

FEDERAL COURT OF AUSTRALIA

Schiff v Nine Network Australia Pty Ltd (No 5) [2023] FCA 753

File number(s): NSD 1086 of 2021

Judgment of: **JACKMAN J**

Date of judgment: 30 June 2023

Catchwords: **PRACTICE AND PROCEDURE** – application for release of security for costs to applicant – where liability is admitted – where the respondents have occasioned delay by their conduct of the litigation – security for costs released

Cases cited: *Schiff v Nine Network Australia Pty Ltd (No 2)* [2022] FCA 1120

Division: General Division

Registry: New South Wales

National Practice Area: Other Federal Jurisdiction

Number of paragraphs: 4

Date of hearing: 30 June 2023

Counsel for the Applicant: Ms S Chrysanthou SC and Mr N Olson

Solicitor for the Applicant: Kennedys (Australasia) Partnership

Counsel for the Respondents: Mr D Sibtain SC and Mr M Lewis

Solicitor for the Respondents: Minter Ellison

ORDERS

NSD 1086 of 2021

BETWEEN: **PETER DAVID SCHIFF**
Applicant

AND: **NINE NETWORK AUSTRALIA PTY LTD ACN 008 685 407**
First Respondent

THE AGE COMPANY PTY LTD
Second Respondent

NICHOLAS MCKENZIE (and others named in the Schedule)
Third Respondent

ORDER MADE BY: **JACKMAN J**

DATE OF ORDER: **30 JUNE 2023**

THE COURT ORDERS THAT:

1. The security for the respondents' costs in the amount of \$210,000 being held in Court pursuant to Order 2 of the Court's Orders of 27 May 2022 be released to the Applicant as directed by the Applicant's solicitors.
2. By 4 pm on 21 August 2023, the parties to give standard discovery in accordance with r 20.14 of the *Federal Court Rules 2011* (Cth) (**Rules**) by each serving verified lists of documents and in accordance with r 20.32 of the Rules, produce electronically documents over which privilege is not claimed.
3. By 4 pm on 21 August 2023, the Applicant to file and serve any affidavits and a list of documents for tender.
4. By 4 pm on 25 September 2023, the Respondents to file and serve any affidavits and a list of documents for tender.
5. By 4 pm on 20 October 2023, the Applicant to file and serve any affidavits and a list of documents for tender in reply.
6. By 4 pm on 27 October 2023, the parties jointly prepare and file a joint court book, both in hard copy and electronically, which:

- (a) as Part A, contains the final version only of the pleadings and any particulars relied upon by the parties and any previous judgments in the matter;
 - (b) as Part B, contains, in chronological order, one paginated copy only of the documents for tender notified by each party (being only documents to which a party proposes to refer to in submissions) and, in this regard, if only part of a document is to be relied upon, only part of the document should be reproduced (additionally, in relation to any email, the email “chain” should not be reproduced but only one copy of each individual email communication should be extracted and then placed in the bundle chronologically by reference to when it was sent; and
 - (c) as Part C, contains the affidavits filed by the parties, to the extent the affidavit refers to a document, a cross reference to Part B of the Court Book.
7. The Court Book contain double-sided printing and, to the extent filed Court documents are reproduced, the Notice of Filing form is to be reproduced at the end of the relevant Court document.
8. The parties to serve objections to affidavits and documents for tender by 4 pm on 6 November 2023.
9. By 4 pm on 13 November 2023, junior counsel briefed to appear at the hearing are directed, pursuant to s 37P(2) of the *Federal Court of Australia Act 1976* (Cth), to confer in person and jointly prepare the following documents:
- (a) a document entitled “Factual and Legal Issues for Determination”, which document identifies each substantive contested factual issue in respect of which the parties consider it is necessary for the Court to make findings and each legal issue the parties require the Court to determine;
 - (b) a Statement of Agreed Facts; and
 - (c) a consolidated list of objections to any affidavit material filed and the proposed rulings to those objections, which should only be taken if the matter the subject of the evidence is bona fide in dispute.
10. By 4 pm 20 December 2023, the parties are to file and serve an outline of opening submissions, with the submissions to be in Times New Roman, 12 font type, are to refer to any authorised report of any cases referred to or cited (or in the absence of an authorised report, any unauthorised report, and the medium neutral citation), and are

not to include footnotes. The submissions are to be cross-referenced to Part B of the Court Book to the extent a document is the subject of reference.

11. By 4 pm on 20 December 2023, the respondents to serve updated admissions on extent of publication in relation to the Broadcast.
12. By 12 pm on 22 December 2023, the parties jointly prepare Part D of the Court Book, which contains all of the documents referred to in Orders 7, 8 and 9 above and opening submissions of each party.
13. By 4 pm on 22 December 2023, the parties are to deliver to the Associate to Justice Jackman Parts A, B, C and D of the Court Book, both in hard copy and electronically.
14. The matter be listed for hearing at **10.15 am on 29 January 2024**, with an estimate of five days.
15. Liberty to apply on 3 days' notice.

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

REASONS FOR JUDGMENT
(REVISED FROM TRANSCRIPT)

JACKMAN J

- 1 The applicant applies for an order that the security for the respondents’ costs in the amount of \$210,000 being held in Court pursuant to order 2 of the Court’s orders of 27 May 2022 be released to the applicant as directed by the applicant’s solicitors.
- 2 Ms Chrysanthou SC, counsel for the applicant, submits that the order is appropriate in circumstances where liability has now been admitted, and where there have been considerable delays of over a year occasioned by the respondents. The applicant already has four substantial costs orders in his favour, and while the figure of \$210,000 was a compromise, it does exceed the costs of registration of a judgment in the United States of America where Mr Schiff resides.
- 3 Mr Sibtain SC, counsel for the respondents, opposes the order and says that it is premature to release the security. Mr Sibtain SC submits that the figure and the provision of security were reached by way of agreement, and it may be that offers of compromise have been made or will be made in the future, a matter which is unable to be addressed at the moment by reason of the privileged nature of those offers. He also draws attention to the fact that in *Schiff v Nine Network Australia Pty Ltd (No 2)* [2022] FCA 1120 the respondents succeeded in establishing that none of the pleaded imputations were conveyed in the newspaper article, in contradistinction to the broadcast.
- 4 In my opinion, it is appropriate that the amount of security for costs now be released. I appreciate that it is conceivable that the respondents may still obtain a favourable costs order which may be in a larger amount than the costs orders already made in favour of the applicant. However, it seems to me that in circumstances where liability is admitted and the respondents have occasioned substantial delay by their conduct of the litigation, the circumstances are now very different from those which obtained when agreement was originally reached on the provision of security for costs. I also take into account that the only tenable basis for an order for security for costs in the present case would be the fact that Mr Schiff resides overseas and that the amount of security that has been provided by way of compromise greatly exceeds the costs of registering a judgment in the United States. In those circumstances, I will make the orders sought by the applicant.

I certify that the preceding four (4) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman .

Associate:

Dated: 5 July 2023

SCHEDULE OF PARTIES

NSD 1086 of 2021

Respondents

Fourth Respondent: CHARLOTTE GRIEVE

Fifth Respondent: JOEL TOZER