

# **FEDERAL COURT OF AUSTRALIA**

**Parties:** **Moira Deeming v John Pesutto**

**File number:** **VID1023/2023**

**Registrar:** **Legge**

**Date of decision:** **16 May 2025**

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIAN REGISTRY  
GENERAL DIVISION**

**VID1023/2023**

**BETWEEN:**

**MOIRA DEEMING**

Applicant

**AND:**

**JOHN PESUTTO**

Respondent

**REGISTRAR:        LEGGE**

**DATE OF ORDER:   16 MAY 2025**

**WHERE MADE:      MELBOURNE**

**THE COURT ORDERS THAT:**

1.     The applicant's costs pursuant to the orders made on 19 December 2024 are determined in the amount of \$2,308,873.11 (inclusive of GST).
2.     A copy of these orders and the reasons for Registrar Legge's assessment of the costs referred to in order 1 be uploaded to the online Court file in the proceeding, subject to any application for redaction made before 1.00pm on 16 May 2025.

## REASONS FOR DECISION

### Introduction

1. This is a proceeding commenced by originating application on 5 December 2023, in which the applicant (Ms Deeming) sued the respondent (Mr Pesutto) for damages (including aggravated damages) and other relief. In summary, Ms Deeming alleged that she had suffered serious harm by reason of the publications alleged in the statement of claim filed with the application.
2. The respondent admitted that he defamed Ms Deeming, but not in the way she alleged. He contested the pleaded imputations, and asserted various defences including public interest and honest opinion.
3. On 12 December 2024, O’Callaghan J delivered judgment on the substantive issues in the proceeding. For the reasons published on that date, O’Callaghan J determined that:
  - a) certain of the imputations admitted to be defamatory carried;
  - b) publication of each of the impugned publications had caused, or was likely to cause, serious harm to the applicant’s reputation; and
  - c) the respondent had failed to establish any of the defences asserted.
4. O’Callaghan J concluded that the appropriate award of damages for non-economic loss was \$300,000. His Honour declined to award aggravated damages.
5. By orders made by consent on 19 December 2024, O’Callaghan J ordered (amongst other things) that:

*1. Judgment be entered for the Applicant against the Respondent in the sum of \$315,632.88.*

*2. The Respondent pay the Applicant’s costs:*

*(a) on the ordinary basis for costs incurred prior to 11.00am on 12 February 2024; and*

*(b) on an indemnity basis for costs incurred after 11.00am on 12 February 2024.*

*3. The assessment of the amount of the Applicant’s costs payable pursuant to order 2 above be referred to Senior National Judicial Registrar Legge, to be determined by her on a lump sum basis pursuant to rule 40.02(b) of the Federal Court Rules 2011 (Cth) following the completion of orders 4-7 below.*

6. Ms Deeming seeks an order that her costs be assessed in the sum of \$2,393,142.74. In support of her claim, Ms Deeming relies upon:
- a) an affidavit of her instructing solicitor, Mr George, sworn on 2 February 2025;
  - b) a **Costs Summary** which is Annexure PG-1 to Mr George's affidavit, and which he deposes (at [6]) has been prepared by a costs consultant, Ms Kerrie Rosati, whom he identifies as a principal of DGT Costs Lawyers; and
  - c) written submissions dated 28 March 2025 and 5 May 2025.
7. Mr Pesutto raises a number of issues with the assessment proposed by Ms Deeming. In particular, Mr Pesutto submits that the Court cannot be satisfied on the material before it that Ms Deeming's claim appropriately takes into account the particular funding arrangements put in place by Ms Deeming to meet her costs of the proceeding. Leaving aside the issue of the funding arrangements (which are discussed further below), Mr Pesutto's response to the Costs Summary assesses Ms Deeming's costs in the sum of \$1,830,552.59. In support of his position, Mr Pesutto relies upon:
- a) two affidavits of his instructing solicitor, Mr Bartlett, sworn respectively on 6 March 2025 and 14 March 2025;
  - b) a **Costs Response** which is Annexure PLB-2 to Mr Bartlett's 14 March 2025 affidavit, and which he deposes (at [5]) has been prepared by a costs consultant, Ms Cate Dealehr; and
  - c) written submissions dated 21 March 2025 and 29 April 2025.
8. In addition to the material described above, I asked Ms Deeming's solicitors to provide me for the purposes of my assessment with copies of the cost agreements and invoices referred to in Mr George's affidavit and in the Costs Summary. Unredacted copies of the invoices were provided to me on the basis that:
- a) copies of the invoices would only be provided to Mr Pesutto's counsel and to Ms Dealehr on their undertaking not to provide a copy or otherwise disclose any part of the invoices to any other person except with GG's prior written consent;

- b) the invoices were provided in confidence and subject to the obligation set out in *Hearne v Street* [2008] HCA 36; and
  - c) the parties agreed that the provision of the unredacted versions of the invoices would not constitute a waiver of privilege in any information in them.
9. For the reasons set out below, I have assessed the costs payable by Mr Pesutto to Ms Deeming on a lump sum basis pursuant to O’Callaghan J’s orders of 19 December 2024 to be \$2,308,873.11.

### **General principles applicable to a lump sum determination**

10. It is well settled that the purpose of a costs order is not to punish the unsuccessful party but to compensate the successful party for the costs incurred in the litigation: *King v Yurisich (No 2)* [2007] FCAFC 51 at [19] (Sundberg, Weinberg and Rares JJ) citing *Latoudis v Casey* (1990) 170 CLR 534 (Mason CJ at 543, Toohey J at 563 and McHugh J at 567).
11. The purpose and usual requirements of the material to which the Court has regard in making a lump sum costs assessment are set out in the Costs **Practice Note** (GPN-COSTS), which provides (amongst other things) -

*[4.11] The Costs Summary must be clear, concise and direct and not resemble a bill of costs in taxable form, nor should it contain submissions on the law. The intention of the lump-sum costs procedure is to streamline and expedite the determination or resolution of the quantum of costs question and not to replicate the taxation process.*

*[4.12] ... The Costs Applicant is not required to exhibit to the Costs Summary the source material verifying the costs and disbursements claimed. However, such material must be available at the costs hearing.*

12. The principles applicable to the assessment of costs on a lump sum basis are also well-established. In summary, the authorities make it clear that the Court adopts a broad-brush approach in arriving at the quantum of a lump sum costs order. The Court is not required to undertake a line-by-line analysis of the costs claim, which would be contrary to the rationale behind the lump sum assessment process: *Fewin Pty Ltd v Burke (No 3)* [2017] FCA 693 at [60] (Markovic J). ‘*The task is one of estimation or assessment and not of arithmetic*’: *Fewin* at [60]. Nonetheless, the discretion to make a lump sum order must be exercised judicially, and the approach of the Court to the sum arrived at should be logical, fair and reasonable: *Beach Petroleum NL v Johnson (No 2)* (1995)

57 FCR 119 at 123 (von Doussa J); *Nine Films and Television Pty Ltd v Ninox Television Ltd* [2006] FCA 1046 at [8] (Tamberlin J).

13. As to the material to which the Court may have regard in its assessment, Murphy J in *Pinnacle Runway Pty Ltd v Triangl Ltd* [2022] FCA 1246 confirmed (at [19]):

*It is for the Court or the Registrar to apply the appropriate and necessary level of scrutiny to the costs in reliance on the evidence in the Costs Summary and Costs Response, and then decide whether to require production of the source material. The Court or the Registrar is not constrained in any way from ensuring that there is sufficient information to make “a logical, fair and reasonable determination”: Paciocco v Australia and New Zealand Banking Group Ltd (No 2) [2017] FCAFC 146 at [26] –[31].*

14. It is open to the Court in assessing the reasonableness of fees to have regard to guidelines published by the Court from time to time: *LFDB v SM (No 4)* [2017] FCA 753 at [9] (Griffiths J); *Bitek Pty Ltd v IConnect Pty Ltd* [2012] FCA 506 at [20] (Kenny J). It may be relevant to have regard to the **Scale** of costs allowable for work done and services performed (which is set out at Schedule 3 to the *Federal Court Rules 2011* (Cth) (**Rules**) and the **National Guide** to Counsel Fees issued by the Court, although the Court is not obliged to apply the Scale strictly: *Geneva Laboratories Limited v Prestige Premium Deals Pty Ltd (No 5)* [2017] FCA 63 at [86(8)] (Bromwich J). The Scale is updated from time to time, and in relation to the party-party costs claimed by Ms Deeming, the Costs Summary confirms (at [11]) that costs have been calculated by reference to the Scale rates applicable from 13 January 2023. The rates published in the National Guide have not been updated since 28 June 2013.
15. In *McCallum v Nikitins (in their capacity as joint and several administrators of Re Holdco Pty Ltd) (Administrators appointed)* [2021] FCA 913, O’Byrne J observed (at [45], citations omitted) that

*It is common for the court to take as its starting point the evidence of the charges for professional costs incurred and disbursements made by the lawyers of the party awarded costs, and to discount that figure to take account of the acceptability of the charges made, the conduct of the proceeding and the measure of success on issues, to arrive at a figure which as a matter of judgment is neither over-compensatory nor prejudicial to the successful party. The Court is entitled to take into account the evidence that is before it, its own observations of the proceeding and the judge’s own experience.*

16. The basis on which a discount to actual or estimated fees is applied is ‘to take into account the contingencies that would be relevant in any formal costs assessment’: *Frigger v Trenfield (No 12)* [2022] FCA 900 at [13] (Jackson J), citing with approval

*Bitek* at [18]. In *Hancock v Rinehart (Lump Sum Costs)* [2015] NSWSC 1640, Brereton J identified some of the factors that may be relevant to the application of a discount and said further (at [57] and [58], footnotes omitted):

*[57] While it is undoubtedly the usual practice of the court when making a lump sum costs order to apply a discount for the reasons mentioned, that does not mean that the court must apply a percentage discount to the sum sought by the successful party, and the court “must be astute not to cause an injustice to the successful party” by applying “an arbitrary “fail safe” discount on the costs estimate submitted to the court”. Thus if the court can be confident that there is little risk that the sum includes costs that might be disallowed on assessment, the case for a discount is seriously undermined.*

*[58] Where a gross sum is assessed on an indemnity basis, and there is no evidence of unreasonableness, it may be inappropriate to apply any discount, although one may nevertheless be appropriate if there is evidence that the successful party “errs on the side of excessiveness [as in excessive use of legal services]”*

17. As Markovic J noted in *Crescent Capital Partners Management Pty Limited v Crescent Funds Management (Aust) Limited* [2019] FCA 1082 at [62], it is not the case that the Court is able to simply apply a percentage recovery in one particular case to another set of circumstances. Each case must be determined based on its own circumstances: see also *Bahamad v Wong* [2020] NSWSC 991 at [68]-[75] (Slattery J).
18. In assessing quantum, the Court is entitled to take into account the evidence that is before it; its own observations of the proceeding; and the judicial officer’s own experience: *Bobb v Wombat Securities Pty Ltd (No 2)* [2013] NSWSC 863 at [10] (Beech-Jones J), cited with approval in *Fewin* at [61].
19. In *Coshott v Burke (No 2)* [2018] FCAFC 81, the Full Court (Logan, Kerr and Farrell JJ) said (at [47], quoted with approval by McKerracher J in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 7)* [2018] FCA 1217 at [59]):

*The Court accepts the submissions put by the appellants that a respondent faced with a Costs Summary that does not identify with precision each item that is claimed necessarily encounters some difficulty in establishing the reasonableness of those items with the same precision as in a taxation. However, in adopting the ‘broad-brush’ approach to quantification of lump sum costs orders, the Court accepts that the benefits of the process (timeliness and avoidance of costs incurred on contested taxation) outweigh loss of absolute accuracy in the outcome.*

20. In *Paciocco v Australia and New Zealand Banking Group Limited (No 2)* (2017) 253 FCR 403, the Full Court (Allsop CJ, Besanko and Middleton JJ) considered the relevant assessment process as follows (at [18]):

*We emphasise that in making a lump sum award of costs, the Court in undertaking the task of assessing costs is not precluded from undertaking a close inquiry of costs relating to a particular issue or category of costs, should the Court consider it appropriate to do so: see e.g. Hudson v Sigalla (No 2) [2017] FCA 339 at [30] (Sigalla). The Court is able to adopt its own procedures in inquiring into costs, is able to be flexible in how it conducts that inquiry, including by the obtaining of suitable assistance whether by referee's report or other reporting, and is able to acquire the level of detail needed to make a determination that is fair, logical and reasonable.*

21. As to the basis on which the costs ordered are to be assessed:

- a) Paragraph 2(a) of O'Callaghan J's orders refers to the payment of costs on an ordinary basis. Costs are ordinarily assessed as between party and party: see r 40.01 of the Rules. The **Dictionary** set out in schedule 1 to the Rules provides that '*costs as between party and party*' means '*only the costs that have been fairly and reasonably incurred by the party in the conduct of the litigation*'.
- b) Paragraph 2(b) of O'Callaghan J's orders refers to the payment of costs on an indemnity basis, in respect of which the Dictionary explains that '*costs on an indemnity basis*' means '*costs as a complete indemnity against the costs incurred by the party in the proceeding, provided that they do not include any amount shown by the party liable to pay them to have been incurred unreasonably in the interests of the party incurring them*'. Where costs are to be assessed on an indemnity basis and the respondent contests the quantum claimed by the applicant, the onus falls on the respondent to establish that quantum sought is unreasonable: *Hancock* at [61].

22. In these reasons:

- a) I refer to the period to 11am on 12 February 2024 that is identified in paragraph 2(a) of O'Callaghan J's orders as the **party-party period** or **Period 1**; and
- b) I refer to the period from 11am on 12 February 2024 that is identified in paragraph 2(b) of O'Callaghan J's orders as the **indemnity period** or **Period 2**.



## Indemnity principle

23. It is not in dispute that the quantum of costs awarded by the Court should not exceed the amount the relevant costs applicant has paid or is liable to pay to her lawyers. This principle is known as the indemnity principle, and it is consistent with the purpose of a costs order as referred to above namely to compensate the successful party for the costs incurred in the litigation. Paragraph 3.16 of the Practice Note expressly refers to the principle as follows:

*3.16 ... a party should never seek to obtain a windfall from any costs process. A fundamental principle of the law relating to costs is that the amount of costs recovered by a party in whose favour the costs order is made must not exceed the amount of costs for which the Costs Applicant is liable (otherwise generally known as the "indemnity principle")*

24. Whilst these general statements of the indemnity principle are not in dispute, the parties disagree as to the particular application of the principle to the assessment before me. Both parties submitted that their respective position was consistent with the line of authority through which the indemnity principle has been confirmed and applied.
25. In *Wentworth v Rogers* (2006) 66 NSWLR 474; [2006] NSWCA 145, the NSW Court of Appeal considered (amongst other things) the question whether the recovery of costs in the context of the particular cost agreement entered into in that case was consistent with the indemnity principle. In summary, the costs agreement there provided that:
- a) *[Solicitor's] legal services and disbursements are provided to [Client] on a pro bono basis in that [Client is] not obliged to pay [Solicitor] (subject to paragraph (c) below) if [Client is] unable to recover any costs against [Opponent] in this litigation.*
  - b) *[Client's] obligation to pay such reasonable fees and disbursements does not arise upon a costs order being made in [Client's] favour but on costs being successfully recovered as against [Opponent].*
  - c) *In the event that such reasonable fees and disbursements cannot be recovered from [Opponent], [Client] undertakes to pay same when and if [Client] is in a position to do so.*
26. At [45] and following, Santow JA said (citations omitted):

*[45] The indemnity principle is long-established at general law. It is however not to be applied rigidly, or uninfluenced by statute or by practice recognised by statute, such as in relation to conditional fee agreements. I do not agree with the amicus' submissions that the principle has ceased to exist. Certainly there have been inroads to it brought about by the Act and by analogical reasoning from recognised exceptions. Where a party to an action has an agreement with their legal adviser that they do not have to pay any costs, then the general law*

*principle states that that party cannot recover party and party costs against their adversary.*

...

*[49] The ultimate application of the indemnity principle will depend on the content and proper construction of the costs agreement. However, I would offer the following as some guidance to the applicable principles.*

*[50] First, the indemnity principle is not immutable, and should be applied flexibly rather than made into a rigid rule ....*

*[51] Second, the Act now recognises conditional costs agreements of the kind where payment of the barrister's or solicitor's costs "is contingent on the successful outcome of the matter"; s 186. No distinction is drawn between such a contingency expressed as a condition precedent or subsequent....*

27. At [104] and [133], Basten JA expressed a different view regarding the recovery of costs payable only in the event of a 'condition subsequent', and said further (citations omitted):

*[104] The indemnity principle has been held to operate in two circumstances which might not obviously fall within its terms. The first is where the lawyers will be paid for their services, but not, as a matter of practice, by the client. Examples of that situation include cases where the litigant is indemnified by an insurer, by an association, such as a trade union, of which the litigant is a member, or where legal aid is obtained. In each case, the primary liability was held to be that of the litigant or client and hence the indemnity principle was satisfied. In other circumstances, a lawyer may be employed by the litigant, either a trading corporation or some similar body, or the Crown. In such cases it has again been accepted that the litigant incurs costs, although questions may arise as to the amount which can be recovered.*

...

*[133] Although it may seem arbitrary to insist that, for the purposes of the indemnity principle, there must be a contractual entitlement to charge fees, subject to a condition subsequent, rather than an entitlement which arises as a result of a successful outcome, there are reasons why that is not so. First, as appears from the costs agreements presented in the present case, a successful outcome will usually involve not merely obtaining a costs order, but actual recovery of costs. It is not possible to make the existence of a right to charge dependent on recovery of the moneys from which the charges would be paid. That would be to take the circularity noted ... one step too far.*

28. In *Noye v Robbins* [2010] WASCA 83 (Owen, Pullin and Buss JJA), the appellant and respondent were both police officers. The respondent instigated a prosecution against the appellant for corruption, which prosecution was discontinued by the filing of a nolle prosequi. The appellant then sued the respondent for damages for malicious prosecution, abuse of process, injurious falsehood and misfeasance in public office. The trial judge dismissed the appellant's claim, and the appeal concerned both the trial

judge's findings on the merits of the case and the costs orders made. As at the date of the appeal, the respondent's costs had been paid by the State, but the respondent had given an undertaking to pay to the State any costs recovered by him: see Owens JA at [336].

29. At [295]-[338], Owen JA discussed the indemnity principle and considered its application in various authorities, and relevantly said:

*[296] The indemnity principle, at its simplest, provides that a party who does not have a liability to his solicitor for costs cannot recover costs against the unsuccessful party to the litigation. The rationale underlying this rule was expressed by Bramwell B in Harold v Smith (1860) 5 H & N 381 [385]; 157 ER 1229, 1231 as follows:*

*Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained [385].*

*[297] The operation of the indemnity principle means that when a party and his solicitor have an agreement that the party will not have to pay the solicitor's costs, that party cannot obtain an award of costs against the unsuccessful party: Gundry v Sainsbury [1910] 1 KB 645. ... Further, when the liability of a party to his solicitor is limited, the amount of costs that can be recovered from the unsuccessful party is also limited to that amount: Tarry v Pryce (No 2) (1987) 88 FLR 270.*

*[298] The indemnity principle does not mean, however, that a party cannot recover costs merely because he may be relieved from the obligation of paying his solicitor's costs. In Adams v London Improved Motor Coach Builders Ltd [1921] 1 KB 495 the plaintiff successfully brought an action against his employer for wrongful dismissal. The plaintiff was a member of a trade union which provided, among other benefits, legal aid for members in connection with their employment. The union had decided to grant the plaintiff legal aid and instructed a firm of solicitors, who were the general solicitors to the union, to act for him. The plaintiff gave no written retainer to the solicitors but there was no agreement with the solicitors that the plaintiff would not be liable to them for costs. The court held that the plaintiff was entitled to recover costs. According to Bankes LJ (501):*

*When once it is established that the solicitors were acting for the plaintiff with his knowledge and assent, it seems to me that he became liable to his solicitors for costs, and that liability would not be excluded merely because the Union also undertook to pay the costs. It is necessary to go a step further and prove that there was a bargain, either between the Union and the solicitors, or between the plaintiff and the solicitors, that under no circumstances was the plaintiff to be liable for costs.*

*[299] This case illustrates that a successful party can recover costs if he has an obligation to pay his solicitors, notwithstanding the fact that a third party might (and in all probability will) relieve him of that obligation.*

30. At [315], his Honour added:

*In Adams, the court ruled that the plaintiff could recover costs unless the defendant could show that the solicitors were not acting for the plaintiff or there was a bargain which prevented the solicitors from recovering costs against the plaintiff. In relation to the second possibility, what was relevant was the terms of the agreement between the plaintiff and his solicitors, not the fact of whether the union had discharged any liability faced by the plaintiff. In other words, once it was established that there was no agreement that the plaintiff would not be liable to pay the solicitors' fees, it was not necessary to go on to determine whether in fact those fees had been paid by the union. It is the creation of a liability to pay the solicitors' fees, not the existence of an ongoing undischarged liability, which gives rise to the entitlement to recover costs.*

31. French J (as he then was) had similarly concluded in *Angor Pty Ltd v Ilich Motor Co* (1992) 37 FCR 65 (at 72) that:

*... the decision in Adams is clear authority for the proposition that the indemnity principle will permit recovery of costs by a successful party who is under a legal liability to his solicitors to pay them even though the likelihood of being called upon to do so is remote.*

32. In *Coshott*, the Full Court referred to Basten JA's judgment in *Wentworth* and to his Honour's judgment and that of Simpson JA in *eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd* [2015] NSWCA 284; 90 NSWLR 451 (at [24]-[26] and [108] respectively) and said:

*Having regard to the principles articulated in those cases, we accept the submissions advanced by Ms Castle on behalf of Mr Prentice that what is required is that the Court be satisfied that the costs applicant is liable to pay his or her legal costs and that, in the present case, liability was established by the provision of the various costs agreements as annexures to the three affidavit of Nicholas Dale. Mr Dale deposed that he had been advised by Antares' solicitors that Antares would indemnify Mr Prentice for his legal costs (at [45] of Mr Dale's 19 December 2016 affidavit). We are satisfied that the content of that affidavit is sufficient to satisfy [3.16] of the Costs Practice Note.*

33. *Kassam v Hazzard; Henry v Hazzard (No 2)* [2021] NSWSC 1599 (Beech-Jones CJ at CL) was a case concerning a challenge to public health orders. The substantive litigation was resolved wholly in favour of the defendants. On the question of costs, the plaintiffs submitted that costs should not follow the event but that the Court should order that each party bear their own costs on the grounds that the proceedings were in the nature of public interest litigation. In this context, the plaintiffs submitted that it

would be ‘unfair and unjust’ for the plaintiffs personally to bear an adverse costs order. At [39] and [41], Beech-Jones CJ said:

*[39] As best I can ascertain, the material tendered by the State about crowdfunding in the Henry proceedings suggests that the one GoFundMe page was used to raise funds for a range of actual and potential legal challenges to COVID-19 measures. Beyond that, a number of matters are left unclear about the purpose of the fundraising and terms on which funds were raised which are, or at least could be, relevant to an assessment of the Henry plaintiffs’ submission that “it would be unfair and unjust for the plaintiffs personally bear the burden from the Court’s adjudication” in the Principal Judgment. One matter that is unclear, is whether the funds were raised to meet any adverse costs order.... A related question is whether the funds were simply a donation which was never to be returned to the donors under any circumstances or held under some form of Quistclose trust (Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567). If it was the former and the funds were to be applied to meet the plaintiffs’ costs and disbursements, then had they been successful then it is doubtful that costs could have been recovered against the defendants (see Wentworth v Rogers (2006) 66 NSWLR 474; [2006] NSWCA 145).*

...

*[41] Two further matters should be noted. First, this judgment does not address all the circumstances in which litigation may be crowdfunding. The right, duties and consequences that might flow from such funding for litigation will differ depending on, inter alia, who undertakes the fundraising (ie, the solicitor, the client or someone else), whether it is undertaken for a plaintiff, defendant or another party and the terms on which the funds are raised. **In this case, the use of crowdfunding only become relevant once the Henry plaintiffs contended that they should not have to bear a costs order because of the public interest nature of the litigation and that it was “unfair and unjust” for them “personally to bear the burden of the costs associated with this litigation”.** (emphasis added)*

34. In *Frigger*, the Court ordered that the applicants each pay certain of the first respondent’s costs, to be assessed on a lump sum basis as between party and party. The relevant costs agreement identified the relevant clients who were party to it as the first respondent and another person, both of whom were at the time the joint and several trustees in bankruptcy of the applicants’ bankrupt estates. All of the invoices were addressed to the firm of which the first respondent was an employee and were marked to the attention of the first respondent and the staff working with her. At [25] and [26], Jackson J said:

*[25] ... It may be inferred from her position as an employee that at no time has [the first respondent] drawn on her own personal funds to pay the invoices. But she undertook the liability to do so, and it does not detract from this that Carles Solicitors may have chosen to render the invoices to her employer as the likely*

*payer, or that it can be inferred that it was the employer that paid them. There were speculative submissions on both sides about the arrangements between Mrs Trenfield, FTI Consulting and Carles Solicitors that might underlie the invoices, but there was no evidence of those arrangements. Nor did there need to be: once it was established that the first respondent was liable to pay her solicitors the costs of representing her in the proceeding, the onus of proving some departure from that fell on the applicants.*

*[26] Support for that last proposition appears in the quote from Howard v Mechtler at [8] above, and also in Adams v London Improved Motor Coach Builders, Ltd [1921] 1 KB 495, on which French J relied in Angor. In Adams, a successful plaintiff was held to be entitled to his costs even though there was no written retainer between him and the solicitors who acted for him and even though it was in fact his trade union that had retained the solicitors. At 501 Bankes LJ said:*

*When once it is established that the solicitors were acting for the plaintiff with his knowledge and assent, it seems to me that he became liable to the solicitors for costs, and that liability would not be excluded merely because the Union also undertook to pay the costs. It is necessary to go a step further and prove that there was a bargain, either between the Union and the solicitors, or between the plaintiff and the solicitors, that under no circumstances was the plaintiff to be liable for costs.*

*Atkin LJ agreed (at 504). See also Noye v Robbins at [318], [320] ff (Owen JA).*

### **The costs applicant's position**

35. The basis upon which Ms Deeming's assessment of costs is calculated is set out in Mr George's affidavit and the Costs Summary exhibited to the affidavit.
36. Mr George deposes (at [5]) that he has settled the Costs Summary and that, in doing so, he has had regard to:
  - a) the costs agreement between GG and Ms Deeming;
  - b) the relevant tax invoices issued by GG and paid by Ms Deeming;
  - c) the costs agreements between GG and counsel, Ms Chrysanthou SC and Mr Dean, and tax invoices issued by counsel to GG; and
  - d) invoices issued by experts and other disbursement providers to GG.
37. As set out above, copies of the costs agreements and invoices referred to in the paragraph above were provided to me on a confidential basis for the purposes of my assessment.
38. At paragraph [12] of his affidavit, Mr George deposes that:

- a) he has read the Federal Court Costs Practice Note;
- b) in relation to the Costs Summary:
  - i. Ms Deeming has not claimed more than she is liable to pay for costs and disbursements, such that her claim as set out in the Costs Summary complies with the indemnity principle;
  - ii. the calculations made are correct;
  - iii. the matters noted are a fair and accurate summary of the costs and disbursements that she is entitled to claim;
  - iv. the amounts claimed are capable of further verification through source material, should such material be required by the Court to be produced; and
  - v. Ms Deeming does not intend to waive privilege where applicable.

39. At paragraph [11] of his affidavit, Mr George deposes that the applicant is a natural person and is not registered for GST, and as such has no entitlement to claim an input credit in respect of GST charged on her legal fees. In this context, GST is claimed on a party/party basis and all amounts in the Costs Summary are stated on a GST-inclusive basis.

40. The basis upon which the quantum of Ms Deeming's claim in respect of solicitors' fees, counsel's fees and disbursements is explained in the Costs Summary as follows.

***Solicitors' fees***

41. Ms Deeming was represented in the proceeding by the law firm Company Giles (**GG**). The costs agreement provided to me is dated 19 May 2023 and is in the form of a letter from Mr George to Ms Deeming to which Terms of Business are attached (**GG costs agreement**). The GG costs agreement provides that GG will charge professional fees for work undertaken based on hourly rates as follows:

<b>Position</b>	<b>Hourly Rate (excl. GST)</b>	<b>Hourly Rates (incl. GST)</b>
Principal	\$900	\$990
Special Counsel	\$600	\$660
Associates	\$325 to \$425	\$357.50 to \$467.50
Graduate	\$325	\$357.50
Paralegal	\$175 to \$275	\$192.50 to \$302.50

42. The GG costs agreement also provides that GG proposed

*... to discount our hourly rates by 25% on the basis that if you obtain a costs order in your favour in the proceedings or negotiate a settlement that includes a payment of your costs, we are entitled to charge you for the discount, being a 25% uplift on the discounted hourly rates.*

43. The Costs Summary identifies (at [9]) the main GG fee earners who worked on the matter and their respective experience at the time the work was undertaken as follows:

Name	Role	Admission	Years of Experience
P George	Principal	December 1980	44 years +
R Giles	Principal	February 2001	23 years +
J Marel	Special Counsel	February 2015	9 years +
B Callaghan	Associate	February 2020	4 years +
P Strkalj	Associate	September 2023	1 year
A Kadmon	Graduate / Associate	March 2024	>1 year

44. Several paralegals also worked on the matter. Appendix A to the Costs Summary sets out the hours worked by the relevant GG fee earners in Period 1, and the hourly rates of charge applied inclusive of GST, as follows:

Fee Earner Name	Position	Hourly Rates	Hours	Hours Percentage	Amount (GST incl.)	Total Costs Percentage
P George	Principal	\$990.00	226.5	40.21%	\$224,235.00	55.38%
R Giles	Principal	\$990.00	2.1	0.37%	\$2,079.00	0.51%
J Marel	Special Counsel	\$660.00	161.1	28.60%	\$106,326.00	26.26%
B Callaghan	Associate	\$467.50	13.5	2.40%	\$6,311.25	1.56%
P Strkalj	Associate	\$0.00	5.2	0.92%	0.00	0.00%
P Strkalj	Associate	\$357.50	7.3	1.30%	\$2,609.75	0.64%
P Strkalj	Associate	\$467.50	108.4	19.24%	\$50,677.00	12.52%
A Kadmon	Graduate Associate	\$357.50	14.9	2.65%	\$5,326.75	1.32%
E Cook	Paralegal	\$302.50	24.3	4.31%	\$7,350.75	1.81%
<b>TOTAL</b>			<b>563.3</b>	<b>100.00%</b>	<b>\$404,915.50</b>	<b>100.00%</b>

45. Appendix A to the Costs Summary sets out the hours worked by the relevant GG fee earners in Period 2, and the hourly rates of charge applied inclusive of GST, as follows:

Fee Earner Name	Position	Hourly Rates	Hours	Hours Percentage	Amount (GST incl.)	Total Costs Percentage
P George	Principal	\$990.00	426.8	16.41%	\$422,532.00	26.46%
R Giles	Principal	\$990.00	2.3	0.09%	\$2,277.00	0.14%
J Marel	Special Counsel	\$660.00	1,010.7	38.85%	\$667,062.00	41.77%
B Callaghan	Associate	\$467.50	3.2	0.12%	\$1,496.00	0.09%
P Strkalj	Associate	\$467.50	926.9	35.63%	\$433,325.75	27.13%



P Strkalj	Associate	\$0.00	1.3	0.05%	0.00	0.00%
A Kadmon	Graduate Associate	\$357.50	41.4	1.59%	\$14,800.50	0.93%
A Kadmon	Graduate Associate	\$0.00	2.9	0.11%	0.00	0.00%
E Cook	Paralegal	\$302.50	176.9	6.80%	\$53,512.25	3.35%
H Turner	Paralegal	\$192.50	0.9	0.03%	\$173.25	0.01%
S de Vine	Paralegal	\$302.50	3.8	0.15%	\$1,149.50	0.07%
Company Support	Paralegal	\$192.50	4.5	0.17%	\$866.25	0.05%
<b>TOTAL</b>			<b>2,601.6</b>	<b>100.00%</b>	<b>\$1,597,194.50</b>	<b>100.00%</b>

46. The Costs Summary describes the tasks performed by the GG fee earners during Period 1 as follows:

Activity	Hours	Hours %	Amount (incl GST)	Total cost %
Amending	2.6	0.46%	\$1,179.75	0.29%
Attendances	86.8	15.41%	\$53,451.75	13.20%
Conferring	38.2	6.78%	\$31,490.25	7.78%
Drafting	124.3	22.07%	\$80,621.75	19.91%
Correspondence	106.9	18.98%	\$96,098.75	23.73%
Preparing	48.6	8.63%	\$28,047.25	6.93%
Research	4.2	0.74%	\$4,020.50	0.99%
Review	113.3	20.11%	\$76,780.00	18.96%
Telephone	38.4	6.82%	\$33,225.50	8.21%
<b>TOTAL</b>	<b>563.3</b>	<b>100.00%</b>	<b>\$404,915.50</b>	<b>100.00%</b>

47. The Costs Summary describes the tasks performed by the GG fee earners during Period 2 as follows:

Activity	Hours	Hours %	Amount (incl GST)	Total cost %
Amending	9.6	0.37%	\$3,319.25	0.21%
Attendances	639.3	24.57%	\$377,467.75	23.63%
Conferring	157.3	6.05%	\$99,643.50	6.24%
Drafting	722.3	27.77%	\$417,403.25	26.13%
Correspondence	206.9	7.95%	\$165,737.00	10.38%
Preparing	306.8	11.79%	\$162,035.50	10.15%
Research	16.1	0.62%	\$6,696.25	0.42%
Review	410.1	15.76%	\$255,433.75	15.99%
Telephone	133.2	5.12%	\$109,458.25	6.85%
<b>TOTAL</b>	<b>2,601.6</b>	<b>100.00%</b>	<b>\$1,597,194.50</b>	<b>100.00%</b>

48. The Costs Summary identifies the following adjustments to the fees charged for the purposes of the assessment.

49. First, the potential 25% uplift in hourly rates that is referred to in the GG costs agreement has not in terms been applied: see Mr George's affidavit at paragraph [7], Costs Summary at paragraph [49(b)].
50. Second, a reduction has been applied to the rates applicable during the party/party period to bring the rates within the **Scale** of costs set out in schedule 3 to the Rules, in the context that the hourly rates charged for principal lawyers, graduates and paralegals were above the Scale: Costs Summary at [13], [14] and [18]. The effect of that adjustment is to reduce the quantum of GG fees for the party/party period from \$404,915.50 to \$337,306.00. No specific reduction to Scale is made in respect of the indemnity period.
51. Third, a reduction has been applied to account for '*some duplication of costs*' between GG fee earners and some costs that would not be considered to have been fairly and reasonably incurred during Period 1, or might have been unreasonably incurred in Period 2. A reduction is also applied to account for the fact that a significant amount of the work undertaken in this period was conducted by email or otherwise involved the drafting of affidavits and other documents, for which work the Scale suggests a lower rate than for other attendances: Costs Summary [28] and [29]. Ms Deeming submits that the proposed reductions also takes into account the above-Scale rate charged by principals in respect of the indemnity period: Costs Summary at [30]. The effect of these reductions is set out in the Costs Summary at [31] as follows:

Period	Incurred Amount	Claimed Amount	Reduction Percentage	Reduction Sum	Reduced Costs
Party/party period	\$404,915.50	\$337,306.00	25%	\$84,326.50	\$252,979.50
Indemnity period	\$1,597,194.50	\$1,597,194.50	15%	\$239,579.18	\$1,357,615.32
<b>Total</b>	<b>\$2,002,110.00</b>	<b>\$1,934,500.50</b>			<b>\$1,610,594.82</b>

52. In relation to the indemnity period, the table at paragraph [49(b)] of the Costs Summary records that the quantum claimed in respect of professional fees is further reduced from \$1,357,615.32 to \$1,197,895.32. The table explains that this reduction reduces the amount claimed to '*75% of \$1,597,194.50 given the matters raised in paragraph 7 of [Mr George's affidavit]*', which paragraph is as follows:

*In issuing tax invoices to [Ms Deeming] to date, GG has applied a discount of 25% to its professional fees. [Ms Deeming's] claim in respect of GG's professional fees is limited to 75% of GG's total professional fees.*

53. Item 11 of the Scale provides that

*An additional amount may be allowed, having regard to all the circumstances of the case, including the following:*

- (a) the complexity of the matter;*
- (b) the difficulty or novelty of the questions involved in the matter;*
- (c) the skill, specialised knowledge and responsibility involved and the time and labour expended by the lawyer;*
- (d) the number and importance of the documents prepared and read, regardless of their length;*
- (e) the amount or value of money or property involved;*
- (f) research and consideration of questions of law and fact;*
- (g) the general care and conduct of the lawyer, having regard to the lawyer's instructions and all relevant circumstances;*
- (h) the time within which the work was required to be done;*
- (i) allowances otherwise made in accordance with this scale (including any allowances for attendances in accordance with item 1.1); and*
- (j) any other relevant matter.*

54. Ms Deeming submits that this was complex and demanding litigation, which involved publications throughout Australia, multiple witnesses and documents and a lengthy trial. In this context the Costs Summary claims (at [33]) an allowance for skill, care and responsibility of 12% against the adjusted costs in Period 1 (that is, a 12% uplift against the fees in respect of that period that have been already discounted to Scale and for the factors described above). No allowance on account of skill, care and responsibility is claimed in respect of the fees referable to the indemnity period. The impact of the 12% allowance in respect of Period 1 is as follows:

<b>Costs incurred</b>	<b>Reduced Amount</b>	<b>Further reduced amount</b>	<b>Add 12%</b>	<b>Total fees</b>
\$404,915.50	\$337,306.00	\$252,979.50	\$30,357.54	\$283,337.04

55. In light of the above, the total amount claimed by Ms Deeming on account of GG fees is {Period 1 = \$283,337.04} + {Period 2 = \$1,197,895.88} = \$1,481,232.92. The amounts claimed represent approximately 70% of the GG costs incurred in respect of Period 1 and 75% of the GG costs incurred in respect of Period 2.

### *Counsel's fees*

56. The costs claimed by Ms Deeming include charges for the services of two counsel – Ms Chrysanthou SC and Mr Dean.
57. Ms Chrysanthou was called to the NSW Bar in 2004 and was appointed Senior Counsel in 2020. The costs agreement for Ms Chrysanthou is dated 7 June 2023 and discloses the basis of charge as:
- a) \$800 per hour for preparation, conferences, other attendances, advices and travelling time;
  - b) \$8,000 per day in Court with a minimum appearance fee of \$4,000 if the matter concludes before 1pm; and
  - c) for short appearances such as directions hearings, a minimum appearance fee of \$800.
58. The fees quoted are exclusive of GST. Ms Chrysanthou is based in Sydney, and the costs agreement provides for reimbursement of the cost of travel, accommodation and incidental expenses in connection with any attendance outside Sydney.
59. Mr Dean was admitted as a solicitor in NSW in 2003 and called to the NSW Bar in 2012. The costs agreement for Mr Dean is dated 23 November 2023 and provides, in summary, that Mr Dean will charge \$350 per hour (including waiting time at Court and travelling time outside Sydney) and subject to the following minimum charges:
- a) \$350 for work on a day with an attendance for conference, interview, examination or other non-telephone attendance, or Court appearance;
  - b) \$1,750 for work on a day with interlocutory argument that extends beyond three hours' court time;
  - c) \$3,500 for work on a day for final trial irrespective of length, or work on a day with interlocutory argument that extends beyond five hours' court time. (This acts a maximum fee for work on the days Mr Dean appears in Court.)
60. As with Ms Chrysanthou, the fees quoted are exclusive of GST. Mr Dean is based in Sydney, and the costs agreement provides that disbursements may include all reasonable costs necessary for him to travel outside Sydney in connection with the

matter, including airfares, taxis, accommodation, meals and other expenses but not photocopying, printing and telephone calls.

61. The Costs Summary identifies total counsel's fees incurred as \$641,152.38 (including GST) as follows:

Period	Counsel	Fees Incurred
Party/Party period	S Chrysanthou SC	\$14,124.00
	B Dean	\$3,850.00
Indemnity period	S Chrysanthou SC	\$415,849.32
	B Dean	\$207,329.06
<b>Total</b>		<b>\$641,152.38</b>

62. The Costs Summary notes that Ms Chrysanthou's fees are slightly above the range identified in the National Guide for senior counsel, but submits that they are within the range routinely charged by experienced senior counsel acting in complex defamation litigation in superior courts and it is uncontroversial that the National Guide has not been updated since 2013. Mr Dean's rates are within range indicated by the Guide.
63. Ms Deeming's claim applies a discount against counsel's fees actually incurred of 15% in respect of Period 1 and 10% in respect of Period 2, to account for some fees '*that might be considered to have not been fairly and reasonably incurred including for any duplication*'. Applying these reductions, the amount claimed is:

Period	Incurred Fees	Reduction	Claimed Fees
Party/party	\$17,974.00	15%	\$15,277.90
Indemnity	\$623,178.38	10%	\$560,860.54
<b>Total</b>	<b>\$641,152.38</b>		<b>\$576,138.44</b>

64. In addition, the Costs Summary identifies that on 31 January 2025 GG received a further invoice from Ms Chrysanthou SC in the sum of \$19,674.91. Ms Deeming claims for 90% of that amount being \$17,707.42.

### ***Disbursements***

65. In addition to counsel's fees, the Costs Summary identifies the following disbursements.
66. Ms Deeming claims 100% of the costs of two experts, namely:

- a) Mr Dhamey, a digital forensic expert, who charged for his services at \$198-\$242 per hour (incl GST) and charged fees totalling \$29,821; and
- b) Mr Campey, an expert in social media and computer science, who charged \$495 per hour (incl GST). Mr Campey attended the hearing and gave evidence, charging total fees of \$35,468.97 including some travel expenses.

67. Ms Deeming claims only 50% of the total amount incurred for taxis, Ubers and meals, and makes no claim for internal copying or printing (but does claim for charges incurred with external service providers for transcription, creation of indexes, coding and deduplicating and copying printing briefs and Court books).
68. The miscellaneous disbursements claimed are set out in the Costs Summary at [45] in respect of Period 1 as follows:

Category	Amount Incurred	Amount Claimed
Service Fees - Wise McGrath	\$869.00	\$869.00
Court Fees	\$1,635.00	\$1,635.00
Transcript Fees	\$518.71	\$518.71
Travel – Flights to Melbourne	\$536.55	\$536.55
Travel - Taxi/Uber Fees (50%)	\$280.23	\$140.12
<b>TOTAL</b>	<b>\$3,839.49</b>	<b>\$3,699.38</b>

69. The miscellaneous disbursements claimed are set out in the Costs Summary at [45] in respect of Period 2 as follows:

Category	Amount Incurred	Amount Claimed
Court Fees & Hearing Fees	\$76,740.00	\$76,740.00
Meeting Room Hire – Melbourne	\$9,949.72	\$9,949.72
Printing/Copying/Stationery Fees	\$17,208.89	\$17,208.89
Search Fees	\$84.04	\$84.04
Transcript Fees	\$39,979.55	\$39,979.55
Travel – Flights for lawyers and counsel to attend the hearing	\$15,076.96	\$15,076.96
Travel - Taxi/Uber Fees (50%)	\$2,760.22	\$1,380.11
Travel and Accommodation Expenses in Melbourne	\$28,147.07	\$28,147.07
Travel – Meals (50%)	\$1,473.90	\$736.95
<b>TOTAL</b>	<b>\$191,420.35</b>	<b>\$189,303.29</b>

***Preparing Costs Summary and assessment application***

70. Ms Deeming claims GG's actual and estimated costs of preparing Mr George's affidavit (including the exhibited Costs Summary) and the assessment application as follows:

Name/Role	Likely hours	Rate	Total	Reduction	Amount claimed
P George Principal	7	\$990	\$6,930.00	25%	\$5,197.50
J Marel Special Counsel	9	\$660	\$5,940.00	20%	\$4,752.00
P Strkalj Associate	9	\$467.50	\$4,207.50	20%	\$3,366.00
<b>Sub-total</b>	<b>25</b>		<b>\$17,077.50</b>		<b>\$13,315.50</b>
<b>Counsel</b>					
Senior Counsel	3	\$880	\$2,640.00	10%	\$2,376.00
Counsel	5	\$385	\$1,925.00	10%	\$1,732.50
<b>Sub-total</b>	<b>8</b>		<b>\$4,565.00</b>		<b>\$4,108.50</b>
<b>Total</b>	<b>33</b>		<b>\$21,642.50</b>		<b>\$17,424.00</b>

71. The Costs Summary claims Ms Rosati's costs of preparing the summary in the sum of \$24,640 (incl GST) comprising:
- a) Ms Rosati's fees of {34 hours x \$660 per hour} = \$22,440; and
  - b) Paralegal fees of {8 hours x \$275 per hour} = \$2,200.

***Total claim by Ms Deeming***

72. The total amount of the claim in respect of the party-party period is set out in the Costs Summary at [49(a)] as follows:

Category	Amount Incurred	Amount Claimed
Professional Costs	\$404,915.50	\$252,979.50
Skill Care & Responsibility		\$30,357.54
Subtotal Professional Costs		\$283,337.04
Counsel's Fees	\$17,974.00	\$15,277.90
Experts' Fees	\$5,940.00	\$5,940.00
Other Disbursements	\$3,839.49	\$3,699.38
<b>TOTAL</b>	<b>\$432,668.99</b>	<b>\$308,254.32</b>

73. The total amount of the claim in respect of the indemnity period (including the costs of the assessment application) is set out in the Costs Summary at [49(b)] as follows:

Category	Amount incurred	Amount Claimed
Professional costs	\$1,597,194.50	\$1,197,895.88
Counsel's Fees	\$642,853.29	\$578,567.96
Experts' Fees	\$59,349.97	\$59,349.97
Other Disbursements	\$191,420.35	\$189,303.29
<b>Sub-Total</b>	<b>\$2,490,818.11</b>	<b>\$2,025,117.10</b>
Kerrie Rosati – Costs Summary	\$24,640.00	\$24,640.00
Estimated Costs of Application	\$21,642.50	\$17,424.00
<b>TOTAL CLAIM</b>	<b>\$2,537,100.61</b>	<b>\$2,067,181.10</b>

74. The total amount claimed by Ms Deeming on the assessment is thus  $\{\$308,254.32 + \$2,067,181.10\} = \$2,375,435.42$ . If the \$17,707.42 in counsel's fees referred to in the Costs Summary at [48] is included, the total amount of costs incurred is \$2,556,775.52 and the total amount of the claim is \$2,393,142.84.

### **The costs respondent's position**

75. Mr Pesutto submits that the amount claimed by Ms Deeming should be reduced on a number of grounds, as follows.

### ***Funding arrangements***

76. First, Mr Pesutto submits that the funding arrangements put in place by Ms Deeming to fund her legal costs render all or part of the claim inconsistent with the indemnity principle.
77. Mr Bartlett's 14 March 2025 affidavit deposes (at [7]) that since 2023 Ms Deeming has maintained a **website** at the domain [www.defenddeeming.com.au](http://www.defenddeeming.com.au), which website remained online at the time of Mr Bartlett's affidavit. Screenshots of the website are exhibited in Annexure PLB-1 and relevantly include the following:

## **Will you help Moira today?**

While Moira can handle the political fight she is in, **the financial toll is putting her family's future at risk**. She is asking for supporters not to donate to a political campaign or a party - but to **provide a gift to her and her family** to help fund the legal fight to clear her name.

If you choose to support Moira and your gift is over \$600, please note that your name and address will be disclosed under Moira's parliamentary register of gifts, but not the amount you donated.



Please also note that your gift is not tax deductible.

78. Underneath this message, the website provides for the completion of payment details, including the name of the payer and the amount of the contribution.
79. Mr Bartlett deposes that Ms Deeming promoted the website on her 'X' profile, and refers to a post dated 16 February 2024 which attributes to Ms Deeming a statement that

*It's not crowd funding software, it's direct deposit to my defamation fund bank account*

80. Mr Bartlett's affidavit also exhibits within Annexure PLB-1 copies of two **ordinary returns** submitted by Ms Deeming to the Clerk of the Parliament of Victoria as required by s 18 of the *Members of Parliament (Standards) Act 1978 (Vic)*. The returns are prepared in the form provided in schedule 2 to the *Members of Parliament (Standards) Regulations 2019 (Vic)* and are in respect of two time periods – the first from 1 July 2023 to 31 January 2024 and the second from 1 February 2024 to 30 June 2024. Each return identifies that, during the relevant period, Ms Deeming received a monetary gift in an amount above the statutory threshold (\$600) from the people or organisations identified in the return. The precise amount above the threshold is not (and is not required to be) disclosed.
81. The ordinary return in Annexure PLB-1 in respect of the period from 1 February 2024 to 30 June 2024 identifies a personal loan from Hilton Grugeon. In relation to this loan, GG explained in an email to my assistant as follows:

*Mrs Deeming disclosed the loan as a personal debt as defined in s2(1) of the Standards Act, owing by her to Mr Grugeon.*

*We are instructed that the loan was an oral agreement between Mrs Deeming and Mr Grugeon under which Mr Grugeon agreed to loan Mrs Deeming funds for the purpose of contributing to the payment of her costs of the legal proceedings against Mr Pesutto and under which Mrs Deeming agreed to repay those funds to Mr Grugeon in the event she was successful in the proceedings and Mr Pesutto was ordered to pay her costs.*

82. In the context of the donations and loan referred to, Mr Pesutto submits that the question whether and if so what part of Ms Deeming's costs liability has been met by benefactors rather than by Ms Deeming herself, and if so on what terms (if any) as to repayment, is relevant to the indemnity principle. Mr Pesutto submits that, if and to the extent that Ms Deeming's costs have been met by non-refundable donations, then

*... to permit recovery by the litigant from the unsuccessful party of those same costs would be to allow just such a windfall as the indemnity principle seeks to avoid.*

83. The Costs Response and submissions raises other issues with the Costs Summary as follows:

- a) First, Ms Dealehr submits that the rate charged in respect of Mr Marel is above the rate that is usually charged by a practitioner of his experience, and Ms Dealehr proposes an alternative rate of \$550 per hour. The Costs Response also takes issue with the rate for principals and paralegals applied in respect of the indemnity period. The submissions filed on 29 April 2025 submit that the charge-out rate for Mr Strkalj was excessive for a solicitor admitted only in September 2023, although the submissions do not suggest an alternative rate. The Costs Response does not take issue with the rates charged by Ms Deeming's counsel.
- b) Second, the Costs Response queries the proportion of GG fee earner time spent by senior practitioners (who are charged at a higher rate than more junior staff), particularly during the party-party period.
- c) Third, the Costs Response and submissions challenge the reasonableness of charging for interstate travel and associated expenses (Uber/taxis, accommodation, room hire and meals) occasioned by Ms Deeming's engagement of interstate counsel, in circumstances where Ms Dealehr submits that experienced Victoria-based counsel should have been available.
- d) Fourth, the Costs Response submits that the 12% uplift applied on account of skill, care and responsibility is not reasonable, and proposes an uplift of 5% instead.
- e) Fifth, the Costs Response submits that a higher reduction than that applied by Ms Deeming to account for duplication of work by multiple practitioners is appropriate.
- f) Sixth, the Costs Response submits that the assessment application should reasonably have required only junior counsel's involvement, and that a charge for senior counsel in respect of the application is not reasonable.

- g) Seventh, the Costs Response submits that the categories of work described in the Costs Summary ('drafting' etc) are so vague as to impair any proper understanding of the work that was done, the persons by whom it was done and the reasonableness of the work and charge. Ms Dealehr's opinion is that it is usual, and more helpful, that the Costs Summary identify the work undertaken by reference to identifiable stages of the litigation such as 'discovery' rather than bare activities such as 'drafting'.
- h) Eighth, the submissions contend that the material contained in the invoices suggests that Ms Deeming's costs include charges for some matters arising in relation to proceedings other than this proceeding.
- i) Ninth, Mr Pesutto submits that the GG costs agreement may be void because it is not compliant with the *Legal Profession Uniform Law (NSW) (LUPL)*.

84. In consequence of these matters, Mr Pesutto submits that the costs that may be claimed in respect of the party-party period (subject to the concerns raised in respect of the indemnity principle and LUPL) are:

<b>Party/Party period up to 12 February 2024</b>	<b>Amount Incurred</b>	<b>Applicant's position</b>	<b>Respondent's position</b>	<b>Difference</b>
Professional Costs	\$404,915.50	\$252,979.50	\$159,792.50	\$93,187.00
Skill Care & Responsibility		\$30,357.54	\$7,989.63	\$22,367.92
<b>Sub-total Professional Costs</b>		<b>\$283,337.04</b>	<b>\$167,782.13</b>	<b>\$115,554.92</b>
Counsel's Fees	\$17,974.00	\$15,277.90	\$15,277.90	
Experts' Fees	\$5,940.00	\$5,940.00	\$5,940.00	
Other Disbursements	\$3,839.49	\$3,699.38	\$3,022.71	\$676.67
<b>TOTAL PARTY/PARTY</b>	<b>\$432,668.99</b>	<b>\$308,254.32</b>	<b>\$192,022.74</b>	<b>\$116,231.59</b>

85. Mr Pesutto submits that the costs that may be claimed in respect of the indemnity period and the assessment application (subject to the concerns raised in respect of the indemnity principle and LUPL) are:

<b>Indemnity period from 13 February 2024</b>	<b>Amount Incurred</b>	<b>Applicant's position</b>	<b>Respondent's position</b>	<b>Difference</b>
Professional Costs	\$1,597,194.50	\$1,357,615.32		
<b>Reduced by 25%</b>		1,197,895.88	\$918,069.90	\$279,825.98
Counsel's Fees	\$642,853.29	\$578,567.96	\$467,383.79	\$111,184.18
Experts' Fees	\$59,349.97	\$59,349.97	\$59,349.97	
Other Disbursements	\$191,420.35	\$189,303.29	\$143,962.20	\$45,341.09

Sub-Total	\$2,490,818.11	\$2,025,117.10	\$1,588,765.86	\$436,351.25
Kerrie Rosati	\$24,640.00	\$24,640.00	\$24,640.00	
Estimate Costs of Application	\$21,642.50	\$17,424.00	\$17,424.00	
Counsel's Fees*	\$19,674.91	\$17,707.42	\$7,700.00	
<b>TOTAL INDEMNITY</b>	<b>\$2,537,100.61</b>	<b>\$2,084,888.52</b>	<b>\$1,638,529.86</b>	<b>\$446,358.67</b>
<i>*Omitted from total in the Costs Summary</i>				

86. In summary, Mr Pesutto submits that Ms Deeming's total costs (subject to the concerns raised in respect of the indemnity principle and LUPL) should be assessed at  $\{\$192,022.74 + \$1,638,529.86\} = \$1,830,552.59$ .

## Consideration

### *Materials and background*

87. In determining the quantum of costs to be awarded I have had regard to the material filed by the parties as identified above, O'Callaghan J's judgment in the proceeding, and the material (including pleadings, affidavits and orders) contained on the Court file.
88. By way of overview, O'Callaghan J's reasons for judgment record that:
- a) Ms Deeming was represented at trial by Ms Chrysanthou SC with Mr Dean, and Mr Pesutto was represented by Dr Collins AM KC appearing with three junior counsel;
  - b) the trial occupied 19 hearing days;
  - c) over 40 affidavits were filed and relied upon by the parties, and most (albeit not all) witnesses were cross-examined at trial;
  - d) more than 800 exhibits were tendered in evidence; and
  - e) closing written submissions comprised almost 1,000 pages.
89. The Costs Summary also records (at [26]) that:
- a) each party served four tranches of discovered documents;
  - b) ten subpoenas to produce documents were issued; and
  - c) the court book comprised approximately 8,641 pages.

90. The Court file records that eighteen sets of Court orders were made prior to 12 December 2024 when O’Callaghan J delivered his reasons for judgment on the substantive issues in the proceeding. Those reasons ran to 849 paragraphs across over 200 pages. His Honour also delivered written reasons for his decisions on 22 August 2024 and 18 September 2024 regarding case management issues that were in dispute between the parties.
91. As identified above, O’Callaghan J’s orders of 19 December 2024 distinguish between costs referable to the period prior to 12 February 2024 and costs referable to the period after that date. In the period to 12 February 2024, the Court file and the material filed on the application before me indicate that the following steps were taken in or in respect of the proceeding:
- a) Concerns notices for the purposes of Part 3 of the *Defamation Act 2005* (Vic) were served in May and July 2023 and were responded to by letter.
  - b) Ms Chrysanthou was retained in May 2023.
  - c) The parties engaged in a mediation and other without prejudice communications.
  - d) Mr Dean was retained in November 2023.
  - e) The proceeding was commenced by originating application filed on 5 December 2023. A statement of claim, defence and reply were prepared (each case involving solicitors and senior and junior counsel) and filed.
  - f) A first case management hearing occurred (at which Ms Chrysanthou appeared without her junior) on 2 February 2024.
  - g) By orders dated 2 February 2024, the Court made orders that (amongst other things) the proceeding be listed for a ten-day trial commencing on 16 September 2024.
92. After 12 February 2024, the Court file indicates that the following steps were taken:
- a) Discovery was undertaken and lists of documents were filed.
  - b) Subpoenas to produce documents were issued and documents were produced, and notices to produce documents were lodged.
  - c) Affidavits were filed.

- d) Subpoenas to attend Court to give evidence were issued.
- e) Opening submissions were filed for trial.
- f) The trial proceeded over 19 days.
- g) Closing submissions were filed.
- h) Judgment was delivered and orders made.

***Application of the indemnity principle***

93. A substantial focus of the affidavit material and submissions filed on Mr Pesutto's behalf on the assessment concerned the application of the indemnity principle to the particular circumstances of this case. In summary, Mr Pesutto submits that the question whether and if so what part of Ms Deeming's costs have been met by benefactors must be taken into account in considering what Ms Deeming herself has paid or remains liable to pay; or alternatively that the Court cannot be satisfied as to these matters unless Ms Deeming makes full disclosure of the quantum and terms of all financial support she received towards payment of her costs.
94. I disagree.
95. The authorities referred to above make it clear that the critical question in considering whether a claim for costs is consistent with the indemnity principle is whether the party claiming has paid or has incurred a legal obligation to pay the legal fees and disbursements that are the subject of the claim. In the case before me, Mr George has deposed that Ms Deeming is claiming no more than she is contractually liable to pay and the source material provided to me is consistent with that confirmation. The loan advanced by Mr Grugeon does not qualify that fundamental analysis: I accept the assurance provided to the Court that the funds were lent to Ms Deeming on the basis that she agreed to repay the loan if she was successful in the proceedings and Mr Pesutto was ordered to pay her costs, analogous to the situation in *Noye*. In respect of donations contributed through the website or otherwise, the language used on the website makes it clear that funds contributed through that mechanism were in the nature of a gift to Ms Deeming and her family. Such contributions do not displace or otherwise affect Ms Deeming's primary legal obligation to pay her legal fees of the litigation. The simple proposition, as stated by Owens JA in *Noye*, is that

... a successful party can recover costs if he has an obligation to pay his solicitors .....

96. The circumstances of the present case confirm that the Court's focus on legal liability is both principled and pragmatic. The assessment process that is undertaken by the Court is the same regardless of the source or extent of the applicant's financial means: an award of costs in favour of a litigant who is independently wealthy does not confer any relevant windfall on the litigant, nor is it a mechanism by which a person of more modest means might become serendipitously enriched. It is unnecessary and inappropriate to attempt to trace the amount of donations or loan moneys so as to determine whether those amounts should be offset against the costs awarded: a litigant is entitled to spend (or save) the funds that are available to her as she thinks fit. Whether the '*gifts to [Ms Deeming] and her family to help fund the legal fight to clear her name*' were expended in direct payment of her legal fees, or on the costs of child-care while she attended Court, or saved for a rainy day, it was up to Ms Deeming how she chose to manage her finances. Ms Deeming assumed the legal liability to pay the legal costs of her proceeding and it is neither necessary nor appropriate to make any further enquiry.
97. I consider my findings regarding the application of the indemnity principle to the circumstances of this case are consistent with authority and not inconsistent with the statements of Beech-Jones CJ in *Kassam*. As set out above, the plaintiffs in *Kassam* unsuccessfully challenged public health orders, but resisted an order to pay costs on the grounds that the proceedings were in the nature of public interest litigation. As Beech-Jones CJ said (at [41]), the use of crowdfunding was only relevant to his determination in the context that the plaintiffs' submission required the court to consider whether it was 'unfair and unjust' that they personally bear the costs of public interest litigation. That is not the circumstance that is before me on this assessment.
98. Finally, in making my determination, I do not consider that any adverse inference (based on the principles in *Blatch v Archer* (1774) 1 Cowp 63, 98 ER 969 and *Jones v Dunkel* (1959) 101 CLR 298) should be drawn from the fact that Ms Deeming has declined to provide further details to Mr Pesutto regarding the quantum of the donations made to her via the website or otherwise. As I indicated at the case management hearing on 6 March 2025 and as reiterated in my reasons above, the critical question in considering the indemnity principle is as to whether the party who is claiming the costs

has the legal obligation to pay those costs. I consider that the material that has been produced to the Court on the assessment – including Mr George’s affidavit, the relevant costs agreements and invoices, details of the website, the copies of the two ordinary returns, and details regarding the loan from Mr Grugeon - provides sufficient assurance to the Court that Ms Deeming is claiming no more than she has paid or is liable to pay and no adverse inference arises.

***Solicitor rates/fees***

99. In respect of the professional fees claimed for work undertaken by GG during the party-party period:

- a) I acknowledge that Ms Deeming’s claim involves a reduction to account for the charging of some practitioner fees above Scale, which results in a reduction from \$404,915.50 to \$337,306.00.
- b) As set out above, Ms Deeming has applied a further reduction of 25% to account for potential duplication in this period, which results in a reduction in the amount claimed from \$337,306 to \$252,979.50.
- c) The Costs Response correctly observes that Mr Marel’s charge-out rate is at the higher end of the allowed range, and that a relatively high proportion of the work charged during the party-party period was carried out by more senior GG practitioners. However, I consider that the 25% reduction applied by Ms Deeming fairly accommodates these criticisms, in circumstances where the particular tasks that appear to have been undertaken during this period (advising, preparing the claim etc) are tasks that are by their nature more difficult to delegate to junior personnel than some of the tasks that come later in the proceeding (such as discovery). I agree that the hourly rate charged for Mr Strkalj is high for a newly qualified solicitor, but I consider that this is also broadly accommodated in the 25% reduction applied for duplication.
- d) In relation to the 12% allowance for skill, care and responsibility, I consider this allowance to be overly generous, noting that the work to which it relates was being undertaken by senior practitioners being charged at or near the upper limit of the range indicated by the Scale and in circumstances where experienced senior counsel was also advising. Nonetheless, I accept that



the litigation required specialist skills and demanded a high degree of care and responsibility. I consider an allowance of 7% to be more appropriate. Application of a 7% uplift adjusts professional fees from \$252,979.50 to \$270,688.07.

- e) The Costs Response submits that the manner in which the Costs Summary describes the work undertaken is uninformative and too imprecise to enable a proper understanding of what was done. Having regard to the material before me, I consider that Mr Pesutto and the Court both have sufficient information to enable a fair assessment of the reasonableness of the costs claimed in the party-party period. Although the categories used in the Costs Summary are not specifically referable to particular stages of the proceeding (for example, discovery), they provide some indication of the split between the work described in item 1 of the Scale and the work described in item 2. I do not consider any further reduction is indicated arising from the descriptors used in the Costs Summary.

- 100. In respect of the professional fees claimed for work undertaken by GG during the indemnity period, the rates charged for principals, graduates and paralegals are all materially above Scale. As set out above, the rate for Mr Strkalj appears high for a junior lawyer. At paragraph [31], the Costs Summary applies a 15% discount against professional fees which is explained as taking into account potential duplication, some adjustment to the rate charged for principals, and the admittedly significant amount of short correspondence and other documentary tasks in respect of which item 2.1 of the Scale suggests a lower rate than for other attendances. However, at paragraph [49(b)] of the Costs Summary the professional fees claimed for the indemnity period are further reduced with the result that the overall reduction is 25% rather than 15%.
- 101. I consider that there is some greater force in the submission that the category descriptions make it difficult to assess whether or to what extent these charges are affected by any specific element of unreasonableness. Whilst not specifically identified as contributing to the 15% discount applied in the Costs Summary, I note that O'Callaghan J's findings in his reasons for judgment concerning the lack of utility of Mr Campey's evidence suggest that solicitor fees associated with the preparation of that evidence might be regarded as unreasonable. However, I consider that these criticisms

are broadly encompassed in the 25% overall reduction that has been applied to professional fees.

102. In light of these matters, I accept the adjusted claim for professional fees in respect of the indemnity period in the sum of \$1,197,895.88.

***Rates for counsel***

103. In relation to counsel's fees, the Guide (published in 2013) sets out indicative rates for senior counsel in the range \$425-740 per hour, and for junior counsel in the range \$265-530 per hour. The maximum daily rate suggested by the hourly rates is \$7,400 for senior counsel and \$5,300 for junior counsel.
104. Mr Dean's hourly and daily fee is within the Guide. Ms Chrysanthou's rate is slightly but not materially above, and I consider it to be reasonable taking into account that the Guide has not been updated since 2013. I note that Mr Pesutto does not submit that counsel's rates are unreasonable.
105. Taking into account the nature of the proceeding, the number of witnesses, the volume of materials and the complexity of the legal issues arising, I consider that it was appropriate to engage both senior and junior counsel.
106. I note that Ms Deeming's claim has applied a 15% reduction against counsel's fees in respect of the party-party period and 10% in respect of the indemnity period. I consider these reductions to be appropriate.
107. Insofar as Mr Pesutto submits that some further discount against disbursements charged by counsel for travel, accommodation and related expenses arising from the circumstance that this was a Victorian proceeding and both counsel were located in Sydney, I do not consider those charges to be unreasonable. I accept Ms Deeming's submission that the subject matter of the proceeding warranted experienced defamation counsel and that it was reasonable to engage counsel from outside Victoria. The material before me does not indicate that travel and associated costs were excessive, nor that they added materially to the overall costs of the proceeding. In any event, I consider that the 10-15% discount applied against counsel's fees fairly accommodates any criticism of travel and related expenses.
108. The Costs Response identifies that the total amount claimed in the Costs Summary on account of counsel's fees may have mistakenly omitted to include an invoice delivered

by Ms Chrysanthou dated 31 January 2025, which the Costs Summary claims at 90% (referred to at paragraph [48] of the Costs Summary). At this stage, and noting that it is unclear precisely what work the invoice relates to, I propose to discount it as an offset to the matters raised in paragraph [8] of Mr Pesutto's 29 April 2025 submissions regarding the inclusion in some invoices of work related to claims (or potential claims) against persons other than the respondent. For clarity, I do not suggest that the invoice is directly related to any such other work – merely that I consider it convenient to deal with that issue in that way.

### ***Disbursements***

109. The disbursements claimed include a charge for a digital forensic expert. I consider the charge to be reasonable.
110. The disbursements claimed also include a charge for a social media expert, who gave evidence at trial. O'Callaghan J's reasons for judgment record (at [540] and [545]):

*[540] In closing submissions, counsel for Mr Pesutto submitted, and I agree, that Mr Campey was an honest witness and that it was to his credit that he admitted in cross-examination to what counsel described as "a litany of errors and shortcomings in his reports". I agree that those shortcomings were so extensive that the reports were ultimately of "extremely limited value" to the court (RCS [10.20]).*

...

*[545] In the end, I am of the view that Mr Campey's reports are of no real assistance to the question of serious harm or, for that matter, to any other issue in the proceeding, given the existence of the subpoena material. That material, as I explain when considering damages below at [809]–[811], readily establishes that publication of each of the impugned publications was extensive.*

111. In light of O'Callaghan J's findings, I consider the charge of \$35,468.97 in respect of Mr Campey is not reasonably charged to Mr Pesutto and I will disallow it.
112. In respect of other disbursements, the Costs Response challenges the reasonableness of travel (\$15,000), accommodation (\$28,147) and meals (charged at 50% = \$1,473.35). The submissions also challenged a charge for the hire of a meeting room (\$9,949). In light of the length of hearing, I do not consider the travel, accommodation and room hire to be unreasonable. I will disallow the charge in respect of meals.

### ***Assessment on basis that costs are GST-inclusive***

113. The Costs Summary records that Ms Deeming is not entitled to input credits. I have therefore assessed costs on the basis that GST should be included.

### ***Costs of the Costs Summary and assessment application***

114. Mr Pesutto accepts the claim for professional fees and Ms Rosati's fees for preparation of the Costs Summary.
115. In relation to counsel, Mr Pesutto accepts the involvement of junior counsel (Mr Dean) but submits that the costs of senior counsel ought not to be recovered. In circumstances where the assessment of costs proceeds on the basis of well-established principles, a straightforward Costs Summary and Response, and familiar judgment calls, I agree that the involvement of senior counsel should ordinarily be unnecessary. However, in this case Mr Pesutto's legal team flagged at an early stage (including by the service on 17 December 2024 of a notice to produce) that the assessment raised at least three 'relatively unusual issues' including the application of the indemnity principle. I consider it reasonable in these circumstances that senior counsel be involved in advice and submissions regarding the merits and case management of these issues. I consider the estimate of three hours for senior counsel and five hours for junior counsel to be reasonable.
116. In summary, I will allow costs of  $\{24,640 + \$17,424.00\} = \$42,064$  for the assessment application and the preparation of the Costs Summary.

### ***Compliance with Legal Practitioners Uniform Law***

117. In the written submissions filed, Mr Pesutto submits that the costs agreement between Ms Deeming and GG is void as a consequence of its non-compliance with various provisions of the *Legal Profession Uniform Law (NSW)* (LUP<sup>L</sup>). The relevant provision of the LUP<sup>L</sup> are as follows:
118. Section 174 of the LUP<sup>L</sup> relevantly provides that:
- A law practice –*
- (a) must when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs.*
119. Section 178 of the LUP<sup>L</sup> relevantly provides that:
- (1) If a law practice contravenes the disclosure obligations of this Part--*
- (a) the costs agreement concerned (if any) is void;*
- (b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority....*

120. Section 181 of the LUPL relevantly provides:

*(1) A costs agreement (a "conditional costs agreement" ) may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.*

*(2) A conditional costs agreement must--*

*(a) be in writing and in plain language; and*

*(b) set out the circumstances that constitute the successful outcome of the matter to which it relates.*

*...*

*(6) A conditional costs agreement may provide for disbursements to be paid irrespective of the outcome of the matter.*

121. Section 182 of the LUPL relevantly provides:

*(1) A conditional costs agreement may provide for the payment of an uplift fee.*

*(2) If a conditional costs agreement relates to a litigious matter--*

*(a) the agreement must not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely; and*

*(b) the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.*

*(3) A conditional costs agreement that includes an uplift fee--*

*(a) must identify the basis on which the uplift fee is to be calculated; and*

*(b) must include an estimate of the uplift fee or, if that is not reasonably practical--*

*(i) a range of estimates for the uplift fee; and*

*(ii) an explanation of the major variables that may affect the calculation of the uplift fee.*

122. Section 185 of the LUPL relevantly provides:

*(1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this Division is void.*

*(2) A law practice is not entitled to recover any amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.*

*(3) A law practice that has entered into a costs agreement in contravention of section 182 is not entitled to recover the whole or any part of the uplift fee and must repay the amount received in respect of the uplift fee to the person from whom it was received.*

123. Mr Pesutto submits that the costs agreement between Ms Deeming and GG did not comply with the LUPL inasmuch as:

- a) no estimate was provided of total costs, nor any breakdown between the quantum of GG's professional costs and disbursements;
- b) no disclosure of the matters required by s 174 of the LUPL was made in respect of counsel, which non-disclosure Mr Pesutto submits is in breach of s 175 of the LUPL; and
- c) to the extent that the costs agreement is described in GG's letter to Ms Deeming as a conditional costs agreement, Mr Pesutto submits that:

*'... the purported conditional costs agreement breaches s.182(2)(a) (there is no evidence of reasonable belief in a successful outcome) and section 182(3) – to the extent that there is an estimate of the value of any uplift fee, and a statement of how it will be arrived at, it is not accurate. There is a single sentence in para 7 indicating a range of possible estimates of the "25% discount" (not any uplift). But even the calculation of this was incorrect, being based on the total legal costs and not only professional fees. The firm has no entitlement to charge an uplift on disbursements, and nor was there to be any 25% "discount" on such disbursements. In any event, in breach of s.182(2)(b), to "add back" a discount of 25% is not to uplift by 25%, but by 33.33%, of the costs "otherwise payable" (a cost charged at \$75 would become \$100, being a one-third increase on what was "otherwise payable" ie in the absence of "success").*

124. In considering the particular cost agreements entered into by the parties, Griffiths J in *LFDB v SM (No 4)* [2017] FCA 753 at [21] noted in the context of there being no evidence before the court of a costs agreement:

*There is no substance in this criticism having regard to the well-established principle that any failure to comply with a cost disclosure requirement under the Legal Profession Act 2004 (NSW) is only relevant to an assessment of costs as between solicitor and client, not the costs as between parties....*

125. In similar vein, Jackson J in *Frigger* said (at [39]):

*I also accept the further submission by counsel for the first respondent that even if the Costs Agreement were to be void, that would not matter for the purposes of this lump sum costs assessment. The consequence of a costs agreement being void is not that the solicitors are unable to recover any costs. As s 287(2) of the LPA set out above provides, the consequence is that the costs are recoverable as set out in s 271(b) or (c). Those paragraphs provide, in effect, that if legal costs are not recoverable under a costs agreement, they are recoverable under 'an applicable costs determination' or, if there is none, 'according to the fair and reasonable value of the legal services provided'. A costs determination is a determination made by the Western Australian Legal Costs Committee under s 275 of the LPA (see s 252) but that Committee has no power to make costs determinations in relation to contentious business before the Federal Court: see s 275(1)(b) and *Stevenson v Zafra* [2021] WASCA 181 at [162] (Buss P,*

*Murphy JA and Hill J). So if the Costs Agreement were to be void, Carles Solicitors would be entitled to recover from the first respondent the fair and reasonable value of the legal services provided. That corresponds to the value that a lump sum costs assessment would set in any event.*

126. On the question of non-disclosure, Davies J said in **Royal v El Ali (No 3)** [2016] FCA 1573 at [31] (citations omitted):

*... it is well established any failure is only relevant to an assessment of costs as between solicitor and client, not to the assessment of costs as between party and party. A failure to comply with the disclosure requirements entitles a client to postpone payment of the costs until assessed by a cost assessor and until that has been done the lawyer has no actionable claim for those costs. If there has been non-disclosure, on an assessment, the costs assessor may reduce the amount of those costs by an amount proportionate to the seriousness of the failure to disclose. The section does not apply to a party liable for inter-partes costs. As between party and party, the section gives no right to the party liable to pay the costs of the other party to argue that the solicitor/client costs of the other party should be reduced by reason of some failure by the other party's lawyer in making disclosure to that party as required by statute.*

127. Her Honour's comments in *Royal* were made in the context of the now repealed *Legal Profession Act 2004 (NSW)*. However, the elements of that statute that were pertinent to the matters referred to in the passage above apply equally to the LUPL: see also *Bolton v Atanaskovic Hartnell* [2024] NSWSC 833 at [88] (Faulkner J); *Bingham v Bevan* [2023] NSWCA 86 at [35]-[58] (Basten AJA, White and Meagher JJA agreeing). In these circumstances, I do not consider that any potential non-compliance with disclosure requirements affects my assessment of the costs payable by Mr Pesutto pursuant to O'Callaghan J's orders of 19 December 2024.
128. In response to the respondent's submissions that allege non-compliance with the provisions of the LUPL regarding disclosures and uplift in relation to conditional costs agreements, the applicant says that those concerns are irrelevant in circumstances where no uplift is claimed for the purposes of the assessment. On their face, I consider that there is some force in Mr Pesutto's submissions as to non-compliance with sub-ss 182(2) and 182(3) of the LUPL. However, I accept Ms Deeming's submissions that, inasmuch as the claim does not depend in any way on any contracted conditional uplift, any potential non-compliance with the requirements for claiming such an uplift is not relevant to my assessment.

## **Conclusion**

129. In summary, my assessment of costs is as follows (all amounts inclusive of GST):

a) Party-party period to 12 February 2024:

Category	Amount Incurred	Amount Claimed	Amount assessed
Professional Costs	\$404,915.50	\$252,979.50	\$252,979.50
Skill Care & Responsibility		\$30,357.54	\$17,708.57
Subtotal Professional Costs		\$283,337.04	\$270,688.07
Counsel's Fees	\$17,974.00	\$15,277.90	\$15,277.90
Experts' Fees	\$5,940.00	\$5,940.00	\$5,940.00
Other Disbursements	\$3,839.49	\$3,699.38	\$3,699.38
<b>TOTAL</b>	<b>\$432,668.99</b>	<b>\$308,254.32</b>	<b>\$295,605.35</b>

b) Indemnity period from 12 February 2024:

Category	Amount incurred	Amount claimed	Amount assessed
Professional fees	\$1,597,194.50	\$1,197,895.88	\$1,197,895.88
Counsel's Fees	\$642,853.29	\$578,567.96	\$560,860.54
Experts' Fees	\$59,349.97	\$59,349.97	\$23,881.00
Other Disbursements	\$191,420.35	\$189,303.29	\$188,566.34
<b>Sub-Total</b>	<b>\$2,490,818.11</b>	<b>\$2,025,117.10</b>	<b>\$1,971,203.76</b>
31.01.2025 counsel invoice	\$19,674.91	\$17,707.42	\$0
Kerrie Rosati – Costs Summary	\$24,640.00	\$24,640.00	\$24,640.00
Estimated costs of assessment application	\$21,642.50	\$17,424.00	\$17,424.00
<b>TOTAL CLAIM</b>	<b>\$2,556,775.52</b>	<b>\$2,084,888.52</b>	<b>\$2,013,267.76</b>

130. In total, the costs assessed are  $\{\$295,605.35 + \$2,013,267.76\} = \$2,308,873.11$  (inclusive of GST).

131. In light of the confidentiality asserted by Ms Deeming in relation to some of the material provided to me, I will provide an opportunity to the parties to make submissions as to whether any of the details included in these reasons should be redacted. Subject to hearing from the parties on that matter, I will publish these reasons together with my orders on the online Court file in the proceeding.

**A Legge, Senior National Judicial Registrar**  
**Federal Court of Australia, Melbourne**  
**16 May 2025**