Federal Court of Australia

Lehrmann v Network Ten Pty Limited (Cross-claims) [2024] FCA 102

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **LEE J** |
|  |  |
| Date of judgment: | 14 February 2024 |
|  |  |
| Date of publication of reasons: | 19 February 2024 |
|  |  |
| Catchwords: | **DEFAMATION** –cross-claims – collateral dispute concerning scope of indemnity required to be provided by Network Ten Pty Limited (**Network Ten**) to Ms Wilkinson – observations as to duelling relief –whether Network Ten “non-associated third party payer” – whether costs incurred in defending defamation proceeding were reasonably incurred within meaning of indemnity – where differences in interests sought to be protected in defamation proceeding – where reasonable to obtain separate legal representation – declaratory relief – consideration of relevant principles – extent of costs recoverable pursuant to indemnity deferred until judgment in defamation proceeding – orders made |
|  |  |
| Legislation: | *Federal Court of Australia Act 1976* (Cth) Pt VB  *Defamation Act 2005* (NSW), ss 30, 30(1)(c)  *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), s 5(1)(b)(ii)  *Legal Profession Uniform Law* (NSW), ss 171(1), 171(1)(c), 198(1), 198(6), 198(7) |
|  |  |
| Cases cited: | *Beau Timothy John Hartnett trading as Hartnett Lawyers v Anthony Robert Bell as Executor of the Estate of the late Mabel Dawn Deakin-Bell* [2023] NSWCA 244  *Matheson Property Group Pty Ltd (Trustee) v Virgin Australia Holdings Limited (No 3)* [2023] FCA 1329  *National Australia Bank Limited v Nautilus Insurance Pte Limited (No. 2)* [2019] FCA 1543; (2019) 377 ALR 627  *National Roads and Motorists’ Association v Whitlam* [2007] NSWCA 81; (2007) 25 ACLC 688  *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223  *Wilkinson v Network Ten Pty Ltd* [2023] NSWSC 1438 |
|  |  |
|  | Julius Stone, *Legal System and Lawyers’ Reasonings* (Stanford University Press, 1964) |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 58 |
|  |  |
| Date of hearing: | 13–14 February 2024 |
|  |  |
| Counsel for the cross-claimant: | Mr M Elliott SC with Mr D Klineberg |
|  |  |
| Solicitor for the cross-claimant: | Gillis Delaney Lawyers |
|  |  |
| Counsel for the cross-respondent: | Mr R Dick SC with Ms Z Graus |
|  |  |
| Solicitor for the cross-respondent: | Baker & McKenzie |
|  |  |
| Counsel for the applicant: | Mr D Helvadjian |
|  |  |
| Solicitor for the applicant: | Mark O’Brien Legal |
|  |  |
| Counsel for the first respondent: | Mr T Senior |
|  |  |
| Solicitor for the first respondent: | Thomson Geer Lawyers |
|  |  |
| Counsel for the second respondent: | Ms S Chrysanthou SC |
|  |  |
| Solicitor for the second respondent: | Gillis Delaney Lawyers |
|  |  |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 103 of 2023 |
|  | | |
| BETWEEN: | BRUCE LEHRMANN  Applicant | |
| AND: | NETWORK TEN PTY LIMITED ACN 052 515 250  First Respondent  LISA WILKINSON  Second Respondent | |
|  |  | |
| AND BETWEEN: | LISA WILKINSON  Cross-claimant | |
| AND: | NETWORK TEN PTY LIMITED ACN 052 515 250  Cross-respondent | |

|  |  |
| --- | --- |
| order made by: | LEE J |
| DATE OF ORDER: | 14 FEBRUARY 2024 |

THE COURT ORDERS THAT:

1. The relief specified in prayers 1 and 2 of the cross-claim filed by Network Ten Pty Limited (**Network Ten**) on 20 December 2023 be dismissed.
2. Network Ten pay Ms Wilkinson’s costs of these proceedings initially commenced in the Supreme Court of New South Wales (file no. 2023/332043) and continued as cross-claims filed in these proceedings, save for any costs incurred by reason of or incidental to commencement of the proceedings in the Supreme Court of New South Wales (rather than by way of cross-claim in these proceedings), and such costs be paid on the ordinary basis.
3. Prayer 2 of the cross-claim filed by Ms Wilkinson on 5 December 2023 seeking such further or other order as the Court thinks fit be stood over for further consideration following delivery of reasons in the defamation proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

LEE J:

# A INTRODUCTION

1. Before the Court are cross-claims brought by the second respondent, Ms Lisa Wilkinson, and the first respondent, Network Ten Pty Limited (**Network Ten**) (**cross-claims**) concerning the scope of an indemnity required to be provided by Network Ten to Ms Wilkinson (**indemnity**).
2. In short, Ms Wilkinson seeks a declaration that Network Ten is obliged to indemnify her for legal costs incurred in defending the claim brought against her by Mr Lehrmann in the defamation proceeding (**defamation proceeding**).
3. Network Ten does not dispute that as Ms Wilkinson’s employer, it is obliged to indemnify her for loss occasioned by acts carried out by her in the course of her employment and also for costs reasonably incurred in defending proceedings against her arising from those acts. Network Ten, however, by its cross-claim, seeks vindication of its position that the costs incurred by Ms Wilkinson in defending the defamation proceeding are not costs which have been reasonably incurred, and hence are beyond the scope of the indemnity.
4. I will address the precise nature of the relief sought by Ms Wilkinson and Network Ten later in these reasons, but first, it is necessary to set out some background.
5. The balance of these reasons is otherwise set out under the following headings:

B RELEVANT BACKGROUND

C CURRENT RELIEF

D CRITICAL FACTS

E APPROPRIATE RELIEF

F ORDERS AND COSTS

# B RELEVANT BACKGROUND

1. The proceeding which now constitutes Ms Wilkinson’s cross-claim was initially commenced in the Supreme Court of New South Wales on 19 October 2023 (**NSWSC proceeding**). On 24 November, Rees J, sitting in the Commercial List of the Equity Division of that Court, cross-vested the NSWSC proceeding to this Court pursuant to s 5(1)(b)(ii) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW): see *Wilkinson v Network Ten Pty Ltd* [2023] NSWSC 1438.
2. In those reasons, her Honour set out the relevant background (at [4]–[22]) in terms I gratefully adopt and, for convenience, will set out below:

**Defamation proceedings**

4 On 15 February 2021, Network Ten broadcast an interview conducted by Ms Wilkinson with Brittany Higgins on “The Project.” On 7 February 2023, Bruce Lehrmann commenced defamation proceedings in the Federal Court against Network Ten and Ms Wilkinson.

5 Network Ten contends in its Commercial List Response that, on 8 February 2023, Ms Wilkinson instructed Thomson Geer to appear for her in the defamation proceedings but, on 11 February 2023, instructed Gillis Delaney and Sue Chrysanthou SC instead. Thomson Geer filed a notice of appearance for Ms Wilkinson on 13 February 2023 but Gillis Delaney filed a notice of change of solicitors the next day. Ms Wilkinson’s agent, Nick Fordham, also sent an email to Network Ten, raising the issue of possible separate representation, confirming that Ms Wilkinson had already received advice from Gillis Delaney and Ms Chrysanthou SC, and seeking confirmation that Network Ten would indemnify her for the costs of the proceedings.

6 According to its Commercial List Response, on 15 February 2023, Network Ten replied to Ms Wilkinson, communicating its view that separate legal representation in the defamation proceedings was unnecessary and not in her best interests. Further, “Lisa has elected to pursue her own defence of the proceedings, and she is entitled, *at her own cost*, to do so.”

7 On 1 March 2023, Ms Wilkinson filed a defence in the defamation proceedings. Mr Collinge said he received an email from Network Ten’s solicitors, which stated that Network Ten accepted that Ms Wilkinson was entitled to seek and obtain separate legal representation in the defamation proceedings and Network Ten was obliged to indemnify her in relation to those costs by reference to section 3 of the *Employees Liability Act 1991* (NSW), which relevantly provides:

**Employee not liable where employer also liable**

(1) If an employee commits a tort for which his or her employer is also liable:

…

(b) the employer is liable to indemnify the employee in respect of liability incurred by the employee for the tort (unless the employee is otherwise entitled to an indemnity in respect of that liability).

8 Network Ten said, in effect, that the question of whether it had any liability to indemnify Ms Wilkinson under that section would only arise after judgment, as the section only operated if an employee committed a tort for which their employer was liable, such that an obligation under the section to indemnify may not arise.

9 On 3 March 2023, Gillis Delaney wrote to Thomson Geer, taking issue with Network Ten’s position. Gillis Delaney suggested that the interests of Ms Wilkinson and Network Ten did not coincide. Further, Ms Wilkinson had concerns about Thomson Geer acting for her given the firm’s earlier involvement in advising on matters in connection with Mr Lehrmann and Ms Higgins. Ms Wilkinson was minded to file a cross-claim for indemnity and contribution unless Network Ten confirmed that it would indemnify her for any damages awarded in favour of Mr Lerhmann [*sic*] against her in the proceedings, any costs orders made against her in the proceedings, and would pay her reasonable legal costs of independent representation associated with the proceedings, regardless of the outcome of the proceedings.

10 On 7 March 2023, Network Ten filed its defence in defamation proceedings. Network Ten admitted that it was vicariously liable for the conduct of its employee. Network Ten’s solicitors also replied to Gillis Delaney, confirming indemnity as limited to section 3 of the *Employees Liability Act*.

11 The parties agree that Network Ten then proposed that advice be sought from leading senior counsel, at its expense, as to whether Ms Wilkinson should have separate representation, the cost and expense of which would be borne by Network Ten. On 17 March 2023, Ms Wilkinson obtained advice from Bret Walker SC.

12 Mr Collinge said that, as Network Ten was not prepared to acknowledge the existence of an obligation to indemnify Ms Wilkinson in relation to her costs of defending the defamation proceedings other than under section 3 of the *Employees Liability Act*, which was said by Network Ten to only operate in limited circumstances, on 20 March 2023, Ms Wilkinson’s agent sent an email to Network Ten, followed by an email from Gillis Delaney to Network Ten’s solicitors on 22 March 2023 on this subject.

13 By now, Network Ten had appointed Baker & McKenzie to deal with this particular matter. On 24 March 2023, Baker & McKenzie asserted that the appropriate time for reimbursement of Ms Wilkinson’s legal costs would be at the conclusion of the defamation proceedings, once the quantum of the costs could be determined taking into account any costs orders in her favour. Correspondence ensued between Gillis Delaney and Baker & McKenzie continued.

14 On 30 May 2023, Gillis Delaney sent Baker & McKenzie invoices and narrations in respect of the work the subject of the invoices. The legal costs and expenses were $375,728.63. Gillis Delaney explained why Network Ten’s position was said to not be reasonably available, where it served to defeat the purpose of the indemnity, leaving Ms Wilkinson with the burden of having to find the ways and means to fund her defence to a claim to which she had become exposed as an employee. Any subsequent costs orders in the plaintiff’s favour were said to be immaterial where Network Ten would be entitled to receive any such sums recovered under a costs order. Network Ten was asked to pay the costs and expenses save for any amount which it considered to be unreasonable.

15 On 21 June 2023, Network Ten’s solicitor responded, as set out in the Commercial List Response, that its preliminary view was that legal costs over $375,000 was unlikely to be reasonable for the limited steps taken in the proceedings so far. Essential work undertaken on behalf of Ms Wilkinson was said to be unnecessarily duplicative of Network Ten’s work in defending the proceedings. Network Ten’s obligation to indemnify their employee did not extend to funding a parallel and duplicative defence in those proceedings. The level of detail provided in the solicitor’s invoices was said to not allow Network Ten to adequately assess the nature and level of the work undertaken.

16 On 25 September 2023, Gillis Delaney sent Baker & McKenzie further invoices totalling $370,017. Gillis Delaney reduced the costs and expenses sought from the 30 May 2023 request to $353,538.88. Network Ten was asked to pay the legal costs and expenses, save for any amount which it considered unreasonable. Mr Collinge says that it is his view that the work performed was work reasonably undertaken for the purposes of Ms Wilkinson’s defence in the defamation proceedings and that the amounts charged for that work were reasonable.

17 Network Ten notes in its Commercial List Response that the invoice for counsel’s fees was only for work completed until 17 June 2023 (for senior counsel) and 31 July 2023 (for junior counsel). Further, Network Ten noted that Ms Wilkinson has not asserted in any correspondence to Network Ten that she has incurred any actual liability in respect of the defamation proceedings, in the sense that she has paid any of these invoices.

**These proceedings**

18 On 19 October 2023, Ms Wilkinson commenced these proceedings, seeking an order that Network Ten pay her legal costs and expenses as set out in the invoices dated 30 May 2023 and 25 September 2023, or in such other amount as the Court determines. Alternatively, Ms Wilkinson sought damages.

19 Ms Wilkinson contends in the Commercial List Statement that it was an implied term of her employment contract that her employer is liable to indemnify her in respect of any liability which she incurs arising out of or in the course of her employment. As such, the employer is required to indemnify her in respect of any award of damages, any costs order made against her and her reasonable legal costs and other expenses incurred in the defamation proceedings.

20 To this, Network Ten accepts that it is obliged to indemnify their employee “but only insofar as [the employee’s] liability is properly incurred and reasonable in amount” and in accordance with section 3(1)(b) of the *Employees Liability Act* and at general law. Whilst Network Ten accepts that it is obliged to indemnify its employee in respect of any award of damages or costs orders made against her in the defamation proceedings, its obligation to indemnify her for her legal costs and expenses incurred in respect of the proceedings arises at the conclusion of the proceedings and after recovery by the employee of any amounts payable to her under any costs awarded in her favour, and in respect of amounts in fact paid by the employee.

21 Alternatively, Network Ten contends that the obligation to indemnify arises at a time when it is possible for the employer to assess the reasonableness of the employee’s costs. In determining what costs are properly and reasonably incurred, regard must be had to whether the costs are incurred in respect of an issue or issues where the employee’s interests are common with those of the employer in defending the proceedings, and whether there was a duplication of costs that would otherwise already be incurred by the employer. Further, the issue of what costs are properly and reasonably incurred was best determined by the Federal Court at the conclusion of the defamation proceedings.

22 Network Ten also contended, in its Commercial List Response, that by its correspondence it made clear its position that it agreed to indemnify Ms Wilkinson against any damages award or costs order made against her and for legal costs incurred in defending the proceedings to the extent that those costs were properly incurred and reasonable in amount, to the extent that Ms Wilkinson was entitled to an indemnity under section 3 of the *Employees Liability Act* and at general law, noting that the appropriate time for reimbursement would be after completion of the proceedings. Further, Network Ten communicated its view to Ms Wilkinson at the outset that it was not reasonable or necessary for her to obtain separate legal representation and maintains that view, such that the costs incurred by reason of that decision are not reasonably incurred. Nor was Network Ten well positioned to assess the reasonableness of Ms Wilkinson’s costs incurred to date where it had not been provided with a complete record of counsel’s invoices for the same period of time to which the solicitors’ fees related, the invoices did not identify with specificity the tasks to which the entries of time related, and Ms Wilkinson was said to continue to refuse to comply with requests for copies of costs estimates, costs agreements or the curriculum vitae of solicitors working on the matter.

(Emphasis in original).

1. On 24 October 2023, five days after the commencement of the NSWSC proceeding, I conducted a case management hearing in the defamation proceeding. By that time, I had become aware of the commencement of the NSWSC proceeding and, during the case management hearing, made the following comments (T5.8–36; T6.10–16):

HIS HONOUR: … It’s a question of the possibility of undue complication by having aspects of this justiciable controversy bifurcated over two courts. … I’m going to have to make costs orders in these proceedings one way or the other. If the respondents are successful, an issue may well arise as to whether or not it was appropriate for there to be separate representation as between respondents. And that may well affect the costs that are ordered, and whether or not there should be more than one set of adverse costs made against the applicant. Conversely, if the respondents were successful then there may be questions about recovery of costs. That’s not only in relation to prospective adverse costs but I have to give now mandatory consideration, because of section 37M(3) of the *Federal Court of Australia Act* in exercising a discretion as to costs as to the efficiency by which these sort of – the issues in the case are being dealt with. And part of that will be whether or not it’s appropriate to have separate representation. I know nothing of that issue.

Now, it may be completely appropriate. There may be conflicts between the respondents. I’m not expressing any view about that at all. But I would have thought it would have been far more efficient for the cross-claim to be dealt with in the context of these proceedings because I didn’t want there to be a complication of someone saying, “I’ve dealt with issues as to costs” or, “I’ve decided as part of the [implied] jurisdiction of this court” … to restrict the amount of costs that could be recovered as between solicitor and client. All those complications seem to me may well be worked through in respect of separate proceedings. But they just simply would not arise if, as is the case of countless cases that I’ve been involved, these issues are raised by way of cross-claim in these proceedings. …

… it’s often in those circumstances appropriate to, as it were, separately determine the cross-claim until determination of the principal issues. But if it’s the same judge dealing with them, there’s no risk of inconsistent findings. And the judge obviously has already made decisions concerning … what costs are properly recoverable. In any event, I raise if for the parties’ consideration as to the course that they propose to take. But I just want to make sure that there is no risk of complication of these proceedings.

1. It is said that one should resist the temptation to say “I told you so”, but here I cannot: it is plain that issues which have emerged in relation to the cross-claims directly affect issues at play in the defamation proceeding. Indeed, the overlap is such that on 13 February (that is, yesterday), I made an order by consent of all parties that leave be granted to Network Ten and Ms Wilkinson (**cross-claim parties**) to reopen their case in the defamation proceeding, and that evidence adduced in the cross-claims be evidence in the defamation proceeding.
2. Leaving that aside, the relief initially sought by Ms Wilkinson in the NSWSC proceeding, which was commenced by way of summons, was as follows:

1. An order that the defendant pay the plaintiff’s legal costs and expenses incurred in respect of Federal Court of Australia proceeding NSD103/2023, as set out in the invoices dated 30 May 2023 and 25 September 2023, or in such other amount as the Court determines.

2. In the alternative, damages.

3. Such further or other order as the Court deems fit.

4. Costs.

1. On 1 December, when the cross-vested proceeding first came before me, I raised with counsel then appearing on behalf of Ms Wilkinson that I did not understand the nature of the relief that was being sought.
2. As I noted then, it was inapt to seek an order in terms of prayer 1, for two reasons. The *first* is that a plaintiff should not frame a prayer for relief that a defendant “pay” a sum of money by reference to invoices, thus seeking an order akin to specific performance. If such an inappropriately framed order was made and not complied with in its terms, it could theoretically amount to a contempt. The proper relief was either a declaration of a liability by reference to invoices or seeking an order for judgment in a monetary sum (hence, if a judgment sum was not paid, then orthodox enforcement steps could be taken).
3. The *second* and more important reason is that there was no apparent recognition in framing such relief of the issue of whether or not Network Ten is a “non-associated third party payer” within the meaning of the *Legal Profession Uniform Law* (NSW) (**Uniform Law**).
4. This necessitates some explanation.
5. Recently, in *Matheson Property Group Pty Ltd (Trustee) v Virgin Australia Holdings Limited (No 3)* [2023] FCA 1329, I dealt with a collateral dispute brought by way of cross-claim concerning the construction of an indemnity and, specifically, whether it authorised the making of periodic payments. As I indicated then (at [8]), any issue concerning the proper construction of the relevant indemnity cannot be considered in a vacuum. An important part of the relevant context is that liability in relation to the payment of costs incurred as between a solicitor and a client is closely regulated. In particular, I noted then that the Uniform Law provides rights to “third party payers” (defined in s 171(1) as persons who have a legal obligation to pay all or any part of the costs for legal services provided to a client).
6. Relevantly, pursuant to s 198(6) of the Uniform Law, a “non-associated third party payer” (defined in s 171(1)(c) as a third party who owes a legal obligation to a client or another person to pay all or any part of the costs for legal services provided to the client) is entitled to request that the client’s solicitor provide sufficient information to allow the third party payer to consider making an application for a costs assessment. If such an application is made pursuant to s 198(1), then the cost assessment must take place without any money being required to be paid into court on account of legal costs, and the client’s solicitor is prohibited from commencing proceedings to recover its costs until the costs assessment has been completed: s 198(7).
7. As is evident from the background I have set out above (at [7]), prior to the commencement of the cross-claims, Network Ten did not seek an assessment of the costs the subject of the invoices. But subject to applicable time limits, that did not affect its legal right to do so, or alternatively, did not affect the core difficulty which is the scope of Network Ten’s ongoing obligation to pay Ms Wilkinson’s legal costs in defending the defamation proceeding.
8. In any event, what then occurred was an amendment to Ms Wilkinson’s relief, which is now advanced by way of cross-claim in this Court.

# C CURRENT RELIEF

1. As I indicated earlier, there is now duelling declaratory relief. Ms Wilkinson claims:

1. A declaration that the Cross-respondent is obliged to indemnify the Cross-claimant in respect of the costs reasonably incurred or to be incurred by her in respect of her defence of the applicant’s claims against her in this proceeding, with:

(a) the quantum of the costs the subject of that indemnity being, in the absence of agreement, the amount assessed as payable pursuant to an assessment of those costs on a solicitor-client basis conducted pursuant to the Legal Profession Uniform Law (or any appeal from or review of that assessment); and

(b) the Cross-respondent being obliged to pay that amount to or at the direction of the Cross-claimant forthwith upon the amount being so assessed (or upon any appeal from or review of that assessment).

2. Such further or other order as the Court thinks fit.

3. Costs.

1. Network Ten claims:

1. a declaration that any costs incurred by the cross-respondent in respect of issues raised in this proceeding which are not found by the Federal Court of Australia to raise any separate legal interest as between the cross-claimant and the cross-respondent (Common Issues), are not costs reasonably incurred within the meaning of the indemnity owed by the cross-claimant to the cross-respondent;

2. a declaration that the costs incurred by the cross-respondent in defending this proceeding through the engagement of legal representatives separate from those legal representatives engaged by the cross-claimant, are not costs reasonably incurred within the meaning of the indemnity owed by the cross-claimant to the cross-respondent;

3. an order that the quantum of costs incurred by the cross-respondent, in respect of any costs found by the Court to fall within the indemnity, be referred to a costs assessor or registrar of the Court for determination in accordance with the reasons of the Court delivered on the cross-claim; and

4. [t]he cross-respondent pay the costs of the cross-claimant in respect of the cross-claim.

1. During the course of argument, I raised with senior counsel for the cross-claim parties whether or not the declaratory relief sought was the most appropriate way of resolving the underlying controversy, consistently with the overarching purpose in Pt VB of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).
2. As presently framed, the competing relief sought necessitates the determination of the following issues; namely *first*, whether it was reasonable for Ms Wilkinson to retain separate legal representatives; and *secondly*, provided the answer to the first question is in the affirmative, whether or not the legal costs incurred by Ms Wilkinson in defending the defamation proceeding are within the scope of the indemnity.
3. At this point, it is worth referring to a letter sent on 24 March 2023 by the solicitors acting for Network Ten (**Baker & McKenzie**) to the solicitors acting for Ms Wilkinson (**Gillis Delaney**) (Ex X1 (at 1229)), which stated:

We are instructed to confirm that:

1) Network Ten agrees to reimburse Ms Wilkinson for her legal costs of defending the Proceedings to the extent that those costs are properly incurred and reasonable in amount and to the extent required under section 3(1)(b) of the *Employees Liability Act 1991* (NSW) and at general law; and

2) the appropriate time for reimbursement of her legal costs will be at the conclusion of the Proceedings once the quantum of those legal costs can be determined, taking into account any costs orders in Ms Wilkinson's favour.

1. In circumstances where it is clear that the law recognises the existence of an obligation on Network Ten’s part to indemnify Ms Wilkinson in respect of her legal costs of defending the defamation proceeding, it is unsurprising that the parties regarded the terms of the indemnity as expressed in the letter as uncontroversial: see *National Roads and Motorists’ Association v Whitlam* [2007] NSWCA 81; (2007) 25 ACLC 688 (at 702 [85]–[89] per Campbell JA, with whom Beazley JA and Handley AJA agreed).

# D CRITICAL FACTS

1. I considered it may be possible to resolve the issue of whether or not Ms Wilkinson was entitled to retain her own legal representatives on the basis of the differing legal interests that are sought to be advanced by Network Ten and Ms Wilkinson in the defamation proceeding, without the need to descend into the detail of issues arising as to the relationship between Ms Wilkinson and Network Ten which, as the evidence makes clear, has deteriorated markedly.
2. I am satisfied there are differences in the interests sought to be protected in the defamation proceeding, which is evident from a review of the nature of the allegations made by Mr Lehrmann and the defences sought to be deployed by Network Ten and Ms Wilkinson.
3. I will address the two most important.
4. *First*, the initial matters relied upon in aggravation of damages were pleaded in Mr Lehrmann’s statement of claim (at [9]). Those particulars, as is often the case, were supplemented immediately following the filing of the defences, which made it clear that a particular of aggravation relied upon was:

[t]he making on national television by [Ms Wilkinson] on 19 June 2022 of an acceptance speech when awarded a Silver Logie for her interview of Ms Higgins which amounted to an endorsement of the credibility of Ms Higgins, and which in the context of the ACT criminal proceedings brought against [Mr Lehrmann] being listed to be heard before a jury on 27 July 2022, was ill advised, reckless and prejudicial to [Mr Lehrmann’s] right to a fair trial because it destroyed the distinction between an untested allegation and the fact of guilt.

1. Later, it was made clear in further particulars of aggravated damages that those particulars are relied upon in the defamation proceeding against *both* respondents. The present particularisation may be the same (prior to the most recent evidence given), but the underlying conduct of Ms Wilkinson and the conduct of others that can be attributed to Network Ten in relation to the giving of the speech is not identical – indeed it is quite different. Moreover, it is evident that Ms Wilkinson now contends she did not behave improperly because she relied on the express advice of a highly experienced in-house solicitor, Ms Tasha Smithies, Senior Litigation Counsel at Network Ten (who has now given evidence of her reasons why she thought it was appropriate that Ms Wilkinson gave the speech), and upon the broader encouragement of others within Network Ten.
2. *Secondly*, there are two defences to the defamation claim which have been the focus of the hearing, although (as is regrettably customary in defamation cases) a smorgasbord of other defences are pleaded. They are (1) substantial truth; and (2) the statutory qualified privilege defence (see s 30 of the *Defamation Act 2005* (NSW) (**Defamation Act**)).
3. As would already be obvious, the statutory qualified privilege defence has, as its point of departure, the notion that Network Ten and Ms Wilkinson cannot prove that Mr Lehrmann sexually assaulted Ms Higgins. Put another way, if I was to find that Ms Higgins was sexually assaulted by Mr Lehrmann as a matter of substantial truth on the balance of probabilities, then the s 30 defence would be rendered otiose because the respondents would have been successful in resisting Mr Lehrmann’s claim.
4. With that said, to the extent that it becomes necessary to deal with the s 30 defence, this requires a focus on the conduct of *each* of the respondents: that is, the conduct of Network Ten and Ms Wilkinson separately.
5. Section 30 of the Defamation Act provides a defence for the publication of defamatory matter subject to, among other things, the relevant respondent proving their conduct in publishing that matter was reasonable in the circumstances: see s 30(1)(c). As I noted in *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 (at [325]), this criterion of reasonableness is open-textured and value-laden; and when Courts are required to apply such a standard, as Professor Julius Stone observed: “judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case … [Such standards] are predicated on fact-value complexes, not on mere facts”: see *Legal System and Lawyers’ Reasonings* (Stanford University Press, 1964) (at 263–264).
6. It follows that there is a need for the trier of fact to make findings in respect of *each* publisher as to what, in fact, occurred, before turning to the statutory mandate to have regard to all the relevant circumstances in considering whether the conduct of *each* publisher was reasonable.
7. It cannot be suggested that it is unnecessary for me to focus separately on the conduct of Ms Wilkinson and Network Ten in making this evaluative assessment. And, as the evidence has gone on, the more it has become evident as to how Ms Wilkinson seeks to distinguish her role from the role of others within Network Ten as to the investigation and publication of *The Project* programme the subject of the defamation proceeding.
8. I am in the unusual position in this case of having some insight into how the sausage has been made. I have seen, for instance, detailed (and at times colourful) email exchanges between the legal representatives of each respondent, identifying the various ways in which Network Ten and Ms Wilkinson proposed to file their defences and approach the conduct of the litigation more generally. This is to be expected in circumstances where the focus of each of the legal practitioners has been, and will be, on protecting the legal interests, reputation, and commercial interest of their respective clients.
9. This is not a case where Ms Wilkinson acted unthinkingly in retaining separate legal representation. Indeed, it is not an unfair characterisation of Network Ten’s initial approach, when the prospect of separate representation was raised to say, in effect, “we cannot stop you from retaining your own legal representatives, but it will be a matter for you to pay for those representatives”. As is evident from the background I have extracted above (at [7]), that course evolved, albeit accompanied by certain complications, including, unusually, a witness involving herself in the controversy (being a matter upon which Network Ten then placed some significance).
10. The *first* was to condition the cooperation of a witness, Ms Higgins, on the basis that (Ex X1 (at 1172)):

… your client(s) will not offer Lehrmann a payment of damages or a retraction of the defamatory statements or an apology or costs (or any other relief) to settle the civil claims commenced by Lehrmann against your clients.

1. The *second*, and more relevantly for present purposes, was Ms Higgins’ solicitor, Mr Leon Zwier, stating that he held Network Ten’s solicitor, Ms Marlia Saunders, and Dr Matthew Collins KC of counsel in high regard, but then noting (Ex X1 (at 1172)):

Brittany has instructed me not to assist lawyers and Counsel currently retained by Lisa Wilkinson to defend civil claims commenced by Lehrmann against Lisa Wilkinson. I am not prepared to work with Lisa’s current senior Counsel, under any circumstances. And the more Brittany is required to deal with differing lawyers the worse it is for her to manage the civil trial processes to the detriment of all those defending Lehrmann’s civil claims. If Lisa Wilkinson subsequently elects to retain the same lawyers as Ten then, the process will be smoother, more orderly and manageable.

1. These and other relevant matters were the subject of correspondence between the cross-claim parties, and were considered in an opinion given by Mr Bret Walker SC and Mr Patrick George on 17 March 2023 as to the reasonableness of Ms Wilkinson having separate representation (Ex X1 (at 1183)) (**opinion**).
2. The opinion concludes, uncontroversially in my view, that although in a typical case for defamation against a media corporation, the interests of the corporation are closely aligned with the interests of the employee journalist, the differences between Ms Wilkinson’s interests and Network Ten’s interests emerge from the response to the claim for aggravated damages, the affirmative defence under s 30 of the Defamation Act, and the likely differences between Ms Wilkinson and Network Ten in the conduct of the defamation proceeding by which she will be seeking to protect her reputation as the primary objective, whereas Network Ten’s interests will not be likely to do so in the light of the current employment situation.
3. Moreover, as was noted in the opinion, Ms Wilkinson should not have reasonably been expected to retain lawyers in whom she does not repose confidence, having regard to: (a) Dr Collins’ criticism of her conduct and the suggestion that Ms Wilkinson may have committed a serious contempt; and (b) Thomson Geer (as was confirmed in evidence before me) advising *The Australian* in relation to a various articles, including articles concerning Ms Wilkinson. Despite Network Ten placing some emphasis on the representations made upon the instructions of Ms Higgins through her solicitor, this was understandably considered to be immaterial as to whether a party was acting reasonably in retaining counsel of her choice.
4. In these circumstances, it seemed to me plain beyond peradventure that it was reasonable for Ms Wilkinson to engage separate legal representation to protect her separate interests.
5. Following the luncheon adjournment today, senior counsel for Network Ten, Mr Dick SC, indicated the separate representation issue was no longer in dispute and, accordingly, the question now becomes: what is the most appropriate way forward?

# E APPROPRIATE RELIEF

1. When it comes to declaratory relief, issues of jurisdiction, power, and discretion overlap. In exercising federal judicial power, declaratory relief must be directed towards resolving legal controversies between parties with a real interest in the matter, rather than one that is hypothetical.
2. Clearly, there is a real and ongoing dispute between the parties about the extent of Network Ten’s liability to Ms Wilkinson pursuant to the terms of the indemnity, which necessitates resolution, and it is apt for the granting of declaratory relief. With that said, declaratory relief must be certain and is most appropriately granted in circumstances where it is as specific as possible: see *National Australia Bank Limited v Nautilus Insurance Pte Limited (No. 2)* [2019] FCA 1543; (2019) 377 ALR 627 (at 653–654 [106]–[110] per Allsop CJ).
3. Subject to some further submissions which are to be filed, the defamation proceeding has now reached the stage where the vast bulk of any legal costs incurred by Ms Wilkinson have already been incurred and, no doubt, in addition to any invoices rendered for legal services, there will be work in progress and disbursements, which will be the subject of further invoices.
4. As I indicated to the parties yesterday, I consider that I will be in a position to deliver judgment in the defamation proceeding following the receipt of further submissions in either March or, in the light of the necessity to review further submissions (and other commitments), in April this year.
5. There are three possible outcomes in the defamation proceeding: the *first* is that Mr Lehrmann succeeds and may be entitled to all or some of his costs against both Network Ten and Ms Wilkinson; the *second* is a mixed result whereby Mr Lehrmann succeeds against one respondent and not the other; and the *third* is that Mr Lehrmann fails, in which case, no doubt, there will be an application that Mr Lehrmann pay the costs of the respondents.
6. It is fair to say that whatever the result, issues concerning costs may not be straightforward, depending, of course, upon the findings and the outcome of certain defences and the possibility (which always exists in defamation proceedings) of taking into account any offers of compromise or *Calderbank* letters that have been served.
7. For these reasons, when I deliver judgment in the defamation proceeding, I will indicate that I will receive further evidence and submissions in relation to costs.
8. Of course, there is no suggestion the costs recoverable pursuant to the indemnity can be mixed up with the distinct issue as to any costs properly recoverable pursuant to any adverse costs order. The two concepts are entirely separate. But the time at which I consider other costs issues is also the optimal time when some clarity can be obtained as to the extent of any liability Ms Wilkinson has to her solicitors, and it is in that context (by reference to specific legal costs charged) that the ambit of any dispute between the respondents as to what costs are said to have been properly recoverable by Ms Wilkinson pursuant to the indemnity is best resolved.
9. Ordinarily, disputes about the reasonableness of costs incurred as between solicitor and client (including when a “non-associated third party payer” is involved) would be resolved through the costs assessment process provided under the Uniform Law. With that said, it seems to me that the existence of such a regime is not inconsistent with this Court’s implied power to control legal costs incurred in relation to proceedings before the Court.
10. Although in the context of the inherent jurisdiction of the Supreme Court of New South Wales, this topic was the subject of recent discussion by the New South Wales Court of Appeal in *Beau Timothy John Hartnett trading as Hartnett Lawyers v Anthony Robert Bell as Executor of the Estate of the late Mabel Dawn Deakin-Bell* [2023] NSWCA 244. There, Bell CJ (with whom Adamson JA and Griffiths AJA agreed) noted (at [123]–[138]) that the jurisdiction to control costs by a superior court of record involves a broad evaluative judgment informed by the need for the Court to control the charging of legal practitioners using the Court’s processes, which is reflected in the statutes of every Australian State regulating the legal profession, as well as a significant body of case law.
11. I would only add that in the context of proceedings brought in this Court, Pt VB of the FCA Act mandates that the Court act in such a way so as to ensure that the overarching purpose, being the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible, is facilitated. I do not consider (and it has not been suggested) that the *implied* (not inherent) power of the Federal Court means its powers to control costs incurred in proceedings before the Court is necessarily restricted by the assessment process under the Uniform Law.
12. In these circumstances, I have raised with the parties whether the appropriate course after the final extent of Ms Wilkinson’s liability has been ascertained is to appoint a referee to inquire into and prepare a report as to whether specified costs were reasonably incurred, and hence subject to the indemnity. This seems to me the most efficient and cost effective way of fastening upon an appropriate figure. Neither party opposes such a course.
13. Subject to hearing from the parties momentarily, I do not propose to speculate as to the precise questions that may be the subject of such a reference, nor express any views concerning distinguishing between reasonable and unreasonable costs when, for present purposes, it is sufficient I find that it was reasonable for Ms Wilkinson to have engaged separate legal representation.

[Submissions then took place on costs, which are recorded on the transcript].

# F ORDERS AND COSTS

1. Accordingly, and after hearing further submissions today from the parties as to costs, I propose to make the orders recorded above. As to costs, my reasons are sufficiently disclosed on the transcript.

|  |
| --- |
| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee. |

Associate:

Dated: 19 February 2024