Federal Court of Australia
NSD103/2023

BRUCE LEHRMANN
Applicant

NETWORK TEN PTY LTD & Anor
Respondents

APPLICANT'S OUTLINE OF SUBMISSIONS ON COSTS

A. Introduction

1. These submissions are made in response to order 2 made by this Court on 15 April 2024.

2. In summary, the applicant does not contend for any particular cost order but instead submits that the appropriate order is a matter for the Court in the exercise of its discretion.

3. To assist the Court in considering the circumstances relevant to the exercise of its discretion, these submissions set out pertinent circumstances that arguably support possible cost orders that depart from the ordinary course or provide for a more nuanced cost order than is usual. For example, in all the circumstances it may be an appropriate exercise of this Court's discretion to recognise the 'success' the respondents have enjoyed but, due to their failure with respect to the qualified privilege defences, temper that success by ordering that the applicant pay only a proportion of the respondents' costs on the ordinary basis. However, at the same time, the applicant accepts that it is also open to the Court, in the face of authority such as ***Roberts-Smith*** *v Fairfax Media Publications Pty Limited (No 45)* [2023] FCA 1474, to order that the applicant pay the costs of the respondents on an indemnity basis.

B. Legal Principles

4. The principles relating to the exercise of this Court's discretion are well settled and do not need to be repeated. For example, it is trite that usually costs follow the event, the discretion as to costs is broad, costs are not awarded to punish but to compensate, and a court is required, pursuant to s 37N(4) of the *Federal Court of Australia* ***Act*** *1976* (Cth), to take into account any failure by a party to comply with the overarching purpose of the civil procedure provisions, namely to facilitate the just resolution of disputes according to

law as quickly, inexpensively and efficiently as possible (see, for example, *LFDB v SM (No 2)* [2017] FCAFC 207 at [7]).

5. Two further principles need emphasis. Firstly, whether a special costs order should be made depends on whether it was unreasonable for the party against whom the order is made to have subjected the innocent party to the expenditure of costs: *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2)* [2017] FCAFC 116 at [5].

6. Secondly, an unreasonable rejection of a *Calderbank* offer may justify an order for indemnity costs: *Bellino v Queensland Newspapers (No 2)* [2019] FCA 1691 at [12], [16], [18]. However, in assessing whether the rejection of an offer is unreasonable, relevant circumstances include the state of the proceeding when the offer was made, the extent of the compromise offered and the offeree's prospects of success assessed as at the date of the offer (see e.g. *Triguboff v Fairfax Media (No 2)* [2018] FCA 1513 at [6]).

C. Submissions as to certain circumstances

Reasonableness in commencing proceedings

7. The applicant commenced these proceedings following a mass media publication which aired an allegation that he raped Ms Higgins. Whilst not named, this Court was "amply satisfied that Mr Lehrmann was in fact identified" (*Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369 at [79] (**judgment** or **J**)).

8. The publication aired graphic elements as part of the allegation, such as the applicant continued to rape Ms Higgins despite, and during, tearful protestations, and that during the rape he crushed Ms Higgins' leg causing a large bruise.

9. Whilst this Court has found the substantive truth of the allegation has been proven to the civil standard of proof, the applicant's conduct in commencing these proceedings to vindicate his reputation could be seen to be reasonable in circumstances where the allegation was of serious criminal conduct, the allegation had not been established in any criminal proceedings, the respondents bore the onus of proof, and the applicant disputed the truth of the allegation.

Findings as to the applicant's credit and his evidence

10. Despite a contention that the applicant acted reasonably in commencing proceedings, the applicant cannot shy away from the findings this Court has made about the applicant's evidence and his general credit (see e.g. J[153]).

11. In *Roberts-Smith*, Besanko J ordered Mr Roberts-Smith pay the respondents costs of the proceeding on an indemnity basis because his Honour had found that Mr Roberts-Smith knew from the commencement of the proceedings "that the most serious imputations were substantially true" ([21]).

12. It cannot reasonably be contended that it would not be open to this Court to find the same circumstance in this instant case, given the findings this Court has made regarding the applicant. Therefore, the state of the applicant's knowledge, as found by this Court, is a relevant circumstance when considering its exercise of its discretion in awarding costs. However, it must be borne in mind that a cost order is not to be used to punish a party. Further, it has been held that "even a finding that a party has fabricated evidence is not necessarily sufficient to warrant the grant of an indemnity costs order" (see e.g. *Barrett Property Group Ltd v Metricon Homes Pty Ltd (No 2)* [2007] FCA 1823 at [12], but cf. [14]-[16], and see also *Walker v Citigroup Global Markets Pty Ltd* [2005] FCA 1866 at [31]-[32].)

The qualified privilege defences

13. In defending the proceedings the respondents did not seek only to justify the allegation but sought to defend the publication on the basis of the 'qualified privilege' defences. It was their case that they had acted reasonably in publishing *The Project* broadcast.

14. These defences included the s 30 defence but also *Lange* qualified privilege (not pleaded by Ms Wilkinson) and a common law qualified privilege defence (not pleaded by Network Ten).

15. In short, none of the qualified privilege defences were successful. Given this Court's findings as to the failure of those defences and the fundamental missteps taken by the respondents in publishing *The Project* broadcast (see e.g. at J[962]) it is open to this Court to conclude that the applicant should be compensated for the time and expense in having to establish that the qualified privilege defences were bound to fail.

16. The respondents were well aware (indeed, the second respondent was present and active) that the first sit down interview with Ms Higgins and Mr Sharaz made plain that there

were "warning signs" with what was being presented to them (see J[962]). The first respondent should have also been aware, and the second respondent must have been aware, that Ms Wilkinson and Mr Angus Llewellyn proceed with an active ignorance to those warning signs.

17. Taking a "rough and ready" approach (*Jackamarra (an Infant) v Krakouer* (1998) 195 CLR 516 at [9] per Brennan CJ and McHugh J, albeit in a different context; see also *Russell v Australian Broadcasting Corporation (No 4)* [2023] FCA 1279 at [15]), this Court might conclude that an appropriate exercise of its discretion on costs would be a cost order that recognised that a certain proportion of the hearing time was taken up by the qualified privilege defences, those defences prolonged the proceeding unnecessarily, and on which the applicant has enjoyed a measure of success.

The Calderbank *letter*

18. On 31 August 2023 the respondents made a 'walk away' offer to the applicant. The applicant did not accept that offer. The fact of the offer being made and not accepted is a relevant circumstance to the exercise of this Court's discretion.

19. Whether under the principles in *Calderbank v Calderbank* [1976] Fam 93 or pursuant to s 40(2)(b) of the *Defamation Act 2005* (NSW) the respondents may well seek to rely on that letter to ground an order for indemnity costs.

20. An important consideration for this Court however is the seriousness of the allegation published and the need for vindication, which an acceptance of a 'walk away' offer would not bring. No apology was provided as part of the offer. Further, despite some uncertainty, as discussed below, and the respondents contending otherwise in their *Calderbank* letter, the truth is the applicant did hold the potential for a successful costs order due to the outcome of the Limitation Extension hearing. Accepting a walk away offer would not provide any compensation for the costs expended in that successful application. A final consideration is even though the respondents have established the substantial truth of the allegation it does not mean the applicant, acting reasonably, should have appreciated that the proceeding was hopeless from the date of the letter. Despite the findings of this Court, the respondents still bore the onus and at the time of the offer it could not be said to have been unreasonable for the applicant to continue to pursue the proceedings rather than accept a 'walk away' offer that left him with no opportunity for vindication.

The Limitation Extension application

21. On 28 April 2023 this Court ordered that the costs of the interlocutory applications for an extension of time be reserved.

22. An application for an extension of time is an application for the Court's indulgence, however the applicant respectfully submits that it would be an error for any court to proceed on the basis that a "particular category of application…necessarily entails a particular outcome on costs" (see e.g. *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 4)* [2018] FCA 74 at [6]).

23. Furthermore, the reason for the indulgence has to be considered and the position of a respondent to an application for the indulgence has to be considered also.

24. In the Limitation Extension application, the applicant, in order to bring defamation proceedings, *had to* seek an indulgence because the criminal proceedings that related to the same subject matter did not conclude in time for the applicant to avoid the expiry of the one year limitation period. Further, the *Limitation Act 1969* (NSW) gave the applicant a right to seek the extension. The respondents opposed that application, putting the applicant to the cost of bringing it and seeing it through to a successful outcome. The respondents should not have opposed that application. The decision of *Joukhador v Network Ten Pty Ltd* (2021) 283 FCR 1 must have made it plain that any opposition would not be successful.

25. In those circumstances, it is open to this Court to consider the applicant's success in the Limitation Extension application when considering the cost order to be made.

D. Conclusion

26. Rather than contending for a particular cost order, the applicant's position is that it is a matter for the Court. In the Court's exercise of its broad discretion the applicant has sought to assist the Court by briefly considering a number of pertinent circumstances that are relevant to its discretion.

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