FEDERAL COURT OF AUSTRALIA

Hockey v Fairfax Media Publications Pty Limited (No 2) [2015] FCA 750

Citation:	Hockey v Fairfax Media Publications Pty Limited (No 2) [2015] FCA 750
Parties:	**JOSEPH BENEDICT HOCKEY v FAIRFAX MEDIA PUBLICATIONS PTY LIMITED ACN 003 357 720** **JOSEPH BENEDICT HOCKEY v THE AGE COMPANY LIMITED ACN 004 262 702** **JOSEPH BENEDICT HOCKEY v THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LTD ACN 008 394 063**
File numbers:	NSD 489 of 2014 NSD 491 of 2014 NSD 492 of 2014
Judge:	**WHITE J**
Date of judgment:	22 July 2015
Catchwords:	**DEFAMATION** – remedies – whether permanent injunctions should be granted restraining respondents from publishing same or like imputations – whether Uniform Defamation Acts would require applicant to seek leave before suing on future publications – matters of principle relevant to consideration **COSTS** – indemnity costs – application of *Defamation Act 2005* (NSW) s 40 and its counterparts – whether respondents failed unreasonably to make or accept settlement offers

COSTS – exercise of costs discretion under *Federal Court of Australia Act 1976* (Cth) s 43 – multiple proceedings – applicant partly successful in two proceedings, wholly unsuccessful in one – common substratum of fact and law – whether differential costs order should be made – respondents part of same corporate group with common representation – damages assessed as though multiple proceedings constituted a single action

Legislation:

Defamation Act 1974 (NSW) s 48A
Defamation Act 2005 (NSW) ss 23, 40
Defamation Amendment Act 2002 (NSW)
Federal Court of Australia Act 1976 (Cth) s 43
Judiciary Act 1903 (Cth) s 79

Cases cited:

Australian Broadcasting Corporation v O'Neill [2006] HCA 46; (2006) 227 CLR 57
Ahmadi v Fairfax Media Publications Pty Ltd (No 2) [2010] NSWSC 1191
Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2) [2008] FCAFC 107
Buckley v The Herald and Weekly Times Pty Ltd (No 2) [2008] VSC 475
Buckley v The Herald and Weekly Times Pty Ltd [2009] VSCA 118; (2009) 24 VR 129
Carey v Australian Broadcasting Corporation [2012] NSWCA 176; (2012) 84 NSWLR 90
Commissioner of Australian Federal Police v Razzi (No 2) (1991) 101 ALR 425
Cornes v Ten Group Pty Ltd (No 2) [2011] SASC 141
Cretazzo v Lombardi (1975) 13 SASR 4
Davis v Nationwide News Pty Ltd [2008] NSWSC 946
Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd (1993) 26 IPR 261
Grobbelaar v News Group Newspapers Ltd [2002] UKHL

40; [2002] 1 WLR 3024
Haddon v Forsyth (No 2) [2011] NSWSC 693
Higgins v Sinclair [2011] NSWSC 163
Hockey v Fairfax Media Publications Pty Ltd [2015] FCA 652
Holt v TCN Channel Nine Pty Ltd (No 2) [2012] NSWSC 968; (2012) 82 NSWLR 293
Hughes v Western Australian Cricket Association (Inc) [1986] ATPR 40-748
James v Surf Road Nominees Pty Ltd (No 2) [2005] NSWCA 296
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 571
Morosi v Mirror Newspapers Ltd [1977] 2 NSWLR 749
Polias v Ryall [2014] NSWSC 1692
Rothermere v Times Newspapers Ltd [1973] 1 All ER 1013
Royal Society for the Protection of Cruelty to Animals v Davies [2011] NSWSC 1445
Sierocki v Klerek (No 2) [2015] QSC 92
Spautz v Kirby (1989) 21 NSWLR 27
Thiess v TCN Channel Nine Pty Ltd (No 5) [1994] 1 Qd R 156
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Trkulja v Yahoo! Inc LLC (No 2) [2012] VSC 217
Waters v PC Henderson (Australia) Pty Ltd [1994] NSWCA 338; (1994) 254 ALR 328

Date of hearing:	14 July 2015
Place:	Adelaide
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	125

Counsel for the Applicant:	Mr B McClintock SC with Ms S Chrysanthou
Solicitors for the Applicant:	Johnson Winter Slattery
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 489 of 2014**

BETWEEN:	**JOSEPH BENEDICT HOCKEY** **Applicant**
AND:	**FAIRFAX MEDIA PUBLICATIONS PTY LIMITED** **ACN 003 357 720** **Respondent**

JUDGE:	**WHITE J**
DATE OF ORDER:	**22 JULY 2015**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. 1. Judgment is entered for the applicant in the sum of $124,200 inclusive of interest.
2. 2. The applicant's claim for injunctions is dismissed.
3. 3. The respondent is to pay 15% of the applicant's costs of and incidental to the proceedings in Action Nos NSD 489 of 2014, NSD 491 of 2014 and NSD 492 of 2014.
4. 4. The enforcement of Order 3 is stayed once the applicant has recovered 15% of his costs in the three proceedings whether from The Age Company Limited or the present respondent.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 491 of 2014**

BETWEEN:	**JOSEPH BENEDICT HOCKEY** **Applicant**
AND:	**THE AGE COMPANY LIMITED ACN 004 262 702** **Respondent**

JUDGE: **WHITE J**
DATE OF ORDER: **22 JULY 2015**
WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

5. 1. Judgment is entered for the applicant in the sum of $82,800 inclusive of interest.

6. 2. The applicant's claim for injunctions is dismissed.

7. 3. The respondent is to pay 15% of the applicant's costs of and incidental to the proceedings in Action Nos NSD 489 of 2014, NSD 491 of 2014 and NSD 492 of 2014.

8. 4. The enforcement of Order 3 is stayed once the applicant has recovered 15% of his costs in the three proceedings whether from Fairfax Media Publications Pty Limited or the present respondent.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 492 of 2014**

BETWEEN:	**JOSEPH BENEDICT HOCKEY** **Applicant**
AND:	**THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LTD ACN 008 394 063** **Respondent**

JUDGE:	**WHITE J**
DATE OF ORDER:	**22 JULY 2015**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

9. 1. The applicant's claim is dismissed.

10. 2. There be no order as to costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 489 of 2014**

BETWEEN:	**JOSEPH BENEDICT HOCKEY** **Applicant**
AND:	**FAIRFAX MEDIA PUBLICATIONS PTY LIMITED** **ACN 003 357 720** **Respondent**

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 491 of 2014**

BETWEEN:	**JOSEPH BENEDICT HOCKEY** **Applicant**
AND:	**THE AGE COMPANY LIMITED ACN 004 262 702** **Respondent**

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 492 of 2014**

BETWEEN:	**JOSEPH BENEDICT HOCKEY** **Applicant**
AND:	**THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LTD** **ACN 008 394 063** **Respondent**
JUDGE:	**WHITE J**
DATE:	**22 JULY 2015**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

1 1 Mr Hockey alleged that each of the Sydney Morning Herald (the SMH), The Age and The Canberra Times had defamed him by articles and other material they had published on 5 May 2014. His principal claims concerned articles written by Mr Nicholls and Mr Kenny which were published in both print and electronic formats.

2 2 In the judgment delivered on 30 June 2015 (*Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652), I found that each of his claims in respect of those articles failed. I upheld Mr Hockey's claims in respect of three matters only, being the poster by which the SMH had promoted its print edition of 5 May 2014, and two tweets published by The Age. Mr Hockey's claim against The Canberra Times failed altogether.

3 3 I assessed Mr Hockey's damages at $120,000 in respect of the publication of the SMH poster and $80,000 in respect of the two tweets and said that I would hear the parties as to interest, injunctions, costs and the form of the orders.

4 4 These reasons concern those matters. They should be read in conjunction with the principal judgment.

Interest

5 5 The parties were agreed that interest should be allowed at the rate of 3%. In the case of the SMH, I will accordingly include $4,200 for interest in the judgment. In the case of The Age, I will include $2,800 for interest in the judgment.

Injunctions

6 6 In respect of The Age, Mr Hockey sought seven distinct injunctions. Two of these were of a mandatory kind, namely:

> (a) The respondent take all steps available to it to have the first Tweet removed from Twitter;
>
> (b) The respondent take all steps available to it to have the second Tweet removed from Twitter.

7 7 The permanent injunctions which Mr Hockey sought in respect of The Age were to the following effect:

> (i) The respondent be permanently restrained from publishing the first Tweet or any matter to the same effect, of and concerning the applicant;

(ii) The respondent be permanently restrained from publishing the second Tweet or any matter to the same effect, of and concerning the applicant;

(iii) The respondent be permanently restrained from publishing the following imputation or any imputation that does not differ in substance: "Joe Hockey corruptly solicited payments to influence his decisions as Treasurer of the Commonwealth of Australia";

(iv) The respondent be permanently restrained from publishing the following imputation or any imputation that does not differ in substance: "Joe Hockey is corrupt in that he was prepared to accept payments to influence his decisions as Treasurer of the Commonwealth of Australia";

(v) The respondent be permanently restrained from publishing the following imputation or any imputation that does not differ in substance: "Joe Hockey corruptly sells privileged access to himself to a select group of business leaders in return for political donations totalling hundreds of thousands of dollars each year".

8 8 The imputations which Mr Hockey seeks to have restrained by the third and fourth of these permanent injunctions are the imputations which I found to be conveyed by the two Age tweets. The imputation in the proposed fifth injunction is an additional imputation which I found to have been conveyed by the second tweet.

9 9 In respect of the SMH, Mr Hockey sought permanent injunctions in the same terms as those numbered (iii) and (iv) which he sought against The Age. These were the imputations which I found to have been conveyed by the SMH poster.

The mandatory injunctions

10 10 I decline to issue the mandatory injunctions sought by Mr Hockey because they would serve no practical purpose. The unchallenged affidavit of the respondents' solicitor indicates that Mr Coleman, the In-house Legal Advisor to the Fairfax Group of Companies, took steps on 1 July 2015 to have the two tweets found to be defamatory removed permanently from The Age's Twitter account. Mr Coleman confirmed on 10 July 2015 that the removal had been effected and this was confirmed on the same day by Mr Holden, the Editor in Chief of The Age.

11 11 Immediately before the hearing on 14 July 2015, the legal representatives of Mr Hockey drew the attention of counsel for the respondents to two further tweets on the Twitter account of The Age. Mr Hockey had not sued on those tweets. Counsel for The Age then gave an undertaking to the Court that these two additional tweets would be removed by 12 noon on 16 July 2015, at the latest. The Court accepted that undertaking.

12 12 Mr Hockey's application for the mandatory injunctions related only to the two tweets which were the subject of the proceedings. As they have already been removed, the mandatory injunctions sought would serve no purpose.

The permanent injunctions

13 13 Mr Hockey referred to three matters in particular in contending that the permanent injunctions he sought should be issued.

14 14 The first was the judgment in *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40; [2002] 1 WLR 3024. In that case, the House of Lords set aside an award of substantial damages and substituted an award of nominal damages. Lord Bingham of Cornhill held at [27] that the appellant was nevertheless entitled to protection against repetition of the defamatory allegation. Lord Scott of Foscote went further saying at [89]:

> It is normal for success in a defamation action to be accompanied by an injunction restraining the defendant tortfeasor from repeating the defamatory remarks.

15 15 Whatever be the position in England, permanent injunctions restraining a repetition of publication of matters found to be defamatory are not usually issued as a matter of course in this country. The authorities show that injunctions are issued only when some additional factor is evident, usually, an apprehension that the respondent may, by reason of irrationality, defiance, disrespect of the Court's judgment or otherwise, publish allegations similar to those found to be defamatory unless restrained from doing so: *Higgins v Sinclair* [2011] NSWSC 163 at [245]; *Royal Society for the Protection of Cruelty to Animals v Davies* [2011] NSWSC 1445 at [63]-[66]; *Polias v Ryall* [2014] NSWSC 1692 at [99]; *Sierocki v Klerek (No 2)* [2015] QSC 92 at [52]-[53].

16 16 Mr Hockey pointed to two matters which he said justified such an apprehension in his case. The first was that The Age had maintained the tweets on its Twitter account until the delivery of the principal judgment on 30 June 2015. The second was the Court's finding at [411] in the principal judgment that Mr Goodsir, the Editor in Chief of the SMH, had set out to harm him and had "lost objectivity". He submitted that Mr Goodsir's animus towards him is unlikely to have subsided since March 2014, giving rise to the apprehension for which he contended.

17 17 I do not accept either of these submissions. Given that the publisher of The Age took the view that its tweets were not defamatory, it is understandable that it

maintained them on its Twitter account until the Court ruled to the contrary. Further, rather than The Age exhibiting an attitude of defiance, its response since the principal judgment was delivered indicates respect for the Court orders and a willingness to act responsibly.

18 18 In relation to Mr Goodsir, a number of points may be made. First, he is the Editor in Chief of the SMH and not The Age which was the publisher of the tweets. Secondly, although I found in the principal judgment that Mr Goodsir had at the time of publication been actuated by an improper purpose and had lost objectivity, I also found at [399] that his evidence was generally reliable. He did not present as a person who is likely to disrespect the Court's ruling, let alone to repeat conduct which the Court has found to be defamatory.

19 19 It is necessary to keep in mind that the only publication of the SMH found to be defamatory was the poster promoting the articles published in the SMH on 5 May 2014. Of their very nature, posters are a topical and transient form of publication. It is highly improbable, on my assessment, that the SMH would publish another poster with the same content.

20 20 Next, Mr Hockey called in aid s 23 of the *Defamation Act 2005* (NSW) (the 2005 Act) and its interstate and territory counterparts. He submitted that, if the SMH or The Age did publish the defamatory imputation again, he would be subject to the "unfair burden" of having to seek leave of the Court before being able to commence fresh proceedings.

21 21 In my opinion, this submission was based on a misunderstanding of the effect of s 23, which provides:

> If a person has brought defamation proceedings for damages (whether in this jurisdiction or elsewhere) against any person in relation to the publication of any matter, the person cannot bring further defamation proceedings for damages against the same defendant in relation to the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought.

22 22 The purpose of s 23 is obvious on its face. It is to limit the potential for a multiplicity of proceedings when a single publication gives rise to multiple causes of action or when several publications of the same or similar kind give rise to multiple causes of action. In *Spautz v Kirby* (1989) 21 NSWLR 27 at 30, Hunt J spoke of this as the purpose of a predecessor of s 23:

> The requirement that leave be obtained is on its face intended to prevent an abuse of process when separate and successive proceedings are brought against the same defendant in respect of the same matter (as defined).

23 23 Given that purpose, s 23 should not readily be construed as requiring an applicant to obtain leave for a second set of proceedings in respect of causes of action arising from publications occurring after judgment on claims in respect of earlier publications. In a case of that kind, it is improbable that the later publication would satisfy the description of a "publication of the same or like matter" for the purposes of s 23.

24 24 This understanding of s 23 is consistent with that adopted by Kaye J in *Buckley v The Herald and Weekly Times Pty Ltd (No 2)* [2008] VSC 475:

> [13] ... The test postulated by s 23 is not that of likeness between the sets of meanings pleaded and relied upon by the plaintiff. Rather, the relevant test is that of likeness between the articles or publications relied upon by the plaintiff in the two proceedings. Obviously, the imputations pleaded by the plaintiff in each proceeding are relevant, indicating the defamatory meanings which the plaintiff seeks to place on the two sets of publications. However, the imputations pleaded by the plaintiff, and any identity or commonality between them, cannot be determinative of the issue.
>
> [14] The construction of s 23 ... is assisted by reference to the underlying purpose served by s 23. ... [T]he obvious purpose of s 23 is to protect a defendant from being exposed to a multiplicity of proceedings arising out of identical, or substantially similar, publications. In the field of defamation law, the same or similar subject matter may become the subject of a number of different and separate causes of action which, theoretically, may each form the basis of separate proceedings. This consideration was highlighted by the New South Wales Law Reform Commission in its Report on Defamation dated 20 April 1971. As the Commission pointed out in that report, each publication of the same book, leaflet or newspaper gives rise to a multitude of causes of action, each time such a document is distributed to a separate recipient. Further, the same publication may give rise to two or more separate causes of action, where the publication is the basis of both false and true innuendos. It was those considerations which caused the Law Reform Commission to propose, as a solution, that a person should not have an uncontrolled liberty to sue a defendant, whom he has already sued, in respect of the same report, article, speech or other matter. The Commission proposed that a second action, in respect of the same report or document, should not be brought except by leave to the court. That proposal was adopted in s 9(3) of the Defamation Act 1974 (New South Wales). That provision is in identical terms to s 23 of the New South Wales Defamation Act 2005 (New South Wales), which, in turn, is identical to s 23 of the Victorian Act.
>
> [15] That background to the enactment of s 23 is relevant, in that it reinforces my view that, in order that there be a relevant "likeness" for the purposes of s 23, the similarities between the matter sued on in the earlier proceedings, and the matter the subject of the present proceedings, must, in a real sense, be significant and substantial. It is not sufficient that there be some similarity, or common features, between the two sets of publications. Rather, the plain

> terms of the section, its underlying purpose, and its history, all lead to the same conclusion, namely, that in order that the publication in the instant proceeding be considered to be "like" the publication sued on in an earlier proceeding, there must be a real and substantial similarity between the two sets of publications.
>
> (Citations omitted)

On my understanding, the reasons of the Court of Appeal on the appeal from a related decision of Kaye J ([2009] VSCA 118; (2009) 24 VR 129) did not disturb this reasoning.

25 25 Accordingly, I consider that any future publication of the kind postulated by Mr Hockey is likely to be regarded as so separated in time and circumstance from the publication of the SMH poster and the two tweets as not to be regarded as a publication of "the same or like matter" for the purposes of s 23.

26 26 Even if that view of s 23 be wrong, and Mr Hockey would require leave, it would not be an impediment to his commencement of proceedings as it would be open to him to commence the proceedings and to seek the leave for their commencement as part of the relief in the proceedings: *Carey v Australian Broadcasting Corporation* [2012] NSWCA 176; (2012) 84 NSWLR 90.

27 27 For these reasons, the matters advanced by Mr Hockey do not justify the permanent injunctions which he seeks. In addition, I consider that matters of principle make them inappropriate.

28 28 The issues of principle arise from four considerations: first, the injunctions sought by Mr Hockey are not anchored to past events or conduct but would extend to publications concerning his future conduct; secondly, Mr Hockey continues as a member of the Federal Parliament and the holder of an important public office, with the consequence that there is likely to be continuing public interest in conduct by him bearing upon, or related to, the discharge of his public functions; thirdly, the public interest in free speech (*Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; (2006) 227 CLR 57 at [31] and [80]) and in receiving information on government and political matters (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571, 574); and, fourthly, from the undesirability of courts making themselves a form of gateway to be negotiated before the publication of material. In respect of this last consideration, Gummow and Hayne JJ in *O'Neill* spoke at [82] of "the reluctance by the courts of equity to participate in any indirect reinstatement of a licensing system by a method of prior restraint by injunctive order".

29 29 These considerations in combination make inappropriate the restraints sought by Mr Hockey. The possibility that he may, in the future, engage in conduct warranting the imputations which he now wishes to avoid may be remote and entirely hypothetical (as the submissions of the respondents acknowledged) but it should not be ignored. The Court should not place Mr Hockey in any better position than any other member of the Australian community in this respect.

30 30 The appropriateness of the Court exercising restraint before issuing the injunctions sought is exemplified by one of the submissions of Mr Hockey's own counsel in the trial in relation to the first paragraph in the Nicholls article. I referred to this submission at [78] of the principal judgment but, for convenience, will set out again both the first paragraph in the Nicholls article and the submission. The Nicholls article commenced:

> Treasurer Joe Hockey is offering privileged access to a select group including business people and industry lobbyists in return for tens of thousands of dollars in donations to the Liberal Party via a secretive fund-raising body whose activities are not fully disclosed to election funding authorities.

In relation to that paragraph, counsel submitted:

> As I cross-examined the witnesses, your Honour, and put to them, that is a corrupt act. There can't be any doubt about it. If you said to someone, any person who was asked this question, "Look, the Federal Treasurer is offering select and privileged access in return for tens of thousands of dollars of donations to the Liberal Party", that is corruption. There's no question. There can be no question about it.

31 31 The emphasis in counsel's submission was on the characterisation of the access as "select and privileged" and on its relationship with the making of substantial donations to the Liberal Party.

32 32 In the principal judgment at [348] I found that Mr Nicholls' characterisation of the access of members of the North Sydney Forum (the NSF) to Mr Hockey as being "privileged" was not wrong or inappropriate. I rejected the evidence and submissions of Mr Hockey to the contrary. I also found that the Nicholls article did not convey an imputation of corruption for reasons related to readers' understanding of the relationship between the donations and what was being provided. That being so, it would be inappropriate for the Court to issue any injunction which may have the effect of preventing or inhibiting the respondent from publishing material of a like kind.

33 33 Accordingly, Mr Hockey's claims for injunctive relief against the SMH and The Age are refused.

Costs

34 34 The positions with respect to costs for which the parties contended were widely divergent.

35 35 Mr Hockey contended that the SMH and The Age should pay his costs of and incidental to his respective proceedings against them on an indemnity basis or, in the alternative, on a party-party basis and that each party in his proceedings against The Canberra Times bear its own costs. The respondents on the other hand submitted that Mr Hockey should pay to them 60% of the party/party costs which the SMH and The Age had incurred in defending the respective proceedings against them and the whole of the party/party costs of The Canberra Times in defending the proceedings brought against it.

36 36 The power which the Court is exercising with respect to costs is that granted by s 43 of the *Federal Court of Australia Act 1976* (Cth).

37 37 Section 43 vests a wide discretion in the Court with respect to costs as the examples in subs (3) indicate. It is, however, a discretion which must be exercised judicially. The principles bearing upon the exercise of the discretion are well developed. The judgment of Toohey J in *Hughes v Western Australian Cricket Association (Inc)* [1986] ATPR 40-748 at 48,136 is often cited as a starting point:

> 1. Ordinarily, costs follow the event and a successful litigant receives his costs in the absence of special circumstances justifying some other order ...
> 2. Where a litigant had succeeded only upon a portion of his claim, the circumstances may make it reasonable that he bear the expense of litigating that portion upon which he has failed ...
> 3. A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them. In this sense, "issue" does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law. ...

To these may be added the principle that costs are compensatory in nature and not punitive.

38 38 It was common ground that s 79 of the *Judiciary Act 1903* (Cth) requires the Court, in relation to the question of costs, to apply s 40 in the 2005 Act and, to

the extent necessary, its counterparts in the legislation of the other States and Territories. Section 40 provides:

> **40 Costs in defamation proceedings**
>
> (1) In awarding costs in defamation proceedings, the court may have regard to:
>
> (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), and
>
> (b) any other matters that the court considers relevant.
>
> (2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise):
>
> (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff-order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff, or
>
> (b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant-order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.
>
> (3) In this section:
>
> **"settlement offer"** means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made.

39 39 The effect of subs (1) is that, when determining both where the burden of costs should lie and the scale on which they be paid, the Court *may* have regard to the way in which the parties to the proceedings conducted their respective cases as well as to any other relevant matter. Subsection (2) specifies that the Court *must* make orders for indemnity costs in two circumstances, unless the interests of justice require otherwise. Subparagraph (a) relates to proceedings in which a plaintiff is successful, and subpara (b) to proceedings in which a plaintiff is unsuccessful. In each case, the Court must be satisfied that the specified conditions exist before making an order for indemnity costs. Mr Hockey submitted that subpara (a) is engaged in this case.

40 40 It is apparent that s 40 of the 2005 Act is derived from s 48A of the *Defamation Act 1974* (NSW) (the 1974 Act). Section 48A was inserted into the 1974 Act by the *Defamation Amendment Act 2002* (NSW). The Parliamentary Secretary introducing the Bill containing the amendment explained its purpose as being, amongst other things, to

promote "speedy and non-litigious methods of resolving disputes and to avoid protracted litigation wherever possible". The Parliamentary Secretary went on to say:

> As a further incentive to settle defamation proceedings before they reach the courts, the bill provides that costs penalties will apply to an unreasonable failure to resolve a matter.
>
> The normal costs rule is that the successful party recovers costs on a party-party basis. Typically, this amounts to about 60% to 80% of their actual legal costs. Both the Supreme Court and the District Court have a general discretion as to the amount of costs to be paid by parties, including the award of indemnity costs. Indemnity costs are usually awarded where there has been a flagrant breach of procedural rules by the unsuccessful party and can amount to 80% to 90% of actual costs. In practice, indemnity costs are seldom awarded. The Bill adds s 48A to the *Defamation Act* which requires the Court to consider an order for costs on an indemnity basis where it forms the view that there has been an unreasonable failure on the part of either the plaintiff or the defendant to resolve the matter.
>
> For example, a plaintiff would be at risk of an indemnity costs order if he or she were not to accept an offer of correction or apology where the offer was reasonable. A defendant would be at risk of an indemnity costs order were it not to make a settlement offer when it would have been appropriate to do so. There is understandable concern about wealthy parties, whether plaintiffs or defendants, using their deep pockets to wear down opponents of modest means to discourage them from continuing, or indeed even commencing, defamation proceedings for fear of a ruinous costs order.

41 41 Section 40 should be understood as having the same rationale. It can be understood as an encouragement to litigants in defamation proceedings to take sensible and reasonable approaches to settlement of the litigation.

42 42 In the present case the following issues arise under s 40(2)(a):

(1) (i) Was Mr Hockey successful in the defamation proceeding he brought?

(2) (ii) If so, are costs in the proceedings to be awarded to Mr Hockey?

(3) (iii) If so, did the respondents, or any one of them, fail unreasonably to agree to a settlement offer proposed by Mr Hockey?

(4) (iv) Alternatively, did the respondents, or any one of them, fail unreasonably to make a settlement offer?

(5) (v) If yes to either (iii) or (iv), do the interests of justice require a departure from the position that the respondents pay Mr Hockey's costs on an indemnity basis?

Each of these issues will be considered in turn.

Did Mr Hockey bring defamation proceedings successfully?

43 43 It is to be remembered that Mr Hockey brought three separate proceedings. Although the Court ordered that there be a single trial of the three proceedings, and published a single judgment, s 40 should be applied in relation to each.

44 44 Mr Hockey failed altogether in his claim against The Canberra Times. Accordingly, s 40(2)(a) can have no application in relation to those proceedings.

45 45 The respondents submitted that Mr Hockey had not been successful in the proceedings he brought against the SMH and The Age. They emphasised that Mr Hockey succeeded on only one of the publications on which he sued in the proceedings against the SMH and on only two of the publications on which he sued in the proceedings against The Age. They also submitted that the principal focus of each of the three proceedings had been on the publication of the Nicholls and Kenny articles together with their associated headlines and graphics and that Mr Hockey's claims concerning them had failed. They submitted that in these circumstances it could not be said that Mr Hockey satisfied the first requirement in s 40(2)(a), namely, that he had brought proceedings successfully.

46 46 I do not accept that submission. I see no warrant for reading into subs (2)(a) an adjective such as "wholly" or "substantially". Mr Hockey had partial success evidenced by the monetary award to be made in his favour in each proceeding. His failure on significant elements of his claim is relevant to other aspects of the costs claims, but not to the first issue arising under subs (2)(a).

Are costs to be awarded to Mr Hockey?

47 47 This element in subs (2)(a) requires that the Court be satisfied that some order for costs, at least, should be made in favour of a successful applicant. Such an applicant may usually expect such an order but it may not be appropriate in every case. Some applicants may be disentitled to costs, for example, because of their rejection of a rules of court offer or a *Calderbank* offer or because of their conduct in the proceeding (including, perhaps, conduct of the kind to which subs (1) refers).

48 48 As already noted, the respondents submitted that Mr Hockey should not be entitled to any costs. Much of the submissions of the parties were directed to this issue. For the reasons which I will give later in relation to the exercise of the discretion under

s 43 of the Federal Court Act, I consider that a partial order for costs should be made in favour of Mr Hockey. I intend to proceed therefore on the basis that this element of subs (2)(a) is satisfied.

Unreasonable failure to agree to a settlement offer

49 49 The third and fourth issues require attention to the definition of "settlement offer" in s 40(3). That term is defined to mean (relevantly) any *offer to settle the proceedings* made before the proceedings are determined. Thus, s 40(2) operates only in relation to an unreasonable failure to make, or to agree to, an offer of a particular kind, namely, an offer to settle the proceedings. There is no reason for the term "offer to settle the proceedings" to be construed narrowly but, however it is construed, the proposal upon which an applicant relies for the contention that a respondent failed unreasonably to agree to an offer must satisfy that description.

50 50 In *Haddon v Forsyth (No 2)* [2011] NSWSC 693, Simpson J considered at [18]-[19] that an offer before the commencement of proceedings may constitute an offer to settle the proceedings for the purposes of subs (2)(a). I respectfully agree with her Honour's analysis. Much may depend upon the proximity to, and the nature of the relationship between, the offer and the commencement of proceedings but there seems no reason in principle why an offer to settle proceedings foreshadowed by an applicant should not satisfy the description of a settlement offer contained in s 40(3).

51 51 Mr Hockey submitted that letters written by his solicitors to the Fairfax Media Group on 5 and 6 May 2014 respectively were "settlement offers" of the kind contemplated by s 40(3) to which the respondents had failed unreasonably to agree. I referred to these letters at [467] of my reasons in the principal judgment.

52 52 By the first letter, Mr Hockey's solicitors, Johnson Winter and Slattery (JWS) asserted that the Nicholls and Kenny articles published in the SMH, The Age and The Canberra Times were defamatory. The letter continued:

> Mr Hockey is considering commencing proceedings against Fairfax Media in respect of all print and online publications. His attitude is that such proceedings should be a last resort for politicians, used only in the most extreme circumstances. But to suggest, as you clearly do on the front page of three principal Fairfax publications, that the Federal Treasurer is corrupt is one such circumstance.

53 53 The letter then demanded that each newspaper publish an unqualified apology and retraction in a specified form and stated that, failing a satisfactory response by 5.30pm that day, senior counsel would be briefed to draft proceedings.

54 54 Mr Coleman, the Fairfax Media in-house solicitor, responded by letter later that same day, telling JWS that it was not possible to respond in the requested time frame. He went on to say that a considered response to Mr Hockey's complaint would be prepared.

55 55 JWS wrote again on 6 May 2014, referring on this occasion for the first time to the SMH poster. They asserted that any defence of qualified privilege was bound to fail and asked Mr Coleman whether he had instructions to accept service on behalf of the "prospective Fairfax Media defendants".

56 56 It is not necessary to refer to Mr Coleman's response of 6 May 2014 in any detail. It appears on its face to have been a reasoned critique of the assertions made by JWS and concluded with a statement that the apologies demanded by Mr Hockey were not warranted. Further, as noted in the principal judgment, Mr Coleman informed JWS of the respondents' interest in publishing a response from Mr Hockey in the form of an article for publication.

57 57 Mr Hockey submitted that the correspondence from JWS amounted to a settlement offer of the kind contemplated by s 40(3). Counsel acknowledged that there was no express offer but submitted that an offer was "implicit" in the correspondence and that, if it had been accepted by the respondents, it would have given rise to a binding settlement which could have been pleaded in defence by the respondents if Mr Hockey had subsequently issued proceedings.

58 58 Given the objective theory of contract (*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at [40]), the question of whether the correspondence from JWS amounted to an offer of settlement is to be determined by reference to the understanding of a reasonable person in the respondents' position.

59 59 In my opinion, no reasonable person could have understood the correspondence in the way for which Mr Hockey contended. The correspondence does not use the word "offer" or any of its synonyms. Nor does it refer to any "acceptance" by the respondents. There are no identified terms. The correspondence does not contain any of the

indicia of an offer which one would expect to find in correspondence from experienced solicitors intending to make an offer on a client's behalf. Counsel for Mr Hockey was unable to point to any such indicia. A reasonable person receiving the correspondence would have expected that JWS would have been well able, had they intended to convey an offer on their client's instructions, to make that explicit.

60 60 In my opinion, a reasonable person reading the correspondence from JWS would have understood it to have been a letter of demand of a typical kind, namely, a demand for an apology and a retraction with an accompanying reference to the commencement of proceedings with a view to impressing on the recipient the seriousness of the demand and an encouragement to accede to it.

61 61 Accordingly, Mr Hockey's reliance on the correspondence of 5 and 6 May 2014 is misplaced.

62 62 Mr Hockey also sought to rely upon the respondents' failure to respond to offers to compromise each of the three proceedings which he had filed in the Court on 6 August 2014. The respondents acknowledged that they had not made any response to those filed offers.

63 63 It is not necessary to set out the terms of the filed offers. It is sufficient to note that Mr Hockey stated his willingness to compromise his claims by payment to him of sums which well exceeded the amounts ultimately awarded to him together with the respondents' consent to injunctions restraining them from publishing "any statements of and concerning the applicant to the same or similar effect as the imputations particularised in the Statement of Claim". Mr Hockey has not bettered either aspect of those offers.

64 64 Mr Hockey's submission in reliance on the filed offers was as follows:

> Even though the applicant was awarded less than he sought at that time, the Court can still hold that the respondents unreasonably failed to accept these offers for the purposes of s 40 – particularly taking into account the timing of the offers, the strength of the applicant's case, the risks of litigation and the fact that substantial costs would be incurred by the parties from that point forward.

65 65 This submission does not provide a reasoned basis upon which the respondents' failure to accede to excessive offers can be regarded as unreasonable, and no other basis has been identified. It cannot be said to have been unreasonable for the SMH and The Age to refuse to agree to a settlement requiring them to pay damages significantly in

excess of the liability found against them and to consent to injunctions which the Court, following the trial, has refused to issue. Furthermore, Mr Hockey cannot rely upon his success in relation to the two Age tweets on which he succeeded to establish unreasonableness by The Age in refusing to agree to the offer. He had not sued on those tweets at the time the offers were filed on 6 August 2014 (they being added by amendment on 3 November 2014) and his offers of compromise were expressed to be open for acceptance for only 14 days after they were served. In this circumstance, Mr Hockey's offer of 6 August 2014 in respect of The Age cannot be regarded as an offer to settle the claims on which he ultimately succeeded.

66 66 For these reasons I am not satisfied that any of the respondents failed unreasonably to agree to a settlement offer proposed by Mr Hockey.

Absence of offers by the respondents

67 67 Mr Hockey's alternative submission in support of his claim for indemnity costs in respect of the proceedings against the SMH and The Age rested on the circumstance, also acknowledged by the respondents to be the fact, that they had not made any offer to settle the proceedings. He contended that their failure to do so had been unreasonable.

68 68 Mr Hockey submitted that the failure of the SMH and The Age to make a settlement offer should be characterised in this way because the SMH poster and the two tweets by The Age on which he succeeded were "clearly" defamatory, should have been recognised as such, and because it was an aggravating circumstance that the respondents had not apologised.

69 69 As is the case in many areas of the law, the assessment of whether conduct was reasonable or unreasonable is a question of fact to be resolved by regard to all relevant circumstances. Relevant matters bearing on the assessment in circumstances like the present include:

(6) (a) The policy of the law that respondents should make sensible attempts to settle defamation proceedings;

(7) (b) The "obviousness" of the outcome and whether it should have been apparent to the respondent that its defence would fail (*Davis v Nationwide News Pty Ltd* [2008] NSWSC 946 at [30]). The more obvious an applicant's probable success, the more

likely a respondent's failure to make an offer will be regarded as unreasonable. The converse is also true;

(8) (c) When an applicant has sued on multiple publications or has alleged multiple defamatory imputations, the extent to which the applicant did succeed;

(9) (d) The extent to which the claims on which an applicant succeeded were intermingled with other claims on which the applicant failed;

(10) (e) The grounds on which the respondent defended the proceedings and the reasonableness of its assessment of the prospects of success (*Holt v TCN Channel Nine Pty Ltd (No 2)* [2012] NSWSC 968; (2012) 82 NSWLR 293 at [55]-[56];

(11) (f) The narrowness (or otherwise) of the issues to be determined in the proceedings (*Trkulja v Yahoo! Inc LLC (No 2)* [2012] VSC 217 at [27]-[28]);

(12) (g) The matters mentioned in s 40(1), namely, the way in which the respondent conducted its case, including any misuse of the respondent's superior financial position (if that be the case) to hinder the early resolution of the proceedings;

(13) (h) The respondent's response to any reasonable offers of settlement by the applicant;

(14) (i) The applicant's attitude to a potential compromise of the proceedings, to the extent that is known to the respondent (*Cornes v Ten Group Pty Ltd (No 2)* [2011] SASC 141 at [31]-[38]). A respondent's failure to make a settlement offer may not be unreasonable if it is apparent that the applicant is intent on a trial in any event but, conversely, a failure to respond to "an invitation to treat" by an applicant may be pertinent.

70 70 I add that an applicant's success in the litigation will not by itself usually have any significance. It is only one of the circumstances which enlivens the application of s 40(2)(a). Similarly, the mere failure of a respondent to make an offer will not by itself be sufficient. The failure must be unreasonable in the circumstances, and a respondent may well be wrong, without being unreasonable.

71 71 In my opinion, the failure of the SMH and The Age to make offers of settlement cannot be regarded as unreasonable. As already noted, the fact that no offer was made is not sufficient by itself to indicate unreasonableness.

72 72 It is pertinent that Mr Hockey succeeded with respect to only one of the five publications on which he sued the SMH and on only two of the seven publications on which he sued The Age, and that he failed altogether in his claim against The Canberra Times. The pertinence arises from the relationship between the matters on which Mr Hockey succeeded and those on which he failed. The attitude of the respondents cannot be said to have been unreasonable in relation to the latter, making a finding of unreasonableness in relation to the former matters, to which they were related, problematic.

73 73 Mr Hockey submitted that it was inappropriate to measure his success by reference to the total number of publications on which he sued. That is because he had, in substance, sued on the same material however it had been published. There is force in that submission.

74 74 However, it is pertinent in my opinion that it was Mr Hockey's complaints about the publication of the Nicholls and Kenny articles, together with their associated headlines and graphics, which were at the forefront of his case. It was reasonable for the defendants to approach the question of settlement on the same basis. The respondents' position in that respect was vindicated because Mr Hockey's claims with respect to the articles failed altogether. The respondents' success with respect to the Nicholls and Kenny articles makes it difficult, in my opinion, to regard their failure to make a settlement offer as unreasonable.

75 75 This is not a case in which it should have been obvious to the respondents that they would fail. The critical issue for present purposes is whether it should have been apparent to them that the SMH poster and the two tweets were defamatory of Mr Hockey. I consider that the submissions made by the respondents on that topic, although not ultimately successful, were reasonably open to them and reasonably made. The fact that these submissions did not succeed does not of itself indicate unreasonableness.

76 76 If the respondents' sole ground of defence to the claims on which they failed had been qualified privilege, then Mr Hockey's claim of unreasonableness may have had more force. However, as the principal reasons indicate, the respondents defended the matters on other bases.

77 77 Mr Hockey did not contend that any aspect of the manner in which the respondents conducted their defences was pertinent for present purposes.

78 78 Accordingly, Mr Hockey does not establish that the failure by the respondents to make any offer of settlement was unreasonable.

The requirement of the interests of justice

79 79 Strictly speaking, it is not necessary to consider this element as Mr Hockey has not established that s 40(2)(a) should be applied.

80 80 I add, however, that I consider that the interests of justice would have required that the Court not make an order for indemnity costs. There was a single trial of three actions involving to a significant extent a common substratum of fact. Mr Hockey failed altogether in one of those proceedings and had only partial success in the other two. It is obvious in those circumstances that Mr Hockey is not entitled to the whole of his costs. I accept the respondents' submissions that it would be manifestly unfair if, despite the failures of Mr Hockey, he was nevertheless entitled to his costs on an indemnity basis.

Summary on the application of s 40

81 81 In summary, I conclude that the question of costs in relation to the three proceedings should be determined without regard to s 40 of the Defamation Act. The Court should exercise the discretion arising under s 43 of the Federal Court Act in the usual way.

Consideration of the costs discretion

82 82 Mr Hockey's alternative submission that he should recover the whole of his costs in the proceedings against the SMH and The Age on a party/party basis and that there should be no order for costs in respect of the proceedings against The Canberra Times is unrealistic. He did not point to any rational basis on which he should be relieved from paying the costs of The Canberra Times and the submission failed to have regard to his failure on the substantive part of his respective claims against the SMH and The Age.

83 83 On the other hand, the respondents' submission that Mr Hockey should pay 60% of the costs of the SMH and The Age in defending the proceedings against them, despite his partial success in those proceedings, would involve the Court making costs orders of an unusual kind.

84 84 Before providing reasons for those conclusions, it is appropriate to refer to matters of principle bearing on costs apportionments and the liability of partially successful applicants. Earlier, I referred to the principles stated by Toohey J in *Hughes v Western Australian Cricket Association (Inc)* that litigants who succeed only in part may be required to bear the expense of litigating the portion upon which they have failed and that a successful party who has failed on certain issues may not only be deprived of the costs of those issues but in addition ordered to pay the other party's costs of them. These are the principles which the respondents seek to be applied in their favour in the present case.

85 85 The statement of principles by Toohey J were those in the judgment of Bray CJ in *Cretazzo v Lombardi* (1975) 13 SASR 4 at 12:

> A successful party who has failed on certain issues may well not only be deprived of his own costs of those issues, but ordered in addition to pay his opponent's costs of them, and in this context "issue" does not mean a precise issue in the technical pleading sense, but any disputed question of fact or, in my view, of law.

86 86 Jacobs J, who agreed with the reasons of Bray CJ, cautioned (at 16) against the too ready apportionment of costs according to a plaintiff's failure on some issues in the trial:

> [T]rials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestions that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues.

87 87 The caution to which Jacobs J referred has been recognised in many of the subsequent authorities. In *Waters v PC Henderson (Australia) Pty Ltd* [1994] NSWCA 338; (1994) 254 ALR 328 at 330-1, Mahoney JA approved a statement in the *Supreme Court Rules 1970* (NSW) that an apportionment of costs would not be appropriate unless the issues on which the successful plaintiff failed were "clearly dominant or separable":

> Where the proceedings involve multiple issues the application of the rule that costs follow the event may involve hardship where a party succeeds on some issues and yet fails on others. Particularly is this so where, for example, a defendant succeeds on issues that occupied the bulk of the time taken by the proceedings. Nevertheless

> unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed.

88 88 However, courts are now more ready to apportion the costs awarded to a party who succeeds in only some of the claims he or she brings. This may reflect the increasing factual and legal complexity of modern litigation and the multiplicity of factual and legal issues it entails, and the tendency of applicants to pursue multiple claims involving different factual enquiries in the one proceeding. It may also reflect an encouragement by the courts to applicants to exercise some discrimination in their selection of the claims they litigate. It is to be remembered that the inclusion of multiple causes of action in the one proceeding, even if based on a common substratum of fact, adds to the costs of the pleadings, interlocutory activity, preparation and presentation of the evidence at trial as well as of the trial itself. Nowadays, courts are particularly conscious of their role in attempting to control the cost of litigation.

89 89 An example of the Court's recognition of the fairness in having regard on the question of costs to an applicant's failure on certain issues is seen in the joint judgment of Finkelstein and Gordon JJ in *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107:

> [3] We think there is force in the argument that the appellant should not benefit from the usual rule that costs follow the event. For many years the traditional rule has been that the winner (once the winner is properly identified) is entitled to recover his costs of the trial. It sometimes happens that there is a departure from the traditional rule and the costs order takes account of the success of the parties on particular issues. But to date the award of costs on an issue by issue basis has only been accepted in limited cases and then only when the circumstances are exceptional.
>
> [4] This approach is, if we may be permitted to say so, quite unfair. Its effect is that a winner is entitled to all of his costs even if he raises a plethora of issues on which he is unsuccessful. ...
>
> [5] We do not believe there is any need to wait for a change in the Federal Court Rules to adopt an issue by issue approach here. Costs are in the court's discretion. Fairness should dictate how that discretion is to be exercised. So, if an issue by issue approach will produce a result that is fairer than the traditional rule, it should be applied. It is not suggested that such an approach requires a precise arithmetical apportionment of the costs as between the winner and loser of discrete issues. No doubt the assessment will often be rough and ready. But it will have the virtues of both fairness and reasonableness, which are often lacking in the application of the traditional rule.

90 90 Similarly, in *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 272, Gummow, French and Hill JJ said:

> Generally speaking, and notwithstanding the considerations referred to by Toohey J and the other authorities mentioned above, the demands of the community for greater economy and efficiency in the conduct of litigation may properly be reflected in a qualification of the presumption that a successful party is entitled to all its costs.

The Court in *Dodds* endorsed the statement of Wilcox J in *Commissioner of Australian Federal Police v Razzi (No 2)* (1991) 101 ALR 425 at 430 as follows:

> But I do not think that courts should be reluctant to recognise the existence of exceptional cases. In these days of extensive court delays and high legal costs the courts should use all proper means to encourage parties to consider carefully what matters they will put in issue in their litigation. If parties come to realise that they will not necessarily recover the whole of their costs, even though they have unsuccessfully raised a discrete issue, they are likely better to consider whether the raising of that issue is a justifiable course to take.

91 91 The Court of Appeal in New South Wales adopted a similar approach in *James v Surf Road Nominees Pty Ltd (No 2)* [2005] NSWCA 296:

> [34] Where a matter involves multiple issues and the question before the court is whether it should make some other order as to costs other than the order that costs follow the event, a distinction is commonly drawn between cases which involve clearly discrete issues for determination, and those in which all issues are inseparable, or at least sufficiently linked, with respect to the overall disposition of a particular matter. In *Permanent Trustee Aust Ltd v FAI General Insurance Co Ltd* (unreported, NSWSC, 3 June 1998), Hodgson CJ in Eq noted that the obvious examples of a matter involving discrete issues is one where a plaintiff makes separate claims for different relief, or a claim by a plaintiff and a cross-claim by a defendant. Another example is where a respondent is successful in having an appeal against an earlier decision dismissed, but for reasons other than those raised in the respondent's Notice of Contention. This is not to say that so-called "discrete issues", for the purposes of apportioning costs, only exist in cases where there are separate claims made within a single matter. As Toohey J stated in the passage quoted at [33] above, it can relate to "any disputed question of fact or law" before a court on which a party fails, notwithstanding that they are otherwise successful in terms of the ultimate outcome of the matter.

92 92 These are the principles to be applied in the present case.

93 93 It is convenient to consider first the respondents' submission that a costs order should be made in favour of the SMH and The Age. The respondents submitted that such an order was appropriate because the "reality" of the matter was that they had won:

> This case was not about tweets. This case was not about a poster. This case was about a major front page article that raised proper and legitimate questions about the way political funds are raised in the Australian system. It was a case about whether Fairfax was entitled to raise those matters in the interests of the health of the polity and in a way that descended in to a very detailed analysis of the North Sydney Forum and the Treasurer's association with it. This case was about that article and we won on that.

94 94 The respondents referred to two cases in which a successful plaintiff in defamation proceedings had been ordered to pay the costs of the unsuccessful defendant. The first was *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 in which Channel Nine had appealed against an order that it pay the partially successful plaintiff two-thirds of his costs. That appeal was upheld and the Full Court substituted an order that the plaintiff pay one-third of Channel Nine's costs. The Court noted at 208 that there were three discrete areas of dispute at trial and that the plaintiff had succeeded on the third, had been wholly unsuccessful on the second, and had been largely unsuccessful on the first. It also noted that the first and second of these matters were the "real core" of the litigation. In those circumstances, the Court considered that the trial Judge's order as to costs favoured the plaintiff unduly. It continued (at 209):

> A more realistic reflection of the outcome of the litigation would be to require each party to pay the costs of the other to the extent of the latter's success in the action. Approached in this way, we think it a fair assessment of the relative victories of each party to say that the plaintiff succeeded as to one-third of his claims for defamation, whereas the defendant was successful in establishing a defence to the remaining two-thirds. The net result of such an approach would be to oblige the plaintiff to pay one-third of the costs of the defendant TCN 9. Approximate though this may be, it seems to us to be preferable to the alternative of apportioning costs according to the success of either party in relation to particular issues, which would produce a process of taxation that seems to be almost universally deplored.

Thiess accordingly is a case in which a partially successful plaintiff was required to pay part of the unsuccessful defendant's defence because the defendant's success exceeded that of the plaintiff.

95 95 However, *Thiess* can be distinguished from the present case because the real issues there were the defendants' pleas of justification to the multiple defamatory imputations alleged by the plaintiff and, accordingly, a division of the costs by reference to each imputation and the corresponding defence, was more readily available than is the case presently.

96 96 Next, the respondents referred to *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749. That case concerned an appeal from a single judgment in nine defamation actions which had been consolidated and heard together. The defendant had succeeded on a number of issues and succeeded altogether in three of the actions. The Full Court held that the plaintiff should have two-thirds of the general costs of the consolidated action and the defendant those costs solely referrable to the actions in which it had succeeded. On my assessment, *Morosi* provides only limited assistance to the respondents presently as the only costs order made in favour of the successful defendant related to the particular actions on which it had succeeded in any event.

97 97 The respondents also referred to *Ahmadi v Fairfax Media Publications Pty Ltd (No 2)* [2010] NSWSC 1191 in which Rothman J at [14] appeared to leave open the possibility that an order that a partly successful plaintiff pay the costs of substantially successful defendant may be appropriate.

98 98 In support of their submission that they had had substantial success in the trial, the respondents compared the number of publications on which Mr Hockey had sued (15) with the number on which he succeeded (3). That meant that they had succeeded with respect to 80% of the publications sued on.

99 99 I accept Mr Hockey's submission that this is not an appropriate measure by which to assess relative success and failure. That is because the articles on which he had sued in the various publications had been the same so that there was in substance a single failure. However, this distinction is of only limited assistance to Mr Hockey because the three publications upon which he succeeded were also essentially the same, so that in substance he succeeded on only one matter. On this basis, the appropriate comparison would be between the relatively terse statements in the SMH poster and the two tweets of The Age, on the one hand, and the substantial articles, on the other. That difference by itself suggests that the greater focus at trial would have been on the articles rather than on those publications on which Mr Hockey succeeded.

100 100 However, one does not need to resort to analyses of that kind to be satisfied that the principal focus at trial, and the parties' work which preceded it, was directed to the articles. A review of the transcript of Mr Hockey's opening submissions at trial, the evidence at trial and of the closing submissions evidences that that was so. Similarly, Mr Hockey's affidavit containing his evidence in chief indicates that it was the articles about

which he was principally concerned. I accept the respondents' submission that the articles were the real core of the trial.

101 101 Although Mr Hockey's claims with respect to the articles failed wholly, the evidence and submissions concerning them were not wholly discrete from the claims on which he succeeded. This makes an approach of the kind adopted in *Thiess* for which the respondents contended inappropriate. It is more realistic to recognise that Mr Hockey had some success on matters having a common substratum of fact and law. Accordingly, I am not satisfied that this is a case in which an order should be made that Mr Hockey pay some of the respondents' costs. Instead, his lack of success on significant matters should be reflected in a reduction of costs to which he is entitled.

102 102 Mr Hockey submitted that, had he sued only on the SMH poster and the two tweets of The Age, the evidence at trial may have been less, but not materially so. He submitted in this respect that the evidence which concerned the publications by The Canberra Times only was limited and that much of the other evidence bearing upon the respondents' defence of qualified privilege and his plea of malice would have been necessary in any event. That is because the respondents relied upon the same matters in all three actions for the defence of qualified privilege and, further, because much of that evidence also related to the plea of malice.

103 103 I do not consider that his submission should be accepted. The submission assumes, as its premise, that had Mr Hockey sued only on those publications on which he succeeded, the trial would have had much the same shape and content as it in fact had and that each party would have adopted the same or similar resources and energies to the prosecution and defence of the claims concerning the SMH poster and the two tweets of The Age as they did to the articles. I doubt the validity of that premise. In fact, it seems inherently implausible. It is much more likely that, had Mr Hockey pursued only a confined claim, the resources expended in pursuing and defending that claim would have been more focused and confined and that the trial itself would have been more confined. It is improbable that a trial concerning only the SMH poster and the two tweets of The Age would have occupied seven days. Put slightly differently, it was the ambit of the claims made by Mr Hockey which defined, and extended, the battleground of the parties' contest.

104 104 Mr Hockey submitted that there had been four principal issues in the trial: defamatory meaning, qualified privilege, malice, and damages. He contended that

relatively little of the evidence had been directed to the first, and that most of the evidence had been directed to the second and third issues. He then contended that the pleaded matters on which the respondents relied for their defences of qualified privilege in relation to the SMH poster and the two tweets of The Age were substantially the same as those pleaded in relation to the Nicholls and Kenny articles. This had the consequence, he submitted, that the evidence led at trial on both sides would still have been necessary even had he confined his claims to the SMH poster and The Age tweets.

105 105 This analysis has the appearance of a retrospective justification for what occurred at the trial. I am not willing to accept it. It is obvious that had Mr Hockey confined his claims to those on which he succeeded, it would not have been necessary for him or the respondents to have led all the evidence they did at trial. Further, the submission overlooks that the costs of the trial itself, while no doubt significant, are a portion only of the costs which he caused the respondents to incur by pursuing the claims on which he failed. The costs of the respondents in pleading to his claims and preparing for the trial in respect of those issues are not to be underestimated.

106 106 The two tweets of The Age were the subject of only minimal discrete submissions at the trial. Mr Hockey's reliance on those tweets appeared to be in the nature of a "tack on" to his principal claims. That impression is confirmed by the fact that they were added by amendment on 3 November 2014.

107 107 The SMH poster received more attention at trial than the tweets but still only minimally compared with the articles which were at the forefront of Mr Hockey's claims. Mr Hockey's reliance now on the work which would have been necessitated had he sued only on the poster and the two tweets is suggestive of the tail wagging the dog.

108 108 Another difficulty with Mr Hockey's analysis based on his identification of the four issues is that it overlooks significant issues within those broad headings upon which he failed. Significant factual issues of this kind included Mr Hockey's claim that the access which he provided to NSF members was not privileged and Mr Hockey's relationship with the NSF. Significant legal issues included the relevance of the evidence concerning the NSF, as Mr Hockey's objections to that evidence on grounds of relevance failed. Reference may also be made in this respect to the inappropriate submissions of Mr Hockey's counsel concerning the conduct of the respondents' counsel to which I referred at [511]-[513] of the principal judgment. In some respects this may seem a

relatively minor matter in the overall sweep of the trial but assumes significance given that the trial had to proceed in to a further day for a short time because counsel had not been able to complete his submissions on the previous afternoon.

109 109 Mr Hockey submitted that he had succeeded on the issue of malice, this being one of the factual issues at the trial. He submitted that the finding of improper purpose was akin to a finding of fraud and, accordingly, a serious finding so that his success on the issue should be reflected in the costs order.

110 110 These submissions of Mr Hockey overstated the findings in the principal judgment. On the hypothesis that it was necessary to address the issue, I found that only Mr Goodsir, the Editor in Chief of the SMH, had been actuated by an improper purpose. Mr Hockey is correct in contending that that was a significant finding in his favour.

111 111 However, I consider that Mr Hockey's case of malice actually counts against him on the question of costs or, at the very least, neutralises the significance of the finding in his favour. That is because Mr Hockey did not confine his case on malice to Mr Goodsir. His pleading in each proceeding was to the effect that each of Mr Goodsir, Mr Holden and Mr Kenny had been actuated by malice. By the time of trial, Mr Hockey had had the affidavits containing the evidence in chief of the respondents' witnesses for some three months. Despite their foreshadowed evidence, counsel for Mr Hockey did not retreat from the allegation of malice when opening the case at trial. On the contrary, the allegations were repeated and enlarged upon, as the following passages in the opening indicate:

> [A]t the end of the case your Honour will be satisfied that it was an act of petty spite on the part of Messrs Goodsir, the Editor of the Herald, Mr Holden, the Editor of The Age, and Mr Kenny.
>
> ...
>
> Mr Goodsir of the Herald and Mr Holden of The Age and Mr Kenny resented and deeply resented being caught out in that false statement and being forced to apologise. That was what motivated, on our case, the publication that happened on 5 May [which] is set out in the Statement of Claim.
>
> ...
>
> Now, your Honour, it is clear from these communications – and this will be our case – that Mr Kenny, Mr Holden and Mr Goodsir formed an intention on 21 March 2014 to exact revenge on Mr Hockey for what they perceived to be a perverse and unreasonable response to the 21 March article.

112 112 As I noted at [387] of the principal judgment, the initial final submissions of Mr Hockey claimed in addition that Mr Cubby had been actuated by malice.

113 113 Despite the pleading and despite the opening, ultimately Mr Hockey pursued (subject to one qualification) the plea of malice only in respect of Mr Goodsir. It was not pursued at all in relation to Mr Kenny or Mr Cubby, or for that matter Mr Nicholls. Only one question was asked of Mr Holden on the topic, and that was not sufficient to put the case on which counsel had opened. The evidence indicated, and I made the finding at [438], that none of Mr Holden, Mr Nicholls, Mr Kenny or Mr Cubby had been actuated by malice.

114 114 The significance of these matters on the question of costs is that, having made the serious allegations which he did about the improper purpose of these employees of the respondents (see *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013 at 1018) and not succeeded, Mr Hockey should not have the costs of the vindication to which they were entitled.

115 115 Mr Hockey referred to an analysis carried out by a solicitor at JWS of the transcript of the proceedings at trial which was said to show that the discrete references at the trial to the defamatory meaning of the publications other than the SMH poster and the two tweets of The Age comprised only 6.23% of the total number of lines in the transcript. The inference was that the remaining time at trial had concerned, whether in whole or in part, the publications and issues on which Mr Hockey succeeded. In my opinion, this analysis is superficial and unhelpful. The assumptions adopted by the solicitor in making the analysis have not been stated; it pays no regard to the costs incurred by the respondents before trial in addressing the claims of Mr Hockey on which he failed; and it ignores the fact that, on any reasonable view, the principal focus at the trial was on Mr Hockey's allegations concerning the publication of the Nicholls and Kenny articles.

116 116 In my opinion, analyses of the kind carried out by the solicitor should not be encouraged: they constitute an undue expense; are of relatively little assistance in an exercise which is inherently evaluative in nature; and are liable to produce, as it has in this case, a distorted impression.

Conclusion on costs issue

117 117 The award of costs should reflect the reality that Mr Hockey did succeed on some matters and did obtain an award of damages. It should reflect Mr Hockey's failure altogether on the claims against The Canberra Times.

118 118 It is plain that Mr Hockey is not entitled to his costs in full against the SMH and The Age as in those proceedings he failed on the matters which were the real core of his claim. Had Mr Hockey sued only on the SMH poster and the two tweets of The Age, the proceedings would have been much more confined and, possibly, may not have involved a trial at all. Mr Hockey failed on a number of legal and factual issues in the trial.

119 119 The respondents had common legal representation throughout the proceedings. It is obvious that most of the work in defending the proceedings was common to each, as is evidenced by the commonality in their respective pleadings. The Court was not informed of the arrangements concerning costs between the respondents. In these circumstances, it seems appropriate to proceed on the basis that each has a responsibility for a rateable portion, namely, one-third each.

120 120 An important consideration in the making of the costs orders is that, in addition to doing justice between the parties, they should be in a form which will enable their ready quantification. The Court should attempt to avoid, so far as possible, creating a situation in which the quantification of costs will be complex, protracted and, by itself, costly. Orders that Mr Hockey have some portion of his costs of each of the individual proceedings against the SMH and The Age and that he pay the costs of The Canberra Times would not achieve that purpose as it would be almost impossible for a taxing Registrar to separate out the costs attributable to each proceeding.

121 121 In those circumstances, I consider that a practical approach is to assess the costs as though the proceedings constituted a single action. That assessment should then take account of Mr Hockey's limited success in relation to the SMH and The Age and the failure of his claim against The Canberra Times. The end result could be expressed in terms of a percentage amount of the overall costs which Mr Hockey could enforce only against the SMH and The Age. There would then be no order for costs in the proceedings against The Canberra Times. The formal orders reflecting a decision reached in this way may result in some injustice to The Canberra Times but, given that it is a member of the same corporate group as the SMH and The Age, I am inclined to think that that may be more theoretic than real.

122 122 The starting point is that Mr Hockey should not be entitled to his costs in suing The Canberra Times. Those costs may not have been one-third of his overall costs but are likely to have been much more than the nominal amount he suggested. A reduction of

approximately 20% seems appropriate. The intermediate figure of about 80% should then be reduced to take account of Mr Hockey's failure on the matters which were at the core of his claims against the SMH and The Age, including his failure on the identified factual and legal issues. Some further reduction again is appropriate if Mr Hockey is spared from an order that he pay the costs of The Canberra Times.

123 123 On that basis, I consider that an appropriate order is that Mr Hockey recover 15% of his costs in the three proceedings. He should be able to recover those costs against the publishers of the SMH and The Age only. An order should be made staying further enforcement of those orders once Mr Hockey has recovered 15% of his overall costs.

124 124 As indicated earlier, I consider that I can proceed on the basis that the apparent injustice to The Canberra Times in not having a costs order in its favour can be accommodated within the Fairfax Group.

Summary

125 125 For the reasons given above, I make the following orders:

In Action No. 489 of 2014 against Fairfax Media Publications Pty Limited:

(15) (1) Judgment is entered for the applicant in the sum of $124,200 inclusive of interest.

(16) (2) The applicant's claim for injunctions is dismissed.

(17) (3) The respondent is to pay 15% of the applicant's costs of and incidental to the proceedings in Action Nos NSD 489 of 2014, NSD 491 of 2014 and NSD 492 of 2014.

(18) (4) The enforcement of Order 3 is stayed once the applicant has recovered 15% of his costs in the three proceedings whether from The Age Company Limited or the present respondent.

In Action No 491 of 2014 against The Age Company Limited:

(19) (1) Judgment is entered for the applicant in the sum of $82,800 inclusive of interest.

(20) (2) The applicant's claim for injunctions is dismissed.

(21) (3) The respondent is to pay 15% of the applicant's costs of and incidental to the proceedings in Action Nos NSD 489 of 2014, NSD 491 of 2014 and NSD 492 of 2014.

(22) (4) The enforcement of Order 3 is stayed once the applicant has recovered 15% of his costs in the three proceedings whether from Fairfax Media Publications Pty Limited or the present respondent.

In Action No. 492 of 2014 against The Federal Capital Press of Australia Pty Ltd:

(23) (1) The applicant's claim is dismissed.

(24) (2) There be no order as to costs.

I certify that the preceding one hundred and twenty-five (125) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White.

Associate:

Dated: 22 July 2015