LEHRMANN V NETWORK TEN

SECOND RESPONDENT'S OUTLINE OF SUBMISSIONS ON COSTS

Outcome of proceedings

1. On 15 April 2023, the Court found that all the defamatory imputations concerning the applicant the *Project programme* carried were substantially true and that Ms Wilkinson and the first respondent had established a defence of justification under s25 of the *Defamation Act* 2005 (NSW): *Lehrmann v Network Ten Pty Limited* [2024] FCA 369 (**Trial Judgment**).

2. Judgment was entered in favour of the respondents.

Costs follow the event

3. It is a well-established principle in the exercise of this Court's costs discretion that costs ordinarily should follow the event and be awarded to the successful party: see *Knowles v Secretary, Dept of Defence* (2021) 174 ALD 61; [2021] FCAFC 215 at [78]; *ALDI Foods Pty Ltd v Transport Workers' Union of Australia* (2020) 282 FCR 174; [2020] FCAFC 231 at [88].

4. Although this Court has a broad costs discretion under s43 *Federal Court Act* 1976, the exercise "*is to be guided by well-established principles in order to promote consistency in decision-making*": see *ALDI Foods Pty Ltd* at [86]-[87].

5. As between Ms Wilkinson and the applicant, costs should follow the event – the applicant should be ordered to pay Ms Wilkinson's costs of the proceedings.

Separate representation

6. The applicant elected to sue Ms Wilkinson personally, a litigation choice made by him.

7. Although he was entitled to this choice, irrespective of any financial benefit to him, the Court would assume that he made that decision because of some perceived advantage to him in having Ms Wilkinson named personally as a party.

8. The decision by the applicant to separate Ms Wilkinson from Network Ten and name her specifically appears to have been deliberate and considered:

(a) it was public knowledge, and widely known that Ms Wilkinson ceased being a host of *the Project* some months before the commencement of the proceedings;

(b) the applicant gave concerns notices to Mr Bendell, Executive Producer for *the Project* programme (Ex 13) and Ms Samantha Maiden (see Limitation Extension judgment at [161]) personally, but not Ms Wilkinson;

(c) the applicant pleaded specific conduct alleged to give rise to aggravated damages as against Ms Wilkinson;

(d) the applicant was plainly aware when he commenced the proceedings that there was no financial benefit in suing Ms Wilkinson in addition to Network Ten, given that he pleaded that the first respondent was vicariously liable for the conduct of Ms Wilkinson: see SOC [3].

9. It can also be assumed that, in suing Ms Wilkinson, the applicant did so understanding the ordinary risks of litigation, including an outcome that would require him to pay Ms Wilkinson costs of the proceedings. It may be, at the time of commencing the proceedings, that he did not foresee a situation where Ms Wilkinson would be separately represented, thus exposing him to costs orders in relation to more than one set of lawyers. However, that being so, he was quickly disabused of any such assumption when Ms Wilkinson's lawyers filed and served a notice of appearance less than a week after the statement of claim was served. Further, the first respondent admitted that it was vicariously liable for the conduct of Ms Wilkinson in its defence filed 28 days after the commencement of the proceedings: 1RD[2].

10. In the circumstances, it was open to the applicant to discontinue his claim against Ms Wilkinson at that time, with little or no costs penalty. He elected to proceed against 2 separately represented respondents even though he had a complete cause of action against the first respondent in relation to any tortious conduct of the second respondent.

11. On 31 August 2023, Ms Wilkinson offered, jointly with the first respondent, to compromise her legal costs by settling on a walk-away basis. Notwithstanding this

offer the applicant made no counter-offer to walk-away from his claim against Ms Wilkinson. This Court has recognised the significance of a walk-away offer to the general exercise of the costs discretion in *Palmer v McGowan (No 6)* [2022] FCA 927 even where, unlike these proceedings, it does not reflect a more favourable outcome than that actually achieved. The second respondent offered a significant compromise from her perspective because the issues raised in the cross-claim were unresolved at that time.

12. This Court ruled in *Lehrmann v Network Ten Pty Limited (Cross-claims)* [2024] FCA 102 at [57] that it was reasonable for Ms Wilkinson to have engaged separate legal representation. The applicant was represented during those proceedings, and had the opportunity, if he so chose, to test and be heard on the evidence adduced on the cross-claim, bearing in mind the evidence was also adduced in the primary proceedings. That finding is relevant to the Court's discretion in ordering costs in favour of Ms Wilkinson as against the applicant. She has not engaged in any disentitling or unreasonable conduct in incurring the costs of her own lawyers separate to those engaged by the first respondent.

13. To the extent that the applicant seeks to agitate an argument in relation to "*separate issues*", notably, the defences on which the second respondent failed were fall back defences in the event the justification defences failed, because otherwise they would be otiose: see *Cross-claims* judgment at [31]. This situation is not unusual in a defamation case where different defences might be available. It is somewhat artificial to consider a qualified privilege defence where justification succeeds because qualified privilege defences seek to establish that there was a privileged occasion to publish *untrue* defamatory matter about an applicant. As the Privy Council explained in *Austin v Mirror Newspapers* (1985) 3 NSWLR 354 at 364, the material part of the circumstances in assessing the reasonableness of a publisher's conduct is how the publisher came to publish a factually *untrue* account about the plaintiff.

14. In any event, the applicant in his statement of claim pleaded a serious allegation that Ms Wilkinson was recklessly indifferent to the truth or falsity of the rape imputations: SOC[9(a)]. This allegation was published on the front page of *The Australian* on the day the statement of claim was filed: see Ex X1 p988. To avoid an adverse inference in the proceedings Ms Wilkinson needed to go into evidence about this allegation, being

evidence that substantially overlapped with the matters required to establish a s30 defence. To that end, Ms Wilkinson needed to subject herself to substantially the same cross-examination to avoid an adverse inference against her on this serious allegation of reckless indifference to truth. The Court determined this allegation in Ms Wilkinson's favour in the Trial Judgment at [1026]-[1028].

15. Given the fact that evidence about distinct aspects of the case overlapped, and parties had varying success as to the legal issues that were raised, an "issue by issue" assessment of the costs is not appropriate. Otherwise, contrary to s37M it would be necessary for the Court to comprehensively peruse the Trial Judgment (and the other evidentiary judgments) to create a score tally. This is not an appropriate exercise of this Court's costs discretion, particularly where one party obtained a complete judgment in their favour, and given the overlap of issues and evidence.

Reserved costs on extension application

16. Although the parties made competing submissions about costs on the *Limitation Extension* judgment those costs were reserved.

17. The application for an extension of time is seeking an indulgence from the Court: see *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 4)* [2018] FCA 74. Consistent with the approach taken under section 43 *Federal Court of Australia Act 1976* in relation to applications for indulgences, s56C of the *Limitation Act* specifically recognises the potential costs consequences for a successful applicant. Had the limitation defence and extension been deferred to trial, as can occur – there would be little doubt that costs should follow the event where the applicant loses. There may be some doubt, unnecessary to consider, whether the Court would have reached the same conclusion, particularly as to the exercise of its discretion, had the decision been deferred to trial: c.f. *Limitation Extension* judgment at [173].

18. The second respondent acted entirely reasonably in opposing the limitation period. Ms Wilkinson's opposition of that extension has been ultimately vindicated, while the extension of time has proven futile, if not self-destructive, for the applicant. The conduct of the applicant, raised below, throughout the trial, is a further and independent reason why Ms Wilkinson should have her costs of the *Limitation Extension* argument.

Conduct of the applicant

19. The Court has found that the applicant engaged in highly disreputable conduct connected with this proceeding: *Trial* Judgment at [1069]-[1074]. The applicant has given false evidence and lied to this Court on repeated occasions on issues material to the proceeding: Trial Judgment at [157]-[162] and [462]-[463]. This conduct, of itself, weighs against the applicant on the question of costs. The findings at [1069]-[1074], however, were made in the alternative on the basis that the applicant was not found to have sexually assaulted Ms Higgins. The Court's conclusion on the justification defence means that this proceeding has been fraudulent from the start including an express false denial of sexual assault in the concerns notice.

20. The second respondent does not submit that every defamation proceeding where justification is established is therefore an abuse or process or that a successful justification defence warrants an award of indemnity costs from commencement - that would be contrary to the well-established principles: see, generally, *Herron v HarperCollins Publishers Australia Pty Ltd (No 4)* [2021] FCA 1021 per Jagot J in declining to award indemnity costs despite justification defence established (costs orders overturned on appeal when judgment for the respondents overturned: see (2022) 292 FCR 336; [2022] FCAFC 68 and (2022) 292 FCR 490; [2022] FCAFC 119). The applicant, however, sought to positively benefit from his lie by expressly alleging falsely in aid of a claim for aggravated damages there were "false allegations of sexual assault as made by Ms Higgins": [9(b)] SOC.

21. Ms Wilkinson has obtained judgment in her favour, and the applicant has wholly failed. Costs should follow the event. The other circumstances of this proceeding and the outcome otherwise support for that order.

Manner in which costs are to be assessed

22. Ms Wilkinson notes the submissions made by the first respondent about indemnity costs. The principles relevant to an award of indemnity costs are well-established and although there cannot be an exhaustive list of circumstances an order requires some special or unusual feature: see *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2)* [2017] FCAFC 116 at [4]-[5].

23. Ms Wilkinson makes no further submission about this issue – it is a matter for the Court having regard to the combination of the circumstances outlined above, and otherwise addressed in the first respondent's submissions.

Sue Chrysanthou 22 April 2024

Barry Dean

Counsel for the second respondent