

**Submissions**

No. NSD 103 of 2023

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**BRUCE LEHRMANN**

Applicant

**NETWORK TEN PTY LIMITED (ACN 052 515 250) & Anor**

Respondents

**Mr Auerbach's submissions on costs**

- 1 These submissions are made in support of Mr Taylor Auerbach's interlocutory application dated 30 April 2024, seeking:
  - a. costs of compliance with a subpoena issued to Mr Auerbach by the Applicant on 3 April 2024 (and dated 2 April 2024) (**Subpoena to Produce**); and
  - b. costs of compliance with a subpoena issued to Mr Auerbach by the First Respondent on 3 April 2024 (**Subpoena to Give Evidence**).
- 2 In support of the interlocutory application, Mr Auerbach relies on the Affidavit of Rebekah Giles sworn 30 April 2024 (**Giles Affidavit**), together with Exhibit RG-1.
- 3 Mr Auerbach seeks orders under r 24.22 of the *Federal Court Rules 2011* that each of the Applicant and the First Respondent pay the amount of any reasonable loss or expense incurred in complying with the Subpoena to Produce and the Subpoena to Give Evidence respectively.
- 4 Mr Auerbach's solicitor / client costs of compliance with the Subpoena to Produce are \$39,176.50 (inclusive of GST): Giles Affidavit [11]. Mr Auerbach's solicitor / client costs of compliance with the Subpoena to Give Evidence \$19,371 (inclusive of GST): Giles Affidavit [19].

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Filed on behalf of (name & role of party)	Taylor Auerbach, witness to the proceedings		
Prepared by (name of person/lawyer)	Rebekah Giles		
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### Legal Principles

- 5 Rule 24.22 is not to be given a narrow interpretation, particularly in circumstances where a third party to litigation is involved: *Chapman v Luminis Pty Ltd (No 3)* (2000) 104 FCR 368 at [28]–[33]. The intent of r 24.22 is to compensate a person for complying with a subpoena, which in the case of non-parties such as Mr Auerbach, should be taxed on a solicitor and client basis: *Fuelxpress Ltd v L M Ericsson Pty Ltd* (1987) 75 ALR 284. That is, a non-party should be compensated for what it has in fact cost that party to comply with the subpoena: *Titan Enterprises (Qld) Pty Ltd v Cross* [2016] FCA 1275 at [12].
- 6 Expenses incurred in compliance, although assessed on the circumstances of each case, include the reasonable costs of seeking legal advice with respect to compliance with the subpoena and assessing claims for privilege: *Titan* at [12]. Expenses also include the costs of objecting to or seeking to narrow the scope of the subpoena including through negotiation, and attendances before the Court when the subpoena is called upon: *Charlick Trading Pty Ltd v Australian National Railways Commission* (1997) 149 ALR 647 at 649–650.
- 7 With respect to a subpoena to appear to give evidence, a witness is entitled to compensation for obtaining advice as to her or his position, and to costs of preparing to give evidence, however not to the costs of preparing a written statement of evidence: see *APRA v Rural and General Insurance Ltd* [2004] FCA 933 at [5]–[6] per Gyles J.

### Subpoena to Produce

- 8 With respect to the costs of compliance with the Subpoena to Produce, the Applicant does not oppose an order being made under r 24.22: Exhibit RG-1, p 14. However, Mr Auerbach has unsuccessfully sought to reach agreement with the Applicant as to the quantum of compliance costs payable: Exhibit RG-1, p 20-23.
- 9 The costs claimed by Mr Auerbach from the Applicant are costs incurred directly in compliance with the Subpoena to Produce. These are the legal costs of:
- a. advising on and negotiating the scope of the Subpoena to Produce: Giles Affidavit at [7]–[8];
  - b. appearing on return of the Subpoena to Produce: Giles Affidavit at [9];
  - c. liaising with Mr Auerbach’s previous lawyers to access responsive documents: Giles Affidavit [13(f)]; and
  - d. reviewing a significant number of documents, including over a thousand pages of message communications, for both relevance to the Subpoena to Produce categories and for privilege. This involved numerous lawyers working non-stop during the period 3 to 4 April 2024, given the very short timeframe in which compliance was required: Giles Affidavit [13(a)–(g)].

- 10 The Subpoena to Produce was served by email at 12:07pm on 3 April 2024, returnable at 9:30am on 4 April 2024. Urgent review and production were required given the tight timeframe for production, which made it necessary for several lawyers, working simultaneously, to assist Mr Auerbach in identifying material which responded to the Subpoena to Produce: Giles Affidavit [13(a)-(b)]. The speed with which Mr Auerbach was required to respond to the Subpoena to Produce was impressed upon his solicitor, Ms Giles, by the Court given the fact that Mr Auerbach was to attend to give evidence on the afternoon of 4 April 2023, some 26 hours after being served with the Subpoena to Produce: T2748.6-10; T2751.33-34. As such, production was required in multiple tranches, requiring the review of extensive documents, particularly correspondence, in short order: Giles Affidavit [10], [13]. Multiple solicitors were required to review and prepare these tranches of documents for production, as on 4 April 2024, Ms Giles, principal solicitor of Giles George, was appearing in Court on behalf of Mr Auerbach, at the return of the Subpoena to Produce and as legal representative of Mr Auerbach in his appearance in compliance with the Subpoena to Give Evidence: Giles Affidavit [9], [22(b)].
- 11 In addition, Mr Auerbach sought advice as to the scope of and compliance with the Subpoena to Produce, as he is entitled to do, and through Ms Giles, sought to narrow the categories of the Subpoena to Produce first through correspondence and subsequently in Court: Giles Affidavit [7]-[8]; see *Charlick Trading* at 649-650. The amendment Mr Auerbach sought to category 2 was ultimately accepted by the Applicant in Court on 4 April 2024, despite earlier attempts by Mr Auerbach to negotiate narrowing the category and after production by Mr Auerbach had already commenced: T2746.38-44.
- 12 The expenses incurred in payment of legal fees for the work outlined above, fall within the recognised categories of expenses to which a subpoena recipient is entitled, as set out in *Charlick Trading* at 649-650.
- 13 The expenses incurred are reasonable, given the circumstances of this proceeding and the urgency with which Mr Auerbach was required to respond to the Subpoena to Produce as set out in the Giles Affidavit.
- 14 That is, it was reasonable for Mr Auerbach to seek legal advice and assistance in attending to production, given the breadth of the categories of production sought, the time within which production was required, and the close scrutiny to which Mr Auerbach was subject from the parties, the public and the media given the subject matter of this proceeding. It was reasonable that Giles George utilised multiple lawyers who were required to work effectively around the clock, to assist in reviewing an extensive number of documents and communications for relevance and privilege, given the tight time frame in which production was required and the broad scope of categories 1, 2 and 5 of the Subpoena to Produce in particular. That process commenced immediately on receipt of the Subpoena to Produce

on 3 April 2024 and continued throughout 4 April 2024 until late in the evening when the final tranche was produced at 10:51pm: Giles Affidavit [10].

15 Finally, Mr Auerbach is entitled to be compensated for the costs he actually incurred in complying with the Subpoena to Produce: see *Titan* at [12].

16 In light of the above, Mr Auerbach seeks an order in accordance with r 24.22, that he be compensated by the Applicant for his expenses of complying with the Subpoena to Produce in the sum of \$39,176.50 (inclusive of GST), being the costs he did in fact reasonably incur.

### **Subpoena to Give Evidence**

17 With respect to the Subpoena to Give Evidence, the First Respondent has not agreed to pay Mr Auerbach any compliance costs under r 24.22: Exhibit RG-1, p 18.

18 The expenses claimed in the form of legal costs incurred in compliance with the Subpoena to Give Evidence relate to the following:

- a. the costs of obtaining legal advice with respect to the Subpoena to Give Evidence;
- b. the costs of Mr Auerbach's legal representatives attending a conference with the First Respondent's solicitors and counsel in preparation for Mr Auerbach's evidence;
- c. the costs of Mr Auerbach's legal representatives attending Court on 4 and 5 April 2024 during Mr Auerbach's evidence; and
- d. the costs of seeking advice and preparing submissions in respect of challenges to Mr Auerbach's credit: Giles Affidavit [22].

19 The expenses incurred in respect of the work outlined above fall within the recognised categories of legal expenses which can be claimed under r 24.22: see *Charlick Trading* at 649-650; *APRA v Rural* at [5]-[6].

20 The expenses incurred were reasonable, given the involvement of two seniors lawyers who attended and advised Mr Auerbach on 4 and 5 April 2024 for a total of ten to twelve hours each over the course of the two days on which Mr Auerbach gave evidence. Mr Auerbach should be compensated for his costs actually incurred in responding to the Subpoena to Give Evidence in accordance with the principles set out in *Titan* at [12].

21 In light of the above, Mr Auerbach seeks an order in accordance with r 24.22, that he be compensated by the First Respondent for his expenses of complying with the Subpoena to Give Evidence in the sum of \$19,371 (inclusive of GST), being the costs he did in fact reasonably incur in complying with the Subpoena to Give Evidence, with legal assistance.

1 May 2024

M Kearney

Tenth Floor Chambers