33)* [2022] FCA 420 at [34].
10. The respondents’ submission in reply on this topic, that the outlines are direct evidence of what the witnesses have told the applicant’s lawyers will be the evidence they are likely to give in the proceedings, must be considered in that context. Attempting to recast the outline in that manner does not overcome its status as described in [53] above. The respondents’ submission that the applicant has said throughout the hearing that the outlines filed by him were prepared with the involvement of the witnesses (in contrast to the respondents’ outlines), must also be considered in that context. I note that the outlines of the applicant and Persons 27, 32, 35 and 39, which are relied on by the respondents in this application, are not signed by the witnesses, which is unsurprising given their status in the proceedings.
11. In any event, that submission as to the circumstances in which the outlines were prepared was merely advanced from the bar table, and cannot bear on the admissibility of the outlines. Nor can the objection schedule provided to the respondents (which also appeared to be relied on in their reply submission). More significantly, the respondents’ conduct in accepting, as described above, that Person 27’s outline may not reflect his anticipated evidence, and indeed by founding a claim of fraud on that basis, is directly inconsistent with their submission in this application that each outline reflects what evidence the witness is to give at trial (or what the witness is said to have told the applicant’s lawyers) such as to establish a prima facie case of collusion between them.
12. The outlines of evidence are not evidence in admissible form in this application, such as required to found an application of this nature.
13. Contrary to the respondents’ submission, the applicant’s contention that this application is premature does not have the effect of requiring the respondents to prove the allegation of collusion. Although at times the applicant’s submission did tend to imply that proof of the improper conduct was required, this submission was, in substance, focussed on the requirement that there be an admissible evidentiary basis to the respondents’ claim. Similarly, the submission about the application being premature is not about fairness to the witnesses, as implied at times by the applicant, but about the necessity of there being admissible evidence to found the claim. Having an admissible evidentiary basis to found an application is consistent with authority. Plainly, that does not alter that the standard of proof is a prima facie basis to establish the improper conduct. Contrary to the respondents’ submission, having an admissible evidentiary basis does not require establishing collusion between the witnesses through cross-examination before privilege can be displaced.
14. As explained above, the outlines of evidence are not admissible in the substantive hearing, unless leave is granted by the trial judge. Leave was granted during the cross-examination of the applicant in respect to this aspect of the topic of Person 12, but only after it had been established that he had carefully read the outline and was satisfied as to its accuracy before instructing his lawyers to serve the document. The applicant was then cross-examined in respect to statements in his outline as to Person 12 and the dog incident. Although, I note that the issue of this alleged collusion was raised by the respondents in opening the case in the substantive hearing, on the transcript provided of the cross-examination on this topic, there does not appear to be any express suggestion of collusion or even any question put to him as to whether he colluded with others on this topic.
15. If Persons 27, 32, 35 and 39 give evidence in the hearing as to Person 12 that is consistent with the anticipated evidence set out in their outlines, the respondents then have evidence on what the witness said occurred. Regardless, if collusion on this topic is an issue at the trial, depending on their evidence, the respondents could also seek leave to cross-examine these witnesses on their outlines in respect to the topic of Person 12, as they had done in respect to the applicant. If the evidence given is different from their outlines, then again, depending on the evidence, the respondents may seek leave to cross-examine them on this aspect of their outline, as they did with the applicant. Whether leave would be granted would be a matter for the trial judge. All this simply illustrates is that, depending on how the evidence unfolds at trial, there may be means to obtain admissible evidence.
16. Moreover, the respondents’ reliance on the submission that the applicant is in a position to dispel the claims made but has not, fails to grapple with the fact that the prima facie allegation of fraud must be based on an admissible evidentiary foundation. The respondents’ reliance on the observations of Gaudron J in *Propend* at 547, that a further burden is cast upon a person claiming privilege, does not assist their case. That burden only arises if there is evidence, in admissible form, which raises a prima facie case that the communications were made in furtherance of an illegal or other improper purpose. Similarly, the observations of Santow J in *Kang* at [37.7], do not advance the respondents’ case in this regard. There his Honour observed that:

[c]onsistent with the reasoning in *Propend*, the standards for establishing reasonable grounds will depend on the circumstances, though must still be sufficient to “give colour to the charge”, that is at a prima facie level. Thus if a person challenging privilege is clearly not in a position to lead very much evidence concerning purpose, as where the other party has exclusive access to that evidence, the Court may be satisfied with relatively less evidence.

The limitations on the respondents’ capacity to bring forward evidence, cannot be used as a makeweight for the absence of evidence. That does not obviate the need for there to be some evidence, in admissible form.

1. Given there is no admissible evidence to found the claim, it is unnecessary (and inappropriate) to consider whether what is relied on gives rise to the inference contended for.
2. It suffices to briefly address four further submissions made.
3. *First,* as accepted by the applicant, there is nothing to prevent the respondents bringing another application if, during the hearing, they have evidence in admissible form on which to base it and on which they contend can establish a prima facie case.
4. *Second*, the respondents placed importance on the fact that no amended outlines have been served, nor has any other notification been given that the witness’ evidence on this topic will be different from what is in their outlines. The significance of this fact to the application is unclear. Even if the evidence of the various witnesses is modified in respect to Person 12, the primary submission as to collusion (if there is prima facie evidence of this) is still capable of applying. That is, the witnesses had colluded to give the erroneous account even if that account can no longer be maintained.
5. *Third*, the respondents, while accepting that cases are fact specific, submitted that *Hallinan* is very similar to this case. In *Hallinan,* witnesses proposed to be called by the defence had engaged in a conspiracy to, in effect, give a fake statement. There the court concluded that there was no sufficient overlap between the issues on the application and those to be determined at trial such that prevented the issue of privilege being separately addressed. Although the effect of the alleged collusion is the same, the nature of the evidence in support was different. That was in a criminal prosecution, and the application was decided before the trial commenced. The application for the material was made by the police to enable them to investigate separate criminal activity, but related to original criminal charges. Whether an alleged falsity relied on can be established independently from the conclusions at the trial can only be decided on the evidence at the time an application is brought.
6. *Fourth*, in so far as the respondents put an alternative submission (referred to at [37] above) thateven if the applicant’s explanation for saying it was Person 12 who was removed because of the dog incident is true, then his outline and his answer to interrogatories are still false, that submission does not assist the respondents. The submission is said to be based on the fact that the applicant has admitted that he did not have a “recollection” of the events and so it was said to be deliberately deceptive to pretend otherwise. It was also said that the deception was expanded by discussing with (at least) Person 35 the content of the evidence that they would give on this topic.That submission is vastly different to the primary allegation of collusion between the five witnesses (whether directly or indirectly). It does not involve any allegation of knowing collusion with others, but rather is based on the applicant having been deceptive. On the applicant’s version alone, it is unclear how it is said that the other witnesses nominated are implicated such that it would establish a fraud or improper conduct. Bearing in mind the notice to produce is directed to obtaining material relating to Persons 27, 32, 35 and 39.

## Conclusion

1. For the reasons above, the respondents’ interlocutory application dated 25 March 2022 is dismissed. I will hear the parties on the issue of costs, given the applicant submitted that in the event this was my conclusion he wished to be heard on this topic.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 22 April 2022

**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 |
| **Interested Persons** |  |
| Interested Person: | COMMONWEALTH OF AUSTRALIA |