

NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	19/09/2024 3:22:47 PM AEST
Date Accepted for Filing:	19/09/2024 3:22:53 PM AEST
File Number:	NSD701/2024
File Title:	BRUCE LEHRMANN v NETWORK TEN PTY LIMITED ACN 052 515 250 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



BRUCE LEHRMANN

Appellant

NETWORK TEN PTY LTD and another

Respondents

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS

Application for Security for Costs

A. Introduction

1. These submissions are made in support of Network Ten's application pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) (**FCA**) and r. 36.09 of the *Federal Court Rules 2011* (Cth) (**FCR**) that Mr Lehrmann provide security for the Respondents' costs of and incidental to defending the appeal proceeding (**Application**). Network Ten seeks an order for the payment of security in the sum of \$200,000 or such other amount as the Court may determine. Network Ten seeks further orders that the appeal proceeding be stayed until the amount of security is provided, and that the appeal proceeding be dismissed pursuant to s 56(4) of the FCA in the event that Mr Lehrmann fails to provide the security.
2. The application is supported by the affidavits of Marlia Ruth Saunders affirmed 21 June 2024 (**First Saunders Affidavit**) and 13 September 2024 (**Second Saunders Affidavit**).
3. Mr Lehrmann relies upon the affidavit of Zali Burrows affirmed 6 September 2024 in opposition to the application (**Burrows Affidavit**).

B. Background

4. On 15 April 2024, Lee J gave judgment for Network Ten and Ms Wilkinson in the proceeding below: *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369 (**Primary Judgment**). His Honour found that, on the balance of probabilities, Mr Lehrmann raped Ms Higgins and that Network Ten and Ms Wilkinson were entitled to

judgment on the basis that they had established the defence of justification under s 25 of the *Defamation Act 2005* (NSW).

5. On 10 May 2024, his Honour ordered Mr Lehrmann to pay Network Ten's costs of the proceeding on the ordinary basis in respect of the costs incurred in relation to the unsuccessful defence of statutory qualified privilege (other than costs in relation to specific affidavits), and on an indemnity basis for all other costs of or incidental to the proceeding: *Lehrmann v Network Ten Pty Limited (Costs)* [2024] FCA 486 (**Costs Judgment**).
6. On 27 June 2024, pursuant to ss 23, 37P(2) and 43 of the FCA, his Honour ordered that the orders made on 10 May 2024 be varied such that the costs payable by Mr Lehrmann in favour of Network Ten were quantified in the fixed sum of \$2,000,000: *Lehrmann v Network Ten Pty Limited (Costs) (No 2)* [2024] FCA 706 (**Second Costs Judgment**).
7. Mr Lehrmann neither consented nor opposed the fixing of the amount of costs payable to Network Ten: *Second Costs Judgment*, [10]. At [4] of the *Second Costs Judgment*, his Honour said (our emphasis):

It is common ground that Mr Lehrmann is a man of modest means. It is not suggested that there is any real likelihood he will be able to pay a substantial costs order. In those circumstances, I raised with the parties whether it would better facilitate the overarching purpose to fasten upon a lump sum or fixed amount for costs, being an amount which, on any view of it, would be payable pursuant to the costs order, and to which Network Ten Pty Limited (Network Ten) (one of the respondents entitled to the costs order) would restrict its claim for costs against Mr Lehrmann. This course would spare the further expense and delay of a reference. This suggestion was taken up and an application is made today for the costs payable by Mr Lehrmann to Network Ten to be quantified in the amount of \$2 million.

8. On 1 May 2024, at the request of Mr Lehrmann, Lee J extended by consent the time for the filing of any notice of appeal until 31 May 2024. On 31 May 2024, Mr Lehrmann filed a notice of appeal, seeking to set aside the Primary Judgment (**Notice of Appeal**).
9. At a case management hearing on 25 July 2024, Mr Lehrmann's solicitor indicated to the Court that he intended to file an amended notice of appeal. An order was made for the filing and service of any amended notice of appeal by 29 August 2024.
10. Mr Lehrmann did not comply with that order nor another order that he file evidence in relation to the Application by that deadline. At the request of Network Ten, the matter was relisted for case management on 6 September 2024.
11. At the case management hearing, Mr Lehrmann offered no explanation for having failed to file and serve an amended notice of appeal and evidence in accordance with the Court's orders. He was given a further opportunity to file and serve an amended notice of appeal

and evidence. He filed the Burrows Affidavit on 6 September 2024 and filed an amended notice of appeal on 13 September 2024 (**Amended Notice of Appeal**).

C. **Security for Costs Principles**

12. Section 56 of the FCA provides:

- (1) The Court or a Judge may order an applicant in a proceeding in the Court, or an appellant in an appeal under Division 2 of Part III, to give security for the payment of costs that may be awarded against him or her.
- (2) The security shall be of such amount, and given at such time and in such manner and form, as the Court or Judge directs.

13. Rule 36.09(1) of the FCR provides:

A party may apply to the Court for an order that:

- (a) the appellant give security for the costs of the appeal, and for the manner, time and terms for giving the security; and
- (b) the appeal be stayed until security is given; and
- (c) if the appellant fails to comply with the order to provide security within the time specified in the order – the appeal be stayed or dismissed.

14. The principles in relation to security for costs are well-known and were recently summarised by Rofe J in *Chawk v Callan* [2024] FCA 92 (**Callan**), [9]-[13]; see also *Nugawela v Dudley* [2023] FCA 1603, [13]-[15] (Jackson J); *Mathews v All Options Pty Ltd* [2019] FCA 1972, [13] (O’Bryan J).

15. The provisions of the FCA and FCR above provide the Court with a broad and unfettered discretion: *Callan*, [12]. There is no general rule, because each case depends upon its own circumstances: *Cooper v Universal Music Australia Pty Ltd* [2006] FCA 642 (**Cooper**), [11].

16. Relevant matters to be considered include:

- (a) the prospects of success of the appeal;
- (b) the likelihood (or quantum of risk) that a costs order will not be satisfied;
- (c) whether the making of the order would be oppressive in that it would stifle a reasonably arguable appeal;
- (d) whether the appellant’s impecuniosity arises out of the respondent’s conduct; and
- (e) whether there are aspects of public interest which weigh against the making of the order.

17. The rationale for the making orders for security in appeal proceedings was explained by Emmett J in *Dye v Commonwealth Securities Ltd* [2012] FCA 992 (**Dye**); cited in *Callan*, [13].
18. In summary, the general hesitancy to order impecunious litigants to pay security for costs that might stymie an arguable claim does not necessarily apply in relation to an appeal where the appellant has had the benefit of a court decision at first instance.
19. In *Cowell v Taylor* (1885) 31 Ch D 34, Bowen LJ said at 38:

There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another.
20. In *Dye* at [27], Emmett J summarised the position as follows:

The feature of an appeal that marks it out from a proceeding at first instance is that there has already been a decision given by the court that heard the matter at first instance. That is to say, the appellant has had his or her day in court and has had an opportunity to present his or her case, and has had a ruling that must be presumed to be correct. Security may not necessarily be ordered if an appeal is brought in good faith and raises substantial questions of law. However, the position will be different where the appeal turns largely on questions of fact and it does not give rise to any important question of law.
21. In *Cooper*, Tamberlain J observed that:

In relation to an appeal, Courts have given weight to the injustice that might be caused to a successful litigant if the litigant is compelled to contest the matter for a second time without the probability of obtaining the costs if ultimately successful: *Cowell v Taylor* (1885) 31 Ch D 34 at 38).

D. Submissions

22. In Network Ten's submission, having regard to the relevant discretionary factors referred to above, the orders for security for costs should be granted.

D.1 Prospects of success on the appeal

23. The prospects of the appeal succeeding are not strong.
24. The original Notice of Appeal raised:
 - (a) 6 grounds of appeal under the heading "Case found outside the pleadings – denial of procedural fairness by Trial Judge";
 - (b) 2 grounds of appeal under the heading "Justification finding contrary to evidence and application of standard of proof required by Trial Judge";
 - (c) 2 grounds of appeal under the heading "Construction/misconstruction of the imputations by Trial Judge"; and

- (d) 2 grounds of appeal under the heading “Inadequate award of damages where aggravation made out by applicant”.
25. The Amended Notice of Appeal strikes out all of the 12 grounds referred to in the preceding paragraph and replaces them with 4 grounds of appeal.
 26. The 4 amended grounds of appeal appear to cover the same ground, in substance, as the original grounds of appeal, although they are expressed in terms of generality.
 27. The impact of Mr Lehrmann seeking to rely upon more general (or less specific) but apparently substantively identical grounds of appeal on Network Ten’s estimate of the costs likely to be incurred in defending the appeal is addressed below. Otherwise, on the basis that the amended grounds of appeal are not intended to and do not in fact differ in substance from the original grounds of appeal, the prospects of the appeal succeeding are weak.
 28. The amended grounds of appeal do not identify any specific instance of the primary judge either mistaking the facts or misunderstanding or misapplying any legal principles.
 29. To the extent that further detail can be divined from the original Notice of Appeal, it appears that the appeal grounds largely turn on questions of fact, rather than any substantive questions of law.
 30. The first 6 grounds of appeal in the original Notice of Appeal contend that the findings made by the primary judge in respect of justification were not pleaded and, as a result, Mr Lehrmann was denied procedural fairness. That contention cannot be maintained. The justification defence as found by the primary judge was always part of Network Ten’s case on justification. The particulars of justification annexed to Network Ten’s Defence in the proceeding below included that: (a) Mr Lehrmann knew that Ms Higgins had not consented to sexual intercourse with him because, prior to penetrating her vagina with his penis, he was aware that she was passed out, either asleep or unconscious: particulars of justification [37(b)]; (b) Mr Lehrmann was reckless or indifferent as to whether or not Ms Higgins had consented to having sexual intercourse with him: particulars of justification [38]; (c) Mr Lehrmann knew that Ms Higgins did not consent to him continuing to have sexual intercourse with her, because he was aware that she was passed out, either asleep or unconscious: particulars of justification [43(d)]; and (d) Mr Lehrmann was reckless or indifferent as to whether or not Ms Higgins had consented to him continuing to have sexual intercourse with her: particulars of justification [44].

31. The second 2 grounds of appeal in the original Notice of Appeal (and possibly ground 3 in the Amended Notice of Appeal) appear to challenge the primary judge's evidentiary findings in respect of the justification defence. Relevantly, in respect of that defence, the primary judge determined that Ms Higgins' account of being sexually assaulted was credible and consistent with her contemporaneous reports: Primary Judgment at [582]-[583]. In contrast, his Honour comprehensively rejected Mr Lehrmann's account: Primary Judgment at [465]-[472]. An appellate court would not lightly overturn the primary judge's findings of credibility, having regard to the advantages his Honour enjoyed in hearing the evidence unfold in the course of a vigorously contested trial.
32. To the extent that those grounds challenge the discretionary findings of the primary judge, any alleged error would have to be of the kind described in *House v The King* (1936) 55 CLR 499.
33. The fourth ground of appeal in the original Notice of Appeal appears to squarely challenge the assessment of damages by the primary judge, a quintessentially intuitive and discretionary process. Mr Lehrmann's challenge to the adequacy of the amount of the contingent damages award does not raise any question of law, but rather merely contends that the award was inadequate: *Callan*, [33].

D.2 Any costs order will not be satisfied

34. There cannot seriously be any dispute that Mr Lehrmann is not in a position to satisfy any costs order made against him in the appeal proceeding.
35. He has made numerous public statements about his impecuniosity and inability to obtain employment: First Saunders Affidavit, [16]-[21]. He does not appear to own any real property: First Saunders Affidavit, [27]. He does not appear to be in receipt of funding from a litigation funder or other third party: First Saunders Affidavit, [22]-[23], [26]. Mr Lehrmann is presently unemployed and has apparently been the recipient of Centrelink benefits from around late 2021: Burrows Affidavit, [9].
36. Ms Saunders has made enquiries with Mr Lehrmann as to his ability to satisfy any costs order made against him. Based on those enquiries, she has determined that he has no capacity to pay his existing liabilities arising from the Primary Judgment, Costs Judgment and Second Costs Judgment, let alone any costs which may be ordered against him in the appeal proceeding: First Saunders Affidavit, [28]-[29].
37. Ms Saunders' assessment is consistent with the observations made by Lee J in the Second Costs Judgment referred to in paragraph 7 above.

38. Mr Lehrmann's impecuniosity weighs heavily in favour of granting Network Ten's application.

D.3 The cause of Mr Lehrmann's impecuniosity

39. Mr Lehrmann contends that his impecuniosity arises out of Network Ten and Ms Wilkinson's conduct: Burrows Affidavit, [5]-[9]. In particular, he appears to assert that Network Ten and Ms Wilkinson's conduct in broadcasting *The Project* program caused him to be suspended and ultimately terminated by his former employer, British American Tobacco, and since then he has been unable to find employment and is reliant on Centrelink.

40. In fact, the evidence discloses that Mr Lehrmann was already suspended before the broadcast of *The Project* program. Ms Maiden's article had been published on the website www.news.com at around 8am on 15 February 2021: Burrows Affidavit, [6].

41. His employer had received an email from Rosie Lewis of *The Australian* apparently confirming that Mr Lehrmann was the man accused of rape in Ms Maiden's article earlier that day.

42. Mr Lehrmann was called into a meeting with his manager at around 2pm on 15 February 2021 and asked about the email from Ms Lewis. It was at that meeting he was immediately suspended pending an internal investigation: Burrows Affidavit, [7].

43. *The Project* program was broadcast later that day at 6:30pm: Second Saunders Affidavit, [7].

44. Mr Lehrmann presented himself to the Royal North Shore hospital on 15 February 2021. He transferred to Ramsay Northside Clinic on 16 February 2021 and stayed there for 14 days. There is no evidence before the Court of Mr Lehrmann's continuing treatment (or the nature of that treatment) or his participation in ongoing medical exemptions for the purposes of reporting obligations to Centrelink, beyond Ms Burrow's bare assertion that such treatment and exemptions are occurring: Burrows Affidavit, [10]-[14].

45. Mr Lehrmann was formally terminated on 18 June 2021 following an internal investigation at British American Tobacco: Burrows Affidavit, [8].

46. On 6 August 2021, Mr Lehrmann was charged with one count of rape: Second Saunders Affidavit, [8]. Prior to being charged, he had not been identified in the mainstream media as being the subject of Ms Higgins' allegations.

47. On 7 August 2021, Mr Lehrmann was identified in the mainstream media. Comments were attributed to his then legal representative, to the effect that Mr Lehrmann would defend the charge and denied that any sexual activity took place: Second Saunders Affidavit, [9].
48. Two observations can be made about the above.
49. *First*, the Court could not be satisfied as a matter of causation that Mr Lehrmann's impecuniosity arises from, or at least solely from, the broadcast of *The Project* program. He appears to have been suspended from British American Tobacco because of the earlier publication and subsequent media enquiry which identified him as the subject of the relevant allegations.
50. *Secondly*, if Mr Lehrmann has experienced difficulty obtaining employment since leaving British American Tobacco in June 2021, it is much more likely to be attributable to him having been identified in August 2021 as the subject of criminal proceedings and the high profile reporting of those proceedings that followed. To the extent that Mr Lehrmann and the allegations against him have continued to receive extensive media coverage since the abandonment of his criminal proceedings, thereby protracting his unemployability, it is attributable to his decision to "go back for his hat" by commencing the defamation proceedings below, with all the coverage that ensued and the disastrous impact on his reputation that followed the outcome.
51. Mr Lehrmann's employability is likely also impacted by the fact that, in or around October 2023, Mr Lehrmann was identified as having been charged with two counts of alleged rape in Toowoomba in October 2021: *Lehrmann v Queensland Police Service & Ors* [2023] QSC 238. In around July 2024, Mr Lehrmann was committed to stand trial in respect of those rape charges.
52. There is no cogent evidence before the Court as to the cause of the mental health issues in respect of which Mr Lehrmann is continuing to seeking treatment (and presumably upon which he relies in support of a contention that he is unable to work).

D.4 No public interest weighing against the order sought

53. In Network Ten's submission, there is no compelling public interest in the appeal proceedings that would weigh against the making of an order for security.
54. The primary proceeding was live streamed and attracted a huge amount of interest among the media and members of the public. However, the case itself was determined by reference to conventional principles. It essentially came down to the primary judge's

findings of fact and assessments of the credit of the two key individuals. The legal principles in respect of the substantive defence of justification were not in issue. The grounds of appeal do not raise any novel issues of law or any other aspect of public interest which might weigh against the making of an order.

55. Mr Lehrmann's reliance on Article 14 of the International Covenant on Civil and Political Rights is unexplained and, with respect, bizarre: Burrows, [15]-[17]. The Article does not form part of Australian domestic law and, in any event, it is silent as to civil appeals.

D.5 Quantum of security

56. Network Ten estimates that the hearing of the appeal and its notice of contention will take 3 days. It has provided an estimate of costs likely to be incurred in defending the appeal and the assumptions upon which that estimate is based: First Saunders Affidavit, [33] and [34]. The total estimate is around \$272,500. Network Ten estimates that the likely amount of those costs that could be recoverable on assessment is around \$219,000: First Saunders Affidavit, [35].
57. It is difficult to know whether the Amended Notice of Appeal has enlarged the grounds of appeal to any significant extent. On the assumption that it does not raise any or any substantially new grounds beyond those appearing in the original Notice of Appeal, Network Ten maintains that 3 days is an appropriate estimate for the hearing of the appeal and its notice of contention.
58. Network Ten's notice of contention is very narrow. It traverses the same territory as Mr Lehrmann's grounds of appeal – specifically, the primary judge's factual findings in respect of the justification defence and his Honour's contingent assessment of damages.
59. Network Ten submits that there would be no unfairness to Mr Lehrmann in ordering him to pay an amount of security to cover its costs of the appeal that would also include the cost of work associated with its notice of contention given: (a) the very narrow scope of the grounds in Network Ten's notice of contention and (b) the overlap between the matters raised in that notice and in Mr Lehrmann's notices of appeal.
60. Even putting costs associated with the Respondents' notices of contention to one side and assuming (very generously in terms of the time saving) a hearing estimate of two days, Network Ten's estimate of costs would still exceed the amount of security sought at a total of \$220,000.
61. Network Ten submits that the inefficient conduct of the proceeding to date by Mr Lehrmann, including the failure to comply with the court timetable and the filing of the

Amended Notice of Appeal, gives rise to a reasonable concern that, if anything, the actual costs incurred in the appeal proceeding are likely to exceed the estimate given in the First Saunders Affidavit.

19 September 2024

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