

NOTICE OF FILING

Details of Filing

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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

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No. NSD701/2024

IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

BRUCE LEHRMANN

Appellant

NETWORK TEN PTY LTD and another

Respondents

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS

Application for Stay of Execution of Costs Order

A. Introduction

1. These submissions are made in opposition to Mr Lehrmann's application pursuant to r. 36.08 of the *Federal Court Rules 2011* (Cth) (**FCR**) for a stay of the order made by Lee J on 27 June 2024 entering judgment in favour of Network Ten in the amount of \$2,000,000 in respect of its costs of the proceedings below: *Lehrmann v Network Ten Pty Limited (Costs) (No 2)* [2024] FCA 706 (**Costs Order**).
2. Mr Lehrmann relies upon the affidavit of Zali Burrows affirmed 1 August 2024 (**Burrows Affidavit**). An outline of written submissions prepared by Ms Burrows, on behalf of Mr Lehrmann, was filed and served on 19 September 2024 (**AS**). Network Ten relies on the affidavit of Marlia Ruth Saunders affirmed 13 September 2024.
3. Network Ten submits that Mr Lehrmann has not discharged his onus to demonstrate a proper basis for a stay of the Costs Order that will be fair to all parties. The application should be dismissed with costs.

B. A Preliminary Submission

4. At AS, [22], Mr Lehrmann alleges, in substance, that Network Ten, in seeking to recover a proportion of the costs it incurred in successfully defending the proceeding below, is engaging in a "tactic" or "procedural play to hinder the Applicant's ability to appeal". At AS, [29] Mr Lehrmann alleges that Network Ten's enforcement of the Costs Order constitutes "bullying tactics".

5. These allegations are nonsense. Network Ten, like any other successful litigant, is entitled to seek to recover a proportion of the substantial costs it properly incurred as a result of Mr Lehrmann bringing the proceeding below. Judgments of the trial division should not be treated merely as provisional. Following a trial, the successful party generally has an unfettered entitlement to enforce their judgment: *Stefanovski v Digital Central Australia (Assets) Pty Ltd* [2017] FCA 1121, [4(a)].
6. Further, the Court knows, because it was informed by junior counsel for Network Ten at a case management hearing on 25 July 2024 (T3.27), that Network Ten has paused any enforcement proceedings in respect of the Costs Order pending the hearing and determination of the present application.

C. Background

7. The relevant procedural background is set out at [4]-[11] of Network Ten's outline of written submissions in support of its application for security for costs dated 19 September 2024. In summary, Network Ten and Ms Wilkinson successfully defended Mr Lehrmann's claim in the proceedings below: *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369 (**Primary Judgment**). On 10 May 2024, Lee J made orders requiring Mr Lehrmann to pay the costs of the proceeding on a particular basis: *Lehrmann v Network Ten Pty Limited (Costs)* [2024] FCA 486 (**First Costs Judgment**). 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**).
8. At no point prior to the making of the First and Second Costs Judgments did Mr Lehrmann make an application for a stay order before the primary judge.
9. The present application was foreshadowed for the first time in correspondence by Mr Lehrmann on 10 July 2024. By that time, Network Ten had already incurred costs in seeking to enforce the Costs Order.

D. Stay Principles

10. Rule 36.08 of the FCR provides:
 - (1) An appeal does not:
 - (a) operate as a stay of execution or a stay of any proceedings under the judgment subject to the appeal; or

- (b) invalidate any proceedings already taken.
 - (2) However, an appellant or interested person may apply to the Court for an order to stay the execution of the proceedings until the appeal is heard and determined.
 - (3) An application may be made under subrule (2) even though the court from which the appeal is brought has previously refused an application of a similar kind.
11. The principles relating to the circumstances in which a stay may be ordered do not appear to be in dispute. They are well established and were summarised recently by Rofe J in *Chawk v Callan* [2024] FCA 92 (Callan), [16] (by reference to Rangiah J in *Flight Centre Ltd v ACCC* [2014] FCA 658, [9]) as follows:
- (a) There is an onus on the applicant to demonstrate a proper basis for a stay that will be fair to all parties.
 - (b) There is a prima facie assumption that the judgment appealed from is correct.
 - (c) There is a prima facie assumption that the Court should not deprive a litigant of the benefit of a judgment in its favour.
 - (d) The Court has a broad discretion as to whether to grant a stay, and it is not necessary for an applicant for a stay to demonstrate special or exceptional circumstances. It is sufficient that the applicant demonstrates a reason or an appropriate case to warrant the exercise of discretion in its favour.
 - (e) The mere filing of an appeal will not, of itself, provide a reason or demonstrate an appropriate case.
 - (f) A stay will usually be granted if there is a real risk that the applicant will suffer prejudice or damage, if a stay is not granted, which will not be redressed by a successful appeal.
 - (g) In the exercise of its discretion, the Court will weigh considerations such as the balance of convenience and the competing rights of the parties before it.
- [*Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694; *Powerflex Services Pty Ltd v Data Access Corporation* (1996) 67 FCR 65 at 66; *McLean Technic Pty Ltd v Digi-Tech (Australia) Ltd* (2002) 55 NSWLR 737 at [18]].
12. The principles referred to above were most recently cited with approval by Halley J in *Master Wealth Control Pty Ltd v ACCC (Stay application)* [2024] FCA 1024 (**Master Wealth**), [24]-[33].

13. A stay should not be granted unless the appeal is at least arguable, although it is usually inappropriate to speculate as to its prospects of success: *ACCC v BMW (Australia) Ltd (No 2)* [2003] FCA 864, [5].
14. In addition to considering whether or not the grant of a stay would render a successful appeal nugatory, it is well established that the Court should consider (a) the balance of convenience, (b) the competing rights of the parties and (c) whether either party will be prejudiced by the stay: *Master Wealth*, [30].

E. Submissions

15. The starting point in respect of the present application is the assumption that the Primary Judgment and First and Second Costs Judgments are correct, and that Network Ten should not be deprived of the benefit of the judgments that it has obtained.
16. The judgments below are not to be treated as provisional decisions – so much is reflected and acknowledged in the language of r 36.08(1) of the FCR.
17. As Gleeson CJ observed in *Swain v Waverley Municipal Council* (2005) 220 CLR 517, at [2], the:

system does not regard the trial as merely the first round in a contest destined to work its way through the judicial hierarchy until the litigants have exhausted either their resources or their possibilities of further appeal.
18. See also *Wooldridge v Australian Securities Commission* [2015] FCA 349 (*Wooldridge*), [18].
19. The Court should not deprive Network Ten of the fruits of victory by granting a stay unless the circumstances warrant the Court’s intervention. There must be a sound reason to justify a suspension of Network Ten’s right to recover judgment: *Stefanovski*, [4(d)].
20. Mr Lehrmann appears to contend that there are three grounds warranting the exercise of discretion in favour of granting a stay:
 - (a) There are arguable grounds of appeal: AS, [14]-[17].
 - (b) Network Ten and Ms Wilkinson share Mr Lehrmann’s view that the judgment is flawed: AS, [18]-[20].
 - (c) There is a risk that the appeal will prove nugatory if a stay is not granted: AS, [21]-[30].

E.1 Arguable grounds of appeal

21. Network Ten does not contend that the grounds of appeal in the Notice of Appeal filed on 31 May 2024 and the Amended Notice of Appeal filed on 13 September 2024 are entirely unarguable or not advanced bona fide. However, for the reasons set out at [23] to [33] of its outline of submissions for security for costs, the prospects of the appeal succeeding are very weak.
22. The raising of faintly arguable grounds of appeal means only that Mr Lehrmann is not precluded from seeking to obtain a stay. It is not, taken alone, a ground for granting the stay.
23. Contrary to the submission apparently made by Mr Lehrmann, this is clearly not a case where the prospects of success of the appeal are so strong or overwhelming that the interests of justice could only be served by granting a stay: *Wooldridge*, [18].

E.2 The Primary Judgment should be upheld

24. Mr Lehrmann submits that Network Ten and Ms Wilkinson have filed notices of contention that “clearly support the Applicant’s view that the judgment is flawed”: AS, [18].
25. That is, with respect, entirely wrong. It misconceives the purpose of a notice of contention. Network Ten does not seek to cross-appeal from any part of the Primary Judgment. Rather, it contends that the Primary Judgment should be affirmed on grounds other than those relied on by the Court.
26. Aside from the Appellant's submission as to the character of the notices of contention being wrong, it is unclear how the filing of notices of contention by the Respondents is said to support the grant of a stay. We can find no support for the submission in the relevant authorities.

E.3 Risk the appeal will prove nugatory

27. The provisions permitting the Court to grant a stay pending the determination of an appeal exist to prevent possible injustice arising from the enforcement of a judgment which might subsequently be overturned: *Stefanovski*, [4(b)].
28. It could not be suggested that Network Ten could not repay any amounts paid by Mr Lehrmann in satisfaction of the Costs Order if the appeal was successful. The point is academic, in any event, in circumstances where Mr Lehrmann is apparently impecunious,

and has not paid a cent towards the amount of the Costs Order. He is unlikely to do so in the future.¹ What is not academic is that Mr Lehrmann is seeking to make Network Ten incur the further costs of an appeal, with little to no likelihood that those costs will be recoverable if the appeal fails.

29. Mr Lehrmann has not shown that there is “a real risk or probability that [he] would be deprived of the fruits of [his] appeal if a stay is not granted”: *Redbubble Ltd v Hells Angels Motorcycle Corporation (Australia) Pty Ltd* [2022] FCA 1039, [35] (per Derrington J).
30. The submissions advanced by Mr Lehrmann in this regard should be rejected:
 - (a) The fact that Mr Lehrmann is receiving Centrelink payments and cannot afford to pay the Costs Order (AS, [21]) does not support the proposition that the appeal will be nugatory without a stay. The submission only serves to reinforce the prejudice visited upon Network Ten in having to incur the costs of an appeal with little or no likelihood that those costs will be recoverable if the appeal fails.
 - (b) Network Ten repeats its submissions at [4] to [6] above in respect of the submission (AS, [22]-[23]) that it has engaged in a “tactic” or “procedural play” or “bullying” in seeking to enforce the Costs Order.
 - (c) As to the prospect and consequences of a sequestration order being made against Mr Lehrmann in the event that he is unable to pay the Costs Order:
 - i. *First*, Network Ten was entitled to seek to enforce the Costs Order following the Second Costs Judgment, contrary to the suggestion at AS, [24].
 - ii. *Secondly*, if a sequestration order were made against Mr Lehrmann, he would be entitled to continue the proceeding in his own name. A cause of action in defamation is treated as a personal wrong to the bankrupt: s 60(4) of the *Bankruptcy Act 1966* (Cth). So much appears to be accepted by Mr Lehrmann: AS, [25]. Mr Lehrmann is impecunious. There is no basis to suppose that a sequestration order would somehow further “stultify” his ability to fund “necessary disbursements in the appeal or ability to brief counsel” as he alleges.

¹ See Network Ten’s outline of submissions in support of its application for an order for security for costs dated 19 September 2024 and the Second Saunders Affidavit.

- iii. *Thirdly*, Mr Lehrmann submits at [26] of the AS that if his appeal succeeds any damages award would be unlikely to satisfy any debt in the amount of the Costs Order. But Mr Lehrmann is seeking to appeal not only the Primary Judgment, but also the First and Second Costs Orders and, as referred to above, there would be no impediment to him prosecuting the appeal even if he went bankrupt before the hearing and determination of the appeal. The Court would reject, as a reason for granting a stay, the peculiar submission that the “further stain” on Mr Lehrmann’s character caused by the stigma of bankruptcy could not be “corrected” by success on appeal. The submission is nonsensical: it is unexceptional that a consequence of a person not being able to pay their debts as they fall due is that they are liable to be declared bankrupt.
- iv. *Fourthly*, contrary to Mr Lehrmann’s submissions at [27] of the AS, there is nothing unusual about Network Ten seeking to enforce the Costs Order. The remainder of the submissions in that paragraph are either wrong, speculative or otherwise irrelevant to the present application.
- v. *Fifthly*, the submission at [28] of the AS should be rejected. It does not follow that because Network Ten has made an application for security for costs, an order for a stay should be made to “save the First Respondent’s lawyers from incurring unnecessary costs on enforcement...in the event that the Applicant is ultimately successful in the Appeal”. Apart from the fact that Mr Lehrmann is impecunious and any costs order is unlikely to be satisfied, the application for security is intended to cover the costs that are to be incurred in responding to the appeal. It has nothing to do with the costs that have been, and will continue to be, incurred in enforcing the Cost Order.
- vi. *Sixthly*, the submissions at AS, [29] do not support the grant of a stay. The proposed appeal is from findings of fact made in a civil trial. Article 14 of the ICCPR is not part of Australian domestic law and art 14(5), in any event, is concerned with criminal, not civil proceedings.

vii. *Seventhly*, the submissions at AS, [30] are confused. They do not afford a ground for a stay that is independent from the principles addressed above.

26 September 2024

M J COLLINS

T SENIOR

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