IN THE FEDERAL COURT OF AUSRALIA
REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

No. NSD 103 of 2023

BRUCE LEHRMANN
Applicant

NETWORK TEN PTY LTD and another
Respondents

Network Ten's Submissions (Costs)

A. INTRODUCTION

1. By orders made on 15 April 2024, the respondents successfully obtained judgment on the statement of claim: *Lehrmann v Network Ten Pty Limited* [2024] FCA 369 (**Trial Judgment**).

2. In accordance with the course propounded by Lee J in *Lehrmann v Network Ten Pty Limited (Cross-Claim)* [2024] FCA 102 (**Cross-Claim Judgment**) at [45]-[57], these submissions address the following issues:

   (a) the appropriate costs order to be made following the Trial Judgment;

   (b) the basis on which those costs should be paid; and

   (c) those costs which should be the subject of a reference.

3. These submissions refer to an affidavit of Conor O'Beirne affirmed 22 April 2024 (**O'Beirne Affidavit**) to be read on the hearing of the application for costs.

4. In summary, Mr Lehrmann brought this proceeding on a deliberately wicked and calculated basis. He put Network Ten to the cost of defending this proceeding, which can be, with the benefit of hindsight, described as a clear abuse of process aimed at concealing the truth that Mr Lehrmann raped Ms Higgins. Mr Lehrmann successfully obtained leave to commence the proceeding out of time (leave that would never have

been granted had Mr Lehrmann been honest with the Court) and came to this Court seeking substantial damages, in circumstances where he knew the allegations he complained about were true.

5. For the reasons developed in Section B below, Network Ten submits that Mr Lehrmann should be ordered to compensate it for the costs that it has incurred in successfully defending the proceeding. For the reasons developed in Section C, Network Ten submits that it is appropriate in the circumstances that those costs be paid on an indemnity basis from the commencement of the proceeding, or in the alternative from 31 August 2023, the date on which it made a settlement offer that was rejected by Mr Lehrmann the same day. Section D addresses Network Ten's liability to indemnify Ms Wilkinson.

B. COSTS SHOULD FOLLOW THE EVENT

The usual costs order

6. Section 43 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) confers a broad discretion on the Court with respect to costs. It is trite that the discretion must be exercised having regard to the dictates of justice, and in accordance with principle: *Northern Territory v Sangare* (2019) 265 CLR 164 at [24]. Further, s 40(1) of the *Defamation Act 2005* (NSW) entitles the Court to take into account the way in which the parties conducted their case and any other matters the Court considers relevant.

7. In the ordinary course, a successful party in litigation is entitled to an award of costs. Costs follow the event not to punish the unsuccessful party, but to compensate the successful party: *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72 (***Oshlack***), [67]-[68].

8. Having been successful in defending the statement of claim, Network Ten is entitled to have Mr Lehrmann pay its costs of defending the proceeding: *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 (at 62–63 [25] per Gleeson CJ, Gummow, Hayne and Crennan JJ).

9. Generally, there must be special or exceptional circumstances to warrant depriving a successful party of an order for the whole of its costs of the proceeding. The mere fact that the successful party has been unsuccessful on some issues will ordinarily not be

sufficient to displace the ordinary rule. The relevant principles were recently summarised by Stewart J in *Siemens WLL v BIC Contracting LLC (costs)* [2024] FCA 201 as follows (our emphasis):

> *"The court may depart from the general rule and exercise its discretion to apportion costs on an issue by issue basis where there are special circumstances to warrant a departure (Firebird Global Master Fund II Ltd v Republic of Nauru (No 2) [2015] HCA 53; 90 ALJR 270 at [6]), such as where there has been* ***disentitling conduct of the successful party, where the raising of the unsuccessful issue was not justified, or it was so unreasonable that it is fair and just to make the order apportioning costs*** *(Findex Group Ltd v McKay (No 3) [2020] FCA 259 at [9]), or where* ***the particular issue was clearly dominant and separable*** *(Bostik Australia Pty ltd v Liddiard (No 2) [2009] NSWCA 204 at [38]).*"

10. Put another way, in *Les Laboratoires Servier v Apotex Pty Ltd* (2016) 247 FCR 61 at [303], the Full Court (Bennett, Besanko and Beach JJ) said (our emphasis):

> *"…the Courts have been slow to order a successful party to pay the costs where it has been unsuccessful on some issues. In Mok v Minister for Immigration, Local Government and Ethnic Affairs (No 2) (1993) 47 FCR 81, Keely J was of the view (at 84) that, without attempting to fetter the discretion, this power ought to be exercised only where the Court, on a consideration of all the circumstances, has concluded that* ***the raising of an issue by the applicant on which it has failed was so unreasonable that it is fair and just to make the order****."*

11. In Network Ten's submission, there is no basis arising from the Trial Judgment or otherwise to contend that it engaged in any disentitling conduct such that it should pay any amount of Mr Lehrmann's costs or be deprived of any amount of its costs.

12. Relevantly:

    (a) Reliance upon the outcome and findings made as to the section 30 defence ought be treated with caution in circumstances where Part J of the Judgment was entirely counterfactual, in that it had "*as its point of departure, the notion that the respondents* ***cannot prove*** *that Mr Lehrmann raped Ms Higgins and, consequently, the substantial truth defence is not made out*": at [760], [922] (our emphasis).

(b) The findings as to Network Ten's conduct therefore do not account for the scenario where despite some "*strong indications of the unreliability of their main source*", the Project team were correct to believe Ms Higgins' core allegation as to the rape. Indeed, Lee J came to the same conclusion as Network Ten as to the credibility of Ms Higgins' description of the sexual act, despite (in his Honour's words) "*all my reservations as to the credibility and reliability of Ms Higgins*", principally because her evidence of the sexual act "*struck me forcefully as being credible and as having the ring of truth*".

(c) The findings themselves do not amount to a failure by Network Ten to comply with the overarching purpose. The pleading and prosecution of the section 30 defence was justifiable, and it was far from the dominant issue in the proceeding.

(d) The Court's indication that it would not have awarded aggravated damages in relation to matters arising from the section 30 defence, in the alternative case, supports the proposition that it was not unreasonable for Network Ten to pursue that defence. It was not a defence that was always doomed to fail, even on the counterfactual, and because of the success of the substantial truth defence, it only fell to be analysed by the Court as a counterfactual.

C. INDEMNITY COSTS

Abuse of process

13. Section 40(1)(a) of the *Defamation Act 2005* (NSW) provides that in awarding costs in defamation proceedings, the Court may have regard to the way in which the parties to the proceedings conducted their case. Even if section 40 of the *Defamation Act* is not picked up in federal jurisdiction, similar considerations are brought to bear by section 37M(3) of the *Federal Court of Australia Act 1976* (Cth): *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 at [11].

14. The principles relevant to the award of indemnity costs in a matter such as the present were helpfully summarised by Besanko J in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 45)* [2023] FCA 1474 at [8]-[13]. The key principles may be set out as follows:

(a) Although a costs order is not intended to punish the unsuccessful party but rather to compensate the successful party: *Hurst and Devlin v Education Queensland (No 2)* [2005] FCA 793 at [5], this is no answer to awarding indemnity costs on the basis of an abuse of process.

(b) Indemnity costs may be necessary to compensate a successful party where it was unreasonable for that party to be subjected to any expenditure of costs, such as where a hopeless proceeding is brought: *Cirillo v Consolidated Press Property Ltd (No 2)* [2007] FCA 179 at [4]-[5].

(c) Although a defamation applicant is not required to prove the falsity of any imputations alleged, it is manifestly an abuse to invoke the court's process to obtain a remedy to which the applicant is indisputably not entitled or else put a defendant to proof of that which cannot be denied: *Farrow v Nationwide News Pty Ltd* [2017] NSWCA 346; (2017) 95 NSWLR 612 at [35].

(d) Circumstances in which indemnity costs might be justified include cases where:

(i) the unsuccessful party has falsely and deliberately concocted his or her own evidence: *Degman Pty ltd (in liq) v Wright (No 2)* (1983) 2 NSWLR 354; and

(ii) the unsuccessful party has made a deliberate and conscious effort to mislead the Court on matters of central importance likely to be determinative of the outcome of the case: *Barrett Property Group v Metricon Homes (No 2)* [2007] FCA 1823 at [13].

15. It follows from the findings made in the Trial Judgment that, at the time of commencing the proceeding, Mr Lehrmann knew that he had raped Ms Higgins. He knew that proof of the rape would be sufficient to establish the substantial truth of the imputations complained of in his statement of claim, and to lead to the dismissal of the proceeding he commenced. It is not an answer to say that Mr Lehrmann considered he had some prospects of success by persuading the Court to accept facts known by him to be false: *Roberts-Smith (45)* at [21]. Nor is it an answer to rely on the principle that indemnity costs are primarily to compensate rather than punish: *Roberts-Smith (No 45)* at [21].

16. After the inconclusive termination of the criminal proceedings, Mr Lehrmann brought this proceeding, gambling on the respondents not being able to discharge their burden of proof in respect of a matter that, in view of the outcome, he must be taken at all times to have known to be true.

17. The Trial Judgment establishes beyond peradventure the extraordinary conduct of Mr Lehrmann in commencing and maintaining this proceeding, including by successfully obtaining an extension to the limitation period, knowing that the imputations were true (J1070-1071), but believing (albeit naively) that "*he had nothing to lose*" (Exhibit R43). In doing so, he engaged in a prolonged and conscious effort to mislead the Court, and deliberately concocted evidence in that endeavour. He instructed his Counsel and solicitors (inadvertently on their part, of course) to conduct this litigation on his behalf robustly and on the basis of the same false footing.

18. In the hope of rehabilitating his reputation on the false basis that he had not sexually assaulted Ms Higgins, Mr Lehrmann engaged in an abuse of the Court's processes, ran a case based on positive falsities, and put Network Ten to the cost of defending a baseless proceeding. Given the subject matter of the proceeding and the success of the substantial truth defence, the seriousness of such conduct cannot be overstated. It follows in our submission that Network Ten is entitled to be reimbursed for its costs of defending the proceeding on an indemnity basis.

Section 40(2)(b) of the Defamation Act

19. Section 40(2)(b) of the *Defamation Act* provides a further and independent basis on which to order indemnity costs against Mr Lehrmann since the commencement of the proceeding. That paragraph provides that the Court *must* make an indemnity costs order, where there has been an unreasonable failure to accept a settlement offer, unless the interests of justice require otherwise.

20. As explained by Jagot J in *Colagrande v Kim (No 2)* [2022] FCA 659 the "*purpose of section 40 is to expand the circumstances in which indemnity costs are to be ordered*": at [21]. Her Honour found that even though she would not otherwise have been disposed to order indemnity costs under general law principles, that does not prevent an order being made under section 40, and cannot amount to a reason why the "*interests of justice require otherwise*": [18]-[21]. Even if section 40 of the *Defamation Act* is not picked up

in federal jurisdiction, Network Ten submits that section 40 provides relevant and appropriate guidance as to the application of the costs principles in the specific context of defamation proceedings.

21. On 31 August 2023, the respondents made a "walk away" offer of compromise to Mr Lehrmann (**Offer**): O'Beirne Affidavit, [6]. The terms of the Offer were that: (a) the proceeding be dismissed without any admission of liability, and (b) there be no order as to costs. The letter in which the Offer was made set out detailed reasons as to why it was reasonable and should have been accepted by Mr Lehrmann. The Offer was expressed to be open for acceptance until 15 September 2023. The respondents noted their intention to rely upon the offer to seek costs on an indemnity basis should they be successful in their defence of the proceeding.

22. Mr Lehrmann rejected the Offer less than two hours after it was made: O'Beirne Affidavit, [7].

23. An offer to settle on the basis that proceedings are dismissed with each party bearing its own costs may be capable of amounting to a genuine compromise, particularly where it is obvious that substantial costs have been incurred up until the date of the offer: *Szencorp Pty Ltd v Clean Energy Council Limited (No. 2)* [2009] FCA 196 (***Szencorp***), [15]; see also *Clark v Commissioner of Taxation* [2010] FCA 415; 222 FCR 102, [90]-[92].

24. The central question is whether the rejection of an offer was unreasonable in the circumstances: *Hazeldene's Chicken Farm Pty Limited v Victorian Workcover Authority (No. 2)* [2005] VSCA 298 (***Hazeldene's Chicken Farm***), [23]. Determining whether conduct was unreasonable will involve matters of judgment and impression, but at least the following factors are relevant to whether the rejection of a settlement offer was unreasonable: (a) the stage of the proceeding at which the offer was made, (b) the time allowed for the offeree to consider the offer, (c) the extent of the compromise offered, (d) the offeree's prospects of success, assessed as at the date of the offer, (e) the clarity with which the terms of the offer were expressed, and (f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree rejecting it: *Hazeldene's Chicken Farm*, [25]; *Anchorage Capital Partners Pty Limited v ACPA Pty Ltd (No 2)* [2018] FCAFC 112 at [7].

25. For at least the following reasons, Network Ten submits that Mr Lehrmann's rejection of the Offer was unreasonable in the circumstances.

26. *First*, Mr Lehrmann knew at all times that he was prosecuting this proceeding on the basis of a lie, and that if the truth came out at trial, the proceeding was bound to fail. Regardless of the prospects of convincing the Court otherwise, Mr Lehrmann knew that he had raped Ms Higgins, and therefore had knowledge that the imputations upon which the entirety of his claim rested were substantially true. In *Roberts-Smith (No 45)*, Besanko J noted that such knowledge is a "*very significant consideration*" to be taken into account when assessing the reasonableness of the refusal of a *Calderbank* offer, and found that in that case it made the respondents' offer to walk away very favourable: [29].

27. *Secondly*, the Offer was made at a point in the proceeding where the parties had exchanged evidence. By 31 August 2023, Mr Lehrmann had 21 affidavits, outlines of evidence or expert reports, including an outline of evidence for Ms Higgins (in addition to the evidence she had given at the criminal trial), served by Network Ten in support of its defence of substantial truth of the imputations. It must have been apparent to Mr Lehrmann, as at the date of the Offer, that the chickens were coming home to roost. The very real prospect of Mr Lehrmann failing in his claim were matters recorded in the Offer letter in support of the reasonableness of the Offer: O'Beirne Affidavit, [6].

28. *Thirdly*, the time allowed for Mr Lehrmann to consider the Offer was reasonable, being 14 days. In any event he rejected the Offer almost immediately.

29. *Fourthly*, the giving up by Network Ten of the opportunity to recover from Mr Lehrmann the substantial costs it had incurred in respect of the extension of time application and in defending the proceeding (including, but not limited to, the preparation of extensive evidence in support of its truth defence) represented a real compromise: *Szencorp*, [15]; *Leichardt Municipal Council v Green* [2004] NSWCA 3. This was a concession expressly identified in the Offer letter: O'Beirne Affidavit, [6].

30. *Fifthly*, the terms of the Offer were in no way ambiguous, and the Offer letter explicitly foreshadowed that an application for indemnity costs would be made in the event that the Offer was rejected, pursuant to the principles in *Calderbank* and/or s 40 of the *Defamation Act*: O'Beirne Affidavit, [6].

31. In those circumstances, the respondents were acting reasonably and in genuine compromise, by offering to walk away from the proceeding, with no order as to costs, notwithstanding the considerable amount of funds already incurred by that stage, and more importantly, by giving up the opportunity to defend the truth of the alleged imputations conveyed by *The Project* interview. The offer also provided Mr Lehrmann an opportunity to avoid the consequences of cross-examination in a widely publicised hearing and adverse findings being made against him.

32. Mr Lehrmann's unreasonableness in rejecting the Offer is underscored by his almost immediate and blunt rejection of the Offer within hours of his having received it.

33. In the circumstances, Mr Lehrmann's rejection of the Offer justifies an order that he pay the respondents' costs of the proceeding on an indemnity basis from the time of commencement of proceedings, in accordance with the presumption in section 40 of the *Defamation Act* or, alternatively, from at least 31 August 2023 in accordance with *Calderbank* principles.

D. NETWORK TEN'S LIABILITY TO MS WILKINSON FOR COSTS

34. If Mr Lehrmann is unable to satisfy an order for costs made against him, and Ms Wilkinson is unable to recover her costs from Mr Lehrmann, Network Ten will have some residual liability to reimburse Ms Wilkinson for part of her costs incurred in defending the proceeding.

35. Network Ten respectfully adopts the proposal as set out at [56] of the Cross-Claim Judgment, and submits that a referee should be appointed to inquire into and prepare a report to the Court as to whether specified costs were reasonably incurred, and hence within the scope of the indemnity.

Meaning of costs reasonably incurred

36. The extent to which Ms Wilkinson should be indemnified by Network Ten for her costs incurred in defending the proceeding is not coextensive with the question of whether a person was reasonably entitled to incur those costs in a more general sense, or within the meaning of the *Legal Profession Uniform Law* (NSW) or the *Federal Court Rules 2011* (Cth). The relevant question for the Court to determine is as was set out in *Broom v Hall*

7 CB (NS) 504 (addressed below) and considered by the Court of Appeal in *National Roads and Maritime Authority v Whitlam* [2007] NSWCA 81.

37. As set out in Network Ten's submissions in respect of the cross-claim, the relevant indemnity between employer and employee includes (in addition to an award for damages) the costs of "*properly defending*" an action brought against the indemnified person: *Williams v Lister Co* (1913) 109 LT 699. Expressed another way, the indemnity is to reimburse the indemnified person for the "*necessary consequences*" of the act carried out under the authority of the principal: *Ronneberg v Falkland Islands Company* (1864) 17 CB (NS) 13.

38. Whether an action has been "*properly*" defended, such that the costs occasioned are a "*necessary consequence*" of the relevant act, is a question of fact, to be determined in each case by having regard to the particular circumstances: *Tindall v Bell* (1843) 152 ER 786. In *Broom v Hall* 7 CB (NS) 504, whether defence costs should form part of the indemnity was framed as whether "*in defending and incurring costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man unindemnified would do in his own case"*: see also, *Tindall v Bell* 11 M&W 231 at 232.

39. It follows from the findings made in the Cross-Claim Judgment that Ms Wilkinson's costs, insofar as they were necessary to protect her separate interests, are costs that fall within the scope of the indemnity.

40. However, it also follows from the authorities that Ms Wilkinson had an obligation to adopt a course in pursuing her defence which a prudent and reasonable person in her position would do. Ms Wilkinson was not entitled to incur costs in respect of her separate interests as she pleased on the assumption that Network Ten would ultimately pick up the bill. She was required to incur costs in a responsible manner, having regard to how those costs might be minimised given the separate but related work being undertaken by Network Ten. To the extent that Ms Wilkinson incurred costs in an unnecessarily duplicative or wasteful manner, Network Ten submits that the indemnity does not require it to reimburse Ms Wilkinson for those costs.

Referee process

41. Network Ten submits that the most efficient way for the costs to be assessed is by first identifying the issues raised in the proceeding which gave rise to a separate interest on the part of Ms Wilkinson (**Separate Interest Issues**). This Court, having now heard the entirety of the proceeding and delivered judgment, is best placed to make findings as to the Separate Interest Issues. Ms Wilkinson is entitled to be indemnified for her reasonably incurred costs in respect of the Separate Interest Issues.

42. Different considerations will apply to costs incurred by Ms Wilkinson in connection with issues in respect of which she had an alignment of interests with Network Ten (**Common Interest Issues**). The question in respect of those costs is whether they were reasonably incurred by Ms Wilkinson, notwithstanding the alignment of interests, so as to fall within the scope of the indemnity.

43. Once the Separate Interest Issues and Common Interest Issues have been identified by the Court, and Ms Wilkinson has furnished Network Ten with a copy of all retainers and invoices demonstrating her total liability to her legal representatives in respect of all issues, the referee ought be directed to inquire into and prepare a report for the Court (with the benefit of submissions from both parties) as to:

    (a) the costs incurred by Ms Wilkinson in connexion with Separate Interest Issues;

    (b) the extent to which those costs were reasonably incurred for the purpose of Ms Wilkinson defending the Separate Interest Issues;

    (c) the extent to which any of those costs should be discounted on the basis of an ordinary solicitor / client assessment;

    (d) in respect of the Common Interest Issues, whether and, if so, the extent to which, it was reasonable for Ms Wilkinson to incur costs, including for example Ms Wilkinson's legal representatives retaining a watching brief in respect of those issues; and

    (e) the extent to which any of those costs should be discounted on the basis of an ordinary solicitor / client assessment.

Separate Interest Issues

44. Ms Wilkinson had separate interests from Network Ten in defending this proceeding in relation to the claim for aggravated damages in respect of the Logies Speech, and the defences of qualified privilege at common law and under section 30 of the *Defamation Act 2005*.

Common Interest Issues

45. All other issues in the proceeding were common as between Ms Wilkinson and Network Ten. To the extent certain issues were emphasised or approached differently in submissions, so much is a necessary and anodyne consequence of separate legal teams being retained to argue the same issues. The different nuance with which certain submissions were made is not a matter indicative of there being a separate interest issue. As was observed in *Lehrmann v Network Ten Pty Limited (Cross-Examination)* [2023] FCA 1477, "*Network Ten and Ms Wilkinson have an identical interest on the vast bulk of issues forming the basis of the defence, particularly when it comes to the evidence of Mr Lehrmann*": at [26].

46. There were five significant Common Interest Issues in the proceeding.

47. **Extension of time application**. The only point of departure between the respondents' submissions in respect of the extension application related to a few minor points advanced in respect of Ms Wilkinson, which were ultimately found to be of little significance by the Court: see *Lehrmann v Network Ten (Limitation Extension)* [2023] FCA 385, [161]-[162]. Given the weight afford to those submissions, they do not reach the level of demonstrating some real separate interest on the part of Ms Wilkinson. This was reflected by the Court's observation at the end of the hearing that it was not evident at that time as to why Ms Wilkinson required separate representation: at [171].

48. A costs order was made against Ms Wilkinson (but not Network Ten) in respect of a notice to produce issued during the course of the extension of time application. Those costs should not be borne by Network Ten.

49. **Truth defence**. The truth defence was prepared and run by Network Ten. The interests of Ms Wilkinson and Network Ten were wholly aligned in defending the proceeding on

the basis of truth. In support of its truth defence, Network Ten called 20 witnesses, and served three expert reports. Network Ten incurred the costs involved in proofing and preparing the evidence-in-chief of those witnesses, and preparing those witnesses for cross-examination. Counsel for Network Ten conducted all of the examinations-in-chief and cross-examinations relating to the truth defence, with the exception of the cross-examination of Ms Brown (Counsel for Ms Wilkinson did some limited cross-examination of Mr Lehrmann relevant to the aggravated damages claim against Ms Wilkinson, but not in respect of the truth defence). Network Ten also took responsibility for making submissions in respect of the defence.

50. **Identification**. There was no divergence between the cases run as to identification. Whether Mr Lehrmann was identified in *The Project* interview was not a matter which raised matters of separate interests as between Network Ten and Ms Wilkinson.

51. **Ordinary compensatory damages and arguments as to abuse of process**. There was no divergence between the interests of the respondents in respect of the damages that might have been awarded to Mr Lehrmann had he been successful in his claim. Obviously, Network Ten would have been vicariously liable for any award of ordinary damages made in favour of Mr Lehrmann against Ms Wilkinson. To the extent there were differences in approach to the submissions made in respect of damages and abuse of process, these differences were the unsurprising result of separate legal teams developing their own submissions in respect of the same issue.

52. **Reopening application**. The First Respondent's successful application to reopen its case falls similarly into this category. To the extent there were any differences in the approach to the submissions by the respondents, they too are the unsurprising result of separate legal teams developing their own submissions in respect of the same issues.

Timing of the obligation to reimburse

53. The issue as to the point in time at which Network Ten's liability to Ms Wilkinson crystallises was abandoned by Ms Wilkinson upon the re-framing of appropriate relief on the cross-claim.

54. It should be uncontroversial, however, applying usual principles at general law, that Network Ten's obligation to indemnify Ms Wilkinson is an obligation to reimburse Ms

Wilkinson for her actual loss suffered: *Ramsay v National Australia Bank* [1989] VR 59 (FC), 66; *Re Famatina Development Corp Ltd* [1914] 2 Ch 271 (CA), 282, see also *Bowstead & Reynolds on Agency*, 19th ed (London, Sweet & Maxwell, 2010), 327 [7-056] and Dal Pont, *Law of Agency*, 4th ed (Lexis Nexis, 2020) at [18.13].

55. However, even if the indemnity is one to be construed as "preventive", it has always been the case at common law that an action on an indemnity cannot be brought until the indemnified party suffered loss.

56. The extent of Network Ten's liability to Ms Wilkinson cannot be finally ascertained until Ms Wilkinson's own loss is finally determined, by reference to:

    (a) the Court's consideration of the report of the referee as to the reasonableness of the costs incurred by Ms Wilkinson: see, for example, the comments made by Henry J in *Dreamtea Pty Ltd v Ochkit Pty Ltd* [2017] QSC 9 at [200]-[215]; and

    (b) the extent to which Ms Wilkinson succeeds in recovering costs from Mr Lehrmann by prosecuting any order for costs made in her favour.

Dated: 22 April 2024

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