

# FEDERAL COURT OF AUSTRALIA

## Winn v Thompson [2024] FCA 358

File number: WAD 104 of 2023

Judgment of: **JACKSON J**

Date of judgment: 12 April 2024

Catchwords: **DEFAMATION** - defence of justification - whether proposed amended defence fails to disclose a reasonable defence - whether proposed amended defence is evasive, ambiguous, or likely to cause prejudice, embarrassment or delay in the proceeding - leave to rely on proposed amended defence refused - respondents given leave to replead

Legislation: *Federal Court of Australia Act 1976* (Cth) s 37M  
*Federal Court Rules 2011* (Cth) r 16.02  
*Defamation Act 2005* (WA) s 25

Cases cited: *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; (2019) 271 FCR 632  
*Brooks v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWSC 1331  
*Gair v Greenwood* [2017] NSWSC 1652  
*Gallagher v Destiny Publications Pty Ltd [No 2]* [2015] WASC 475  
*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125  
*Hayson v John Fairfax Publications Pty Ltd* [2007] NSWCA 376  
*Hunt v Times Newspapers Ltd* [2012] EWHC 110 (QB)  
*Johnson v Miller* (1937) 59 CLR 467  
*Khan v Fairfax Media Publications Pty Limited [No 3]* [2015] WASC 400  
*Rush v Nationwide News Pty Ltd* [2018] FCA 357  
*Seltsam Pty Ltd v McGuinness* [2000] NSWCA 29; (2000) 49 NSWLR 262  
*Wing v The Australian Broadcasting Corporation* [2018] FCA 1340

Division: General Division

Registry:	Western Australia
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	135
Date of hearing:	3 April 2024
Counsel for the Applicant:	Mr R Graham with Mr I Priddis
Solicitor for the Applicant:	Graham & Associates Lawyers
Counsel for the Respondents:	Ms R Young SC
Solicitor for the Respondents:	MinterEllison

# ORDERS

WAD 104 of 2023

**BETWEEN:**            **STEPHEN WINN**  
Applicant

**AND:**                 **HOLLY THOMPSON**  
First Respondent

**FAIRFAX DIGITAL AUSTRALIA & NEW ZEALAND PTY LIMITED**  
Second Respondent

**THE AGE COMPANY PTY LIMITED**  
Third Respondent

**FAIRFAX MEDIA PUBLICATIONS PTY LIMITED**  
Fourth Respondent

**ORDER MADE BY: JACKSON J**

**DATE OF ORDER: 12 APRIL 2024**

## THE COURT ORDERS THAT:

1. Leave to the respondents to rely on the minute of amended defence provided to the Court on 19 February 2024 is refused.
2. By 4.00 pm AWST on 10 May 2024, the respondents must file and serve a further minute of amended defence.
3. The matter is listed for a case management hearing on 23 May 2024 at 9.30 am AWST.

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

## REASONS FOR JUDGMENT

### JACKSON J:

1 These reasons concern an application by the respondents for leave to rely on an amended  
2 defence in a defamation proceeding. The proposed amended defence contains particulars of  
3 what is said to be the substantial truth of the defamatory imputations allegedly conveyed by  
4 the publications in question.

5 The applicant, Professor Winn, opposes leave on the basis that some of the particulars are  
6 impermissibly broad and imprecise, that the respondents have not pleaded sufficient primary  
7 facts to support inferences and conclusions as to the imputations which they plead, and that  
8 certain pleas introduce false issues. Each of these matters are said to mean that the proposed  
9 amended defence offends against the requirements in r 16.02(2)(c), (d) and (e) of the *Federal  
10 Court Rules 2011* (Cth) that a pleading must not be evasive or ambiguous, or be likely to cause  
11 prejudice, embarrassment or delay in the proceeding, or fail to disclose a reasonable defence.

12 For the following reasons, leave to rely on the minute of amended defence will be refused, but  
13 the respondents will have leave to replead.

### The claim and the defence

14 From 2019 to 2022, Professor Winn was the Executive Dean of the School of Education at  
15 Edith Cowan University (ECU).

16 On 19 May 2022 the second, third and fourth respondents (members of the Nine/Fairfax group  
17 of companies) published articles written by the first respondent, a journalist. The articles were  
18 identically worded and will be referred to collectively as the **publication**. The publication was  
19 made available on a number of news websites, including *WA Today*, the *Brisbane Times*,  
20 Melbourne's *The Age* and the *Sydney Morning Herald*.

21 Professor Winn alleges that the publication (which is still online) conveys the imputations that,  
22 as Executive Dean of the School of Education at ECU, he:

- 23 (a) bullied and intimidated staff under his supervision and management;
- 24 (b) created, further or alternatively fostered, a toxic workplace culture of bullying and fear  
25 within the School; and

(c) bullied, intimidated and gaslit staff under his supervision and management, causing staff to feel panicked, anxious, humiliated and afraid.

Professor Winn also alleges that the publication conveyed the imputation that he is a bully.

7 In their defence, the respondents deny that the publication conveys the imputations. Relevant to the present matter, however, is their additional defence, under s 25 of the *Defamation Act 2005* (WA), that each of the pleaded imputations is substantially true. In their defence as filed, the factual basis of the additional defence is set out in a schedule. The present controversy concerns a proposed new schedule (**Schedule**) which contains the particulars of substantial truth on which the respondents seek to rely.

### **The Schedule and Professor Winn's complaints about it**

8 In summary, the Schedule and Professor Winn's submissions about it proceed as follows.

9 First, the Schedule introduces the School of Education at ECU and Professor Winn. These parts are not presently controversial.

#### ***Leadership style***

10 Then, there a section under the heading of Professor Winn's 'leadership style'. This can be broken into four components.

11 The first is allegations that Professor Winn's predecessor as Executive Dean 'established a culture of collegiality, honesty and open communication amongst staff at the School of Education' (para 10). Professor Winn submits that this lacks detail about what Professor Winn's predecessor did to establish such a culture and fails to appraise him of the case he has to meet.

12 The next component concerns what is alleged to be an unwritten policy that Professor Winn adopted when he commenced as Executive Dean, that he would not have any direct communication with staff members below the level of Associate Professor. The effects of that policy are said to be that it made staff members below that level 'feel undervalued and alienated' (para 13(a)) and that it caused Associate Deans to be intermediaries between Professor Winn and all other staff, so that they 'were required to reluctantly deliver bad news to lower-ranking staff members resulting from decisions unilaterally made by' Professor Winn (para 13(b)).

- 13 The third component of this section of the Schedule makes allegations that Professor Winn did not reply to certain emails that were sent by colleagues, both to Professor Winn specifically and to all colleagues (para 14).
- 14 The fourth component of this section is an allegation that, by reason of the above matters, 'staff members at the School of Education considered the Applicant to be distant and unapproachable'. It is said (para 15) that this was 'later evidenced' by matters that occurred at a staff meeting in June 2021, which will be mentioned below.
- 15 Professor Winn submits that in view of the size of the School of Education and the number of interactions he had with staff each day, he cannot know what evidence to subpoena and what witnesses to call to refute the second, third and fourth components just described. An affidavit he affirmed on 23 February 2024 contains evidence that the School had 70 to 80 academic staff members, 29 professional staff members and around 600 casual staff members. That means it would be oppressive, Professor Winn says, to require him to try to answer these particulars, especially when the people who are alleged to have felt undervalued and alienated are not named.
- 16 Professor Winn also says that, since it is not alleged that these matters amount to bullying, intimidation or gaslighting, they are of limited relevance. The conduct alleged could only possibly relate to the imputations that he created or fostered a toxic workplace culture of bullying and fear. And even then, he says, it is insufficient to establish the truth of those matters.
- 17 Professor Winn further submitted, on the basis of his affidavit, that these allegations are demonstrably false. But at the hearing of the application, his counsel correctly accepted that to the extent that his client contends that the allegations made in the Schedule disclosed no reasonable defence, it is not to the point that there might be evidence that contradicts the allegations: see e.g. *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130.
- 18 In light of that concession, I will have no regard to that particular submission, and several similar ones that Professor Winn made, that is, submissions that factual allegations were not true. The affidavit was nevertheless admitted into evidence without objection, on the basis that it was potentially relevant to Professor Winn's submissions that aspects of the proposed amended were embarrassing and prejudiced his preparation for trial. Similarly, submissions

that Professor Winn made to the effect that pleadings of inferences in the proposed amended defence were deficient, because his evidence showed that there were other inferences possible, will not be addressed further. They too merely raise factual disputes that must be determined at trial.

### ***Investigation into honorarium***

19 Then, under the heading just given, the Schedule narrates events in which, it is said, Professor Winn referred a Senior Lecturer, Geoff Lowe, to the ECU Office of Integrity for allegedly failing to disclose an honorarium of \$1,000 (para 24). Dr Lowe is said to have received this from a university in the United States for defraying the costs of students from that university who had visited ECU. Professor Winn did not communicate his concerns to Dr Lowe prior to referring him to the ECU Office of Integrity. It is said that, during the investigation, Dr Lowe felt intimidated and afraid that he would lose his job.

20 It is said that after investigating for five months, the Office of Integrity found that Dr Lowe had no case to answer. But then an Associate Dean, Andy Jones, gave Dr Lowe a letter signed by Professor Winn (and, it is said, rewritten by him from a draft prepared by Dr Jones) 'which referred to a range of obscure University by-laws, stating that Lowe had brought ECU into disrepute, and suggested that Lowe was unprofessional' (para 29(c)).

21 The Schedule alleges that:

- (a) in 'circumstances where the Office of Integrity had cleared Lowe of any wrongdoing, it is to be inferred that the Applicant's letter to Lowe was designed to be intimidatory and to instil a sense of fear' (para 30); and
- (b) Professor Winn's conduct towards Dr Lowe 'constituted bullying, gaslighting, and contributed to a culture of fear amongst staff at the School of Education' (para 33).

22 Professor Winn submits that the respondents do not have a copy of the letter they refer to at paragraph 29(c) of the Schedule, so they have an insufficient basis for that paragraph and the plea in paragraph 30. They should not be permitted to obtain the letter by subpoena later. Professor Winn was relying, in that regard, on the general principle that a defendant should be in a position to allege facts sufficient to support a plea of justification at the time the defence is filed, and will not be permitted to await subpoenas and discovery before pleading such facts: see *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [172]-[175] (Wigney J).

23 Further, Professor Winn submits that the conduct pleaded does not amount to bullying, intimidation or gaslighting. Professor Winn says that this section of the Schedule does not allege any conduct by he himself. In any event it is, he says, 'more akin to "reasonable management action" within the meaning of the *Fair Work Act 2009* (Cth) s 789FD'. He submits that the particulars do not support the inferences and conclusions in paragraphs 30 and 33 of the Schedule, which do not arise above speculation and conjecture. Further, to the extent that the allegations about Dr Lowe's honorarium are said to have contributed to a toxic workplace culture of bullying and fear, Professor Winn submits that particulars of how that occurred are missing, especially since the events alleged can be expected to have been private.

### ***DFAT Funding***

24 There is then a section concerning funding that another member of the School of Education, Bill Allen, had received from the Department of Foreign Affairs and Trade (**DFAT**) to provide professional development for teachers from Papua, Indonesia.

25 Essentially, according to the Schedule, a dispute arose between Dr Allen and Professor Winn about whether those funds were to be 'confiscated' from Dr Allen. This is said to have resulted in Professor Winn being informed that the funds could not be confiscated (para 43). But, it is alleged, Professor Winn told Dr Allen, via Dr Jones, that he was required to spend the remaining funds by the end of 2020. Then, in January 2020 when Dr Allen applied to use the remaining funding for a trip to Indonesia where he had been invited to conduct professional development programs, Professor Winn is said to have denied approval.

26 The Schedule alleges, at paragraph 47, that Dr Jones told Dr Allen, in substance, that Professor Winn:

has refused the application because he spoke with ECU's legal and governance department, who informed him that research cannot be conducted in Indonesia without specific approval from the Indonesian Government.

No other details are given of this, for example a date on which it was said or other particulars of the occasion. Professor Winn says that this is impermissibly imprecise.

27 The Schedule alleges that the reason that Professor Winn is said to have given for refusing the application was false, because the planned trip to Indonesia did not include any research, and Dr Allen had previously been approved to travel to Indonesia for the same purpose (para 48). It is then said that it can be inferred from all this:



that this false reason was manufactured to provide a purportedly legitimate basis for refusing the application when in fact the Applicant's decision was designed to make Allen feel as though he was inferior to the Applicant as retribution for:

- (a) Allen's reluctance to have the DFAT funding moved into the centralised pool;
- (b) Allen's involvement of HR in the decision-making process; and
- (c) the Applicant not being permitted to confiscate Allen's funds.

28 It is pleaded, in conclusion to this section, that Professor Winn's conduct in relation to Dr Allen 'constituted bullying, gaslighting, and it contributed to a toxic culture of fear amongst staff at the School of Education' (para 51).

29 Professor Winn submits in any event that the actual conduct ascribed to him is insufficient to amount to bullying, gaslighting or intimidation, and that the facts alleged do not provide sufficient basis for the inferences and conclusions alleged. He submits that the facts pleaded at paragraph 48 do not actually falsify the reasons given in paragraph 47. He repeats the submission that no actual conduct by him is pleaded.

#### ***Emails from Dr Prout***

30 The next section of the Schedule concerns an email that an Honorary Lecturer and Researcher at ECU, Peter Prout, sent to all colleagues on 4 December 2019. The email is characterised as having been sent to offer 'support and encouragement' (para 53). The substance of the email is pleaded as having referred to 'the weariness around campus and that many colleagues were tired and feeling burnt out', as assuring colleagues of Dr Prout's 'support and care', and as encouraging colleagues 'to not despair, but rather honour one another with care and mutual respect'. It is pleaded that Dr Prout said in substance 'there are teachers and support staff like yourselves, passionate and enthusiastic who are adapting and rising above the negativity and toxicity in many workplaces to carry on inspiring one another and the kids they teach' (para 54).

31 The Schedule alleges that Dr Prout did not receive a response to this email from Professor Winn, and nor did Professor Winn make any effort to 'to contact staff to seek feedback about Prout's email of 4 December 2019 or offer support to staff' (para 55).

32 Professor Winn submits that the latter allegation, of a failure to offer support to staff, is a vague assertion and to answer it, he would need to give evidence of every action he took in order to support staff during his tenure as Executive Dean, which would be oppressive.

33 The Schedule also alleges that on 9 September 2020, Dr Prout tried to organise a meeting with Professor Winn to discuss the issues raised in his earlier email to all colleagues, and that Professor Winn did not reply to Dr Prout's email requesting a meeting.

34 It is alleged that Professor Winn's failures to respond to the emails of 4 December 2019 and 9 September 2020 'constituted bullying [and] gaslighting, and ... contributed to a toxic culture of fear amongst staff at the School of Education' (para 57A).

35 Professor Winn submits that his conduct in not responding to those two emails is 'self-evidently not capable of amounting to bullying, intimidation or gaslighting', and nor is it capable of establishing that he caused a toxic workplace culture of bullying and fear. He submits that these particulars are embarrassing and disclose no defence.

### ***Refusal to allow Dr Prout to tutor***

36 The next section of the Schedule narrates events under which, it is said, Professor Winn decided not to permit Dr Prout to be one of the tutors for a unit in 2020 about teaching, learning and assessment, even though he had been in previous years. It is alleged that when Dr Allen (who was responsible for the unit) asked Dr Jones whether that was because of Dr Prout's circular email of 4 December 2019, Dr Jones said words to the effect that it very possibly was (para 57C). The Schedule alleges that it is to be inferred that the email was indeed why Professor Winn did not permit Dr Prout to have the tutoring role (para 57D). This is said to have 'constituted bullying and contributed to a toxic culture of fear amongst staff at the School of Education' (para 57E).

37 Professor Winn submits that the conduct relied on is insufficient to amount to bullying, gaslighting or intimidation, and that the particulars do not support the inferences pleaded in paragraphs 57D and 57E. He also submits that the inference pleaded does not rise above speculation and conjecture.

### ***Staff survey***

38 The Schedule then narrates the conduct of a survey of staff at the School of Education in September 2020 and the results of the survey. The tenor of the allegations is that staff satisfaction, as reflected in a range of metrics, had dropped significantly since the last time a similar survey was conducted, in 2018 (under Professor Winn's predecessor). The metrics did not directly concern serious matters such as bullying, fear, intimidation or gaslighting. The pleaded conclusion in this section is that, given that Professor Winn took over from his

predecessor in early 2019, it is to be inferred that the poor survey results are 'predominantly attributable' to him (para 66).

39 Professor Winn submits that it would be oppressive to require a forensic examination of the survey results where the respondents' 'pleaded case does not rise above a possibility'. From the oral submissions made on his behalf, this seems to be a criticism of the inference just mentioned, since there could be all manner of reasons why there were inferior survey results in 2020 (if that is indeed what they were).

### *Events following the survey*

40 The next section of the Schedule pleads that, after the survey, in May 2021, a staff meeting was held to discuss the results. It is alleged that during that meeting, Professor Winn sat in the corner of the room on his laptop, and did not speak. His personal assistant is alleged to have stood in front of staff and said that if the staff had any questions, they could direct them to the personal assistant (para 68). Professor Winn submits that this is insufficient to amount to bullying, gaslighting or the creation or fostering of a toxic culture of fear, and discloses no reasonable defence.

41 Another staff meeting is said to have occurred in June 2021. It is not alleged that Professor Winn attended it. It is alleged that (para 71):

[t]here was a view expressed by an overwhelming majority of the staff that attended the June meeting that the Applicant was the biggest reason for the extremely negative survey results within the School of Education because he refused to communicate with most of the staff, and because he had established a toxic culture.

42 Professor Winn submits that this part of the Schedule is hearsay. It is not clear from the Schedule whether the respondents allege that the view said to have been expressed at the meeting was correct. How or why the things said at this meeting are relevant is also unclear. The purpose for which the respondents rely on the views expressed at the meeting should be made clear.

### *Three specific decisions*

43 Particulars are then given of three decisions that Professor Winn made that are said to have upset staff members:

(72) In around September to October 2021, Zina Cordery (**Cordery**), who was an IT teacher, was refused approval by the Applicant to appoint a person as a tutor to teach one of her classes. The Applicant's stated basis for refusal was

that the tutor's first degree was in theology, when that reason ought not have disqualified the tutor from being so appointed in the circumstances where the tutor was approved to be a tutor. That refusal upset Cordery and was communicated by Cordery to Allen.

(73) In around late 2021, Eileen Slater (**Slater**), who taught a Masters program, which included about 30 to 40 Bhutanese students, failed a number of the Bhutanese students on the first assignment in the unit because, on her assessment, their English comprehension skills were inadequate. While Slater was on leave, Paula Mildenhall, with the approval of the Applicant, had altered those fail marks to pass marks. This alteration of Slater's marks upset her and was communicated by her to Allen.

(74) In around late 2021, Christine Cunningham (**Cunningham**) was promoted to the position of Assistant to Associate Dean, a role reporting to the Applicant. Despite the promotion she was neither given a salary increase nor a promotion to Associate Professor, in circumstances in which the prior practice had been to do so for a person appointed to that position. The Applicant was empowered to increase her salary or promote her to Associate Professor. His omission to do either upset her and was communicated by her to Allen.

44 It is alleged that this conduct on the part of Professor Winn, along with his conduct at the May 2021 staff meeting, 'constituted bullying, gaslighting, and it contributed to a toxic culture of fear amongst staff at the School of Education' (para 74A).

45 Professor Winn submits again that the particulars given of those three decisions do not disclose any bullying, intimidation or gaslighting behaviour. According to Professor Winn, they raise false issues and disclose no reasonable defence. He also complains about a lack of particulars of the allegations in paragraph 72.

### ***Investigation into the School of Education***

46 Under this heading, the Schedule goes on to recount four occasions in 2021 and 2022 on which written allegations were made that concerned the culture at the School of Education (paras 75-86). One is a statutory declaration which Dr Prout sent to Professor Winn, copied to the Vice-Chancellor of ECU, Steve Chapman, on 14 October 2021. Another is a letter Dr Prout sent to Professor Winn in early 2022 which substantially reiterated the concerns expressed on the October 2021 statutory declaration. It is pleaded that Professor Winn had not responded to the 14 October communication. Another is a response Dr Allen gave to an inquiry and investigation into the culture of the School of Education which Professor Chapman announced in October 2021. The fourth is a letter that the National Tertiary Education Union (NTEU) sent to ECU on 18 May 2022.

47 The Schedule then pleads that on 19 May 2022, Professor Chapman sent an email to all ECU staff which said:

Following a cultural review of the School, the next step is to embark on a significant cultural improvement program. Consequently, both Professor Winn and I were in agreement that it is appropriate he pass the baton on to the next person to take the School forward ... ECU will shortly commence the process of recruiting a new Executive Dean.

48 At paragraph 88, it is pleaded that it 'may be inferred that ECU had concluded, following its cultural review, that the Applicant was responsible for the toxic workplace culture in the School of Education'.

49 It is not necessary to repeat the allegations made in any of the four communications described in [46] above. While the Schedule does not make this clear, the respondents confirmed in oral submissions that they do not seek to rely on any of the communications as evidence of the truth of their contents.

50 In any event, only the first communication is the subject of any specific submission by Professor Winn. The submission is that not replying to Dr Prout's 14 October 2021 communication does not disclose any bullying, intimidatory or gaslighting conduct by Professor Winn, does not establish that he created or fostered a workplace culture of bullying and fear, raises a false issue, and discloses no reasonable defence.

51 More broadly, Professor Winn complains that the statements made on each occasion are hearsay. He also submits that the respondents have failed to particularise 'primary facts' that raise the inference in paragraph 88 'above the level of a possibility', and in oral submissions his counsel also criticised the inference as 'pure conjecture'.

### **Some general submissions by Professor Winn**

52 Counsel for Professor Winn made submissions which acknowledged, correctly, that the particulars of justification given in the Schedule need to be assessed cumulatively (see below). He submitted that even when that is done, 'there remains nothing there'. All that is pleaded, he submitted, is a series of management decisions which may have upset certain people, but display no instance of certain specific conduct referred to in the publication, namely reducing staff to tears and accusing them of lying.

53 One submission Professor Winn makes about the overall structure of the Schedule is that it is in narrative form and not organised by reference to each imputation. It was not clear how

intently Professor Winn pressed that as an independent basis to refuse leave to rely on the proposed amended defence.

54 Submissions were also made comparing the proposed defence to the defence of justification that was struck out in *Wing v The Australian Broadcasting Corporation* [2018] FCA 1340 (*Wing v ABC*) (Rares J). Professor Winn submitted that in that case, and also in this, there were insufficient particulars of the plea of justification and insufficient links between the particulars and the conclusory pleas. He also submitted that in the Full Court decision in which an appeal from *Wing v ABC* was dismissed, *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; (2019) 271 FCR 632, the Court deprecated an attempt by the appellants to broaden the definition of 'espionage', that being the substance of one of the imputations. This, Professor Winn submitted, was similar to the attempt by the respondents to broaden the true meaning of the imputations in this case, to encompass things that do not amount to bullying, intimidation or gaslighting. He submitted that the imputations that he has pleaded are precise, in that they convey that he engaged in bullying and intimidation (and gaslighting) that led staff to feel a certain way, and the respondents seek to meet that by pleading different conduct that falls under a broader concept of bullying and intimidation.

55 Professor Winn's counsel also pointed generally to the prejudice that he says his client would suffer if the matter were to be permitted to proceed on the basis of the Schedule. Professor Winn's affidavit contains evidence to the effect that his physical and mental health has suffered as a result of the publication, and that it has caused him to be effectively unemployable. To require him to devote time, effort and resources to answering such imprecise allegations would cause further prejudice.

56 It is not entirely clear whether Professor Winn opposes the respondents having leave to replead. He submits that the logical explanation for the respondents' failure to plead 'primary facts' as to bullying, gaslighting and intimidating conduct is that, despite having had nine months to come up with sufficient evidence, they have been unable to do so. If that were true, it might follow that they should not be permitted to try again. I will consider leave to replead below.

### **Principles**

57 Although in form this is an application for leave to rely on a minute of proposed pleading, it is no different in substance from a strike out application. The parties agreed that the principles that govern such an application are as discussed in the judgment of Wigney J in *Rush* at [42]-[54]. I respectfully adopt his Honour's discussion, noting that it has been approved by

the Full Court in *Chau Chak Wing* at [132]. It is not necessary to set the passage from *Rush* out in full; it is enough to note the following points of particular relevance to this application:

- (1) The power to strike out pleadings is discretionary and is only to be employed in a clear case. There needs to be a high degree of certainty about what would happen if the proceeding were permitted to go to trial in the ordinary way: *Rush* at [42]-[43].
- (2) The need for caution arises because, in determining a strike out application, it is necessary to make factual evaluations that are difficult to make within the context of an interlocutory hearing pitched at the low evaluative threshold of showing 'respectable arguability': *Rush* at [48], citing *Gallagher v Destiny Publications Pty Ltd [No 2]* [2015] WASC 475 at [33] (Kenneth Martin J).
- (3) The need for caution also arises (*Rush* at [49]-[50]) because, as Hodgson JA said in *Hayson v John Fairfax Publications Pty Ltd* [2007] NSWCA 376 at [20] (Santow and Tobias JJA agreeing):

For my part I would accept that there could be circumstances where particulars fall so far short of being capable of supporting the truth of imputations that it could be justified to strike out imputations. However, the particulars do not themselves indicate the outer limits of what may be proved. They indicate, in effect, topics on which evidence may be led. But the full effect of evidence led within the particulars may be greater than what the bare particulars themselves indicate.

- (4) Also, it is necessary to assess the cumulative effect of the particulars. It would be a mistake to consider each, one by one, and find that they do not disclose a reasonable defence, when in truth that needs to be assessed on the basis of the defence as a whole: *Rush* at [51], citing *Gallagher* at [54]; *Chau Chak Wing* at [135].
- (5) In *Rush* at [46], Wigney J summarised the criteria by which particulars of justification are to be judged as follows:

Particulars provided in support of a defence of justification must generally satisfy two requirements. First, they must be shown to be capable of proving the truth of the defamatory meaning sought to be justified. Second, they must be sufficiently specific and precise to enable a claimant to know the case they are required to meet.

- (6) As to the second of these requirements, the need for precision in a defamation case where the defence of justification is raised is perhaps even more acute than usual. The plaintiff's case will typically go first and they need to be fully on notice at that time of the case to be met: see *Rush* at [53].

58 Professor Winn relied on McCallum J's statement in *Brooks v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWSC 1331 at [11] that a defendant in a defamation case must specify the particulars relied upon with the same precision as in an indictment. However that proposition is to be understood in light of what her Honour went on to say at [12]:

That expression ('with the same precision as in an indictment') is one which is capable of being misunderstood. It is a requirement of specificity rather than one going to the amount of information to be provided. As I observed during argument, the amount of detail in an indictment is often spare but the specificity provided should be such as to put an accused person on notice of the Crown case as to each element of the offence with which he or she is charged.

59 That is consistent with Dixon J's statement in *Johnson v Miller* (1937) 59 CLR 467 at 489 that 'a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge'.

60 To the above principles should be added the observation of Le Miere J in *Khan v Fairfax Media Publications Pty Ltd [No 3]* [2015] WASC 400 at [20] that any pleading of a defence of justification:

must be directed at one or more defamatory meanings, which are clearly identified, and must be based on or supported by particulars which are not only clear but also both relevant to, and sufficient to support, each meaning. It is not sufficient that the particulars merely identify some 'topic' about which some evidence might emerge which would justify the imputation. That is akin to Mr Micawber's faith that 'something will turn up'. It is not a sufficient basis for a plea of justification.

61 As Eady J said in *Hunt v Times Newspapers Ltd* [2012] EWHC 110 (QB) at [24]:

Moreover, each sub-paragraph of particulars of justification should be relevant to and supportive of one or more of the defamatory meanings sought to be justified. Of course, it is right that some material may appear as necessary background, but it must genuinely form part of the narrative for the purpose of achieving that ultimate objective. It is obviously not appropriate to include allegations merely with a view to creating a climate of prejudice.

62 It is these principles that I will apply to the assessment of the submission mentioned above, namely, that the narrative structure of the Schedule is itself prejudicial because it does not proceed by reference to each imputation. For myself, I do not consider that the narrative structure of the particulars of justification is, in itself, deficient: see *Gair v Greenwood* [2017] NSWSC 1652 at [6]-[7]. The true question is: is it clear which particulars relate to which imputation?



### **Is a reasonable defence disclosed?**

63 As has been said, it is necessary to consider the Schedule as a whole. That is especially germane to Professor Winn's submissions that it fails to disclose a reasonable defence. Before addressing his specific complaints one by one, therefore, it is helpful to assess the case the Schedule puts in overview. In doing so, I agree with the tenor of Professor Winn's submissions that it is necessary to focus on the allegations of specific conduct in which he is alleged to have engaged and, perhaps, the reactions of others to that conduct, rather than inferences or conclusions said to arise from those facts. The imputations, inevitably, concern things Professor Winn is said to have done and, in one case, concern his character (as 'a bully').

64 With that focus, the relevant particulars, *if established* at trial, and taken *at their highest*, would lead to the following primary findings of fact:

- (1) Professor Winn refused to communicate with staff members under the level of Associate Professor. That made staff members feel undervalued and alienated. It required Associate Deans to have to reluctantly deliver bad news. Professor Winn did not reply to certain emails, two of which were directed to him specifically, and one of which was sent to all colleagues in relation to the culture of the School of Education. All this behaviour led staff members to consider him to be distant and unapproachable.
- (2) Professor Winn reported Dr Lowe to the ECU Office of Integrity regarding a \$1,000 honorarium, without speaking to Dr Lowe about any concerns first. During the investigation, Dr Lowe felt intimidated, shocked and afraid that he would lose his job. Professor Winn offered him no support and showed no concern for him during the investigation. After Dr Lowe was cleared of any wrongdoing, Professor Winn caused a letter to be sent to him stating that Dr Lowe had brought ECU into disrepute, and suggesting that he was unprofessional. Dr Lowe felt intimidated by Professor Winn.
- (3) Professor Winn disputed Dr Allen's control over the DFAT funding, then amounting to approximately \$4,000, and was informed that he could not confiscate those funds. Subsequently, in late 2019, he told Dr Allen to spend the funding by the end of 2020. He refused an application from Dr Allen to use the funds in January 2020 and gave a false (meaning incorrect) reason for doing so.
- (4) Professor Winn did not reply to Dr Prout's circular email of 4 December 2019 (note that this is one of the emails referred to in (1) above) expressing concern about the culture of the workplace at the School of Education, assuring colleagues of his support and

care, and encouraging them not to despair but to treat each other with care and mutual respect. Professor Winn did not otherwise contact staff about the email or offer support to staff. He did not respond to Dr Prout's subsequent request for a meeting (note that this is also one of the emails referred to in (1) above). A few months after Dr Prout sent his first, circular email, Professor Winn refused permission for Dr Prout to tutor a unit which he had tutored in previous years.

- (5) A decline in staff satisfaction measures occurred during Professor Winn's tenure as Executive Dean, as measured by comparing staff survey results in September 2020 to a similar survey in 2018. Professor Winn was silent and unapproachable at a staff meeting called to discuss the survey results.
- (6) Professor Winn:
  - (a) refused, for a spurious reason, to approve the appointment of a particular person as a tutor to teach an IT class, upsetting the teacher of the class;
  - (b) approved the act of another person to convert fail marks of some 30 to 40 foreign students that had been based on their lack of proficiency in the English language, to pass marks, upsetting the teacher of the relevant program; and
  - (c) contrary to previous practice, did not give a salary increase or promotion to Associate Professor to a person who had been promoted to the position of Assistant to Associate Dean, which upset that person.
- (7) In around October 2021 the Vice-Chancellor of ECU announced an inquiry and investigation into the culture of the School of Education. On 19 May 2022 he sent an email to all ECU staff which said that, following that investigation, a 'significant cultural improvement program' would be undertaken and consequently Professor Winn would be stepping down from the position of Executive Dean.

65 A further relevant background fact which is the subject of one of the particulars is that Professor Winn's predecessor established a culture of collegiality, honesty and open communication amongst staff at the School of Education (para 10). The breadth of that allegation makes it problematic, as discussed below, but for present purposes it may be assumed that it is established. It is relevant to the question of a reasonable defence because, as Professor Winn's submissions point out, the imputation that he created a toxic workplace culture of bullying and fear implies that the culture was not of that kind before he made it so.

66 With hesitation, I conclude that some of the allegations summarised above, when taken together, and after proven by evidence, will be capable, taken at their highest, of establishing the substantial truth of most of the imputations pleaded by Professor Winn.

67 The hesitation arises because it cannot be said that the particulars (assuming them to be proven) present a strong case that the imputations are true. The imputations are strong; they present Professor Winn's behaviour as reprehensible, involving serious misconduct such as bullying, intimidation, and the creation or fostering of a toxic workplace culture. The particulars, if established, may not rise to be so strong.

68 However, I am conscious of the need for caution in strike out applications (which this substantially is), especially those based on no reasonable defence having been disclosed. And I am also conscious that, as explained above, particulars are not evidence; ultimately it is the evidence, with its full context and texture, that must be adjudged as requiring, or not, a characterisation of what occurred as bullying or intimidation.

69 In that regard, there were few submissions made about the meaning of 'bullying'. Senior counsel for the respondents submitted that it could extend to acting in a way where a staff member is not able to approach the Executive Dean in a workplace where such communication would otherwise be expected or required. She also submitted that it could extend to omitting to take acts to deal with genuine staff concerns. I do not accept that either of those concepts by themselves amount to bullying. In the absence of full submissions it would not be appropriate to make a finding at this point about what the term does mean. It is enough to say that it is likely to involve physical or emotional aggression with a view to inflicting fear or physical or psychological harm, or at least with reckless disregard of such consequences.

70 When the story about the investigation of Dr Lowe (paras 24-32) that is told in bare terms in the particulars becomes the subject of evidence, it may deserve such a characterisation. It may be found to have been a distressing attack on Dr Lowe's integrity for no good reason. The same may be said, albeit with less confidence, of the conduct in relation to Dr Allen's honorarium (paras 38-50). It may be found that Professor Winn sought to meddle with the DFAT funds and vindictively withheld approval for their use on the basis of a false reason. And, again with less confidence, it may be said that Professor Winn's refusal to permit Dr Prout to tutor, and his conduct at paragraphs 72 to 74 of the Schedule (described at [43] above), also deserve such a characterisation. All of that is in the context where Professor Winn was the Executive Dean

of the School of Education and therefore in a position where it was open to him to abuse his authority.

71 In that context, and taken together, it is reasonably possible that the conduct alleged, if established, was bullying and intimidatory. And having been repeated, it may thus be the conduct of a bully. It would further follow, if that conclusion were to be reached at trial, that it would be reasonably possible for that conduct, as conduct of the head of the School of Education, to be found to have created or fostered a toxic workplace culture of bullying and fear within the School.

72 I therefore accept (with hesitation) that the Schedule discloses a reasonable case as to the substantial truth of the imputations pleaded at paragraphs 7.1, 7.2 and 7.4 of the statement of claim. The particulars do not fall so far short of being capable of supporting the truth of those imputations that it is justified to refuse leave to rely on them.

73 That reasoning also explains why I conclude that *some* of the allegations disclose a reasonable defence. The conduct actually attributed to Professor Winn that may rise to that level is the conduct summarised at (2), (3), (4) (concerning the refusal to permit Dr Prout to tutor) and (6) above. It is impossible to see how the other matters alleged, if proven, would show the substantial truth of strong imputations of bullying and intimidation. Whether they may nevertheless stay in the particulars as necessary background will be considered below.

74 Also, I have said that the particulars are capable of establishing some of the imputations, and I have not said that is so in relation to the imputation at paragraph 7.3 of the statement of claim. It will be recalled that this imputation is that Professor Winn 'bullied, intimidated and gaslit staff under his supervision and management causing staff to feel panicked, anxious, humiliated and afraid'. So while the allegations of bullying and intimidation of staff are repetitive of some of the other imputations, this paragraph goes further, to refer to the effect of the conduct as causing staff to feel panicked, anxious, humiliated and afraid. It also refers to gaslighting.

75 As to the effect of the conduct on staff, there are allegations that the investigation into the honorarium, and the letter received after it, caused Dr Lowe to be intimidated and afraid that he could lose his job (which amounts to anxiety) and caused him to panic. There is an allegation that Dr Allen felt humiliated by Professor Winn's conduct.

76 But as for gaslighting, senior counsel for the respondents accepted as a reasonable (minimum) definition of gaslighting, 'behaving towards somebody in a way that causes them to doubt the truth of their perceptions': see e.g. *Macquarie Dictionary* (9th ed) 'gaslight'.

77 That kind of behaviour does not appear in the Schedule. Senior counsel submitted that it can be seen in the allegations concerning Dr Lowe, in that Dr Lowe was made to doubt or to second-guess the morality of his conduct with respect to the honorarium. But there is no suggestion in the Schedule that the investigation into the honorarium had that effect or that purpose; to say that it did is conjecture. And even if there was such a suggestion, the actual conduct alleged only amounts to challenging and criticising Dr Lowe's integrity. As upsetting as that might be, without more it does not amount to gaslighting. For similar reasons, I do not accept that the allegations about Professor Winn's conduct in relation to the DFAT funding could amount to gaslighting.

78 The conclusory assertions throughout the Schedule that the alleged conduct was gaslighting therefore have no foundation. Leave to rely on them, that is, leave to rely on paragraphs 33, 51, 57A and 74A of the Schedule, will not be granted. It was common ground that in that circumstance, and subject to resolution of Professor Winn's further objections, there should be leave to replead.

79 Before moving on from this overview, it is necessary to address another thread to Professor Winn's submissions, namely that the primary facts alleged do not support the pleas that various conclusions can be inferred (described above). Professor Winn relied in that regard on the following observations of Spigelman CJ in *Seltsam Pty Ltd v McGuinness* [2000] NSWCA 29; (2000) 49 NSWLR 262 at [87]-[88]:

As Lord Wright put it in a frequently cited passage in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169-170:

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some case the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

The test is whether, on the basis of the primary facts, it is reasonable to draw the inference: see, e.g., *Luxton v Vines* (1952) 85 CLR 352 at 358.

80 However, Spigelman CJ and Lord Wright were describing the role of inference in fact finding based on evidence at trial. While of course the difference between inference on the one hand, and conjecture and speculation on the other must be observed, I accept the submission of senior counsel for the respondents that in the present context the question comes down to that articulated by Wigney J in *Rush*: whether the facts alleged, at their highest, are capable of proving (by inference or otherwise) the truth of the defamatory meaning sought to be justified. For the reasons given, I consider that here they are (save in respect of gaslighting).

81 The correct approach to assessing inference in the present context is, with respect, reflected in the following observations of Rares J in *Wing v ABC* at [101]:

It is one thing to point to facts that, objectively, enable an inference to be drawn when considered with other facts or evidence or the totality of the evidence. Indeed, in a circumstantial case, all of the evidence must be weighed together in order for the tribunal of fact to be satisfied whether or not the case has been proved: *R v Hillier* (2007) 228 CLR 618 at 638 [48] per Gummow, Hayne and Crennan JJ. But it is not reasonable to allege, as the respondents repeatedly have, that the Court will, or should, infer that, for example, in par 57, Dr Wing had conversations with 11 named, living persons in which he said or did something to support what is alleged, when the respondents do not, and cannot, give particulars of any facts or circumstances that occurred in any of those meetings.

82 Here, in contrast to *Wing v ABC*, there are particulars given of things Professor Winn is said to have done on relevant occasions, and with the qualifications expressed above they are, as a matter of logic, capable of supporting the inferences asserted. I will not deny leave to the respondents to rely on the allegations of inference at paragraphs 30, 49 and 57D. I have other concerns, described below, about the parts of the pleading that contain pleas as to inferences in paragraphs 66 and 88, so for reasons given below leave to rely on them will not be given.

83 Beyond that I did not, with respect, find the comparisons between this case and *Wing v ABC* and *Chak Chau Wing* useful. Each case depends on its own facts. While I did consider that the respondents were seeking to extend the definition of 'gaslighting' too far (and also the definition of 'bullying'), the fact that an attempt to do something similar failed in the case of Dr Chau was not especially illuminating.

**Are any particulars evasive, ambiguous or likely to cause prejudice, embarrassment or delay?**

84 Professor Winn submits that at numerous points, the Schedule is insufficiently precise. That lack of precision, he says, means that he is not on fair notice of the case of substantial truth that

he must meet, and that the time and cost associated with preparing to meet that case will be unreasonable and oppressive.

85 It is not possible to evaluate these aspects of Professor Winn's submissions in overview. It is necessary to descend to the detail of each impugned part of the pleading. I will do so by reference to the structure of the description of the Schedule set out above. This part of the reasons will hark back to that part, without detailed cross referencing. To try to rein in the length of this judgment, many of the conclusions will be expressed summarily.

86 The conclusions I have already reached, and the further conclusions I am about to outline, lead inexorably to the result that the respondents cannot be given leave to rely on the proposed amended defence in its current form. So to the extent that I indicate below that leave would have been given to rely on a particular passage, that is relevant to any attempt to replead (also dealt with below). It does not, of course, mean that the respondents could file and rely on some version of the present Schedule that is riddled with deletions of the other, objectionable paragraphs.

### *Leadership style*

87 I agree with Professor Winn that the allegation that his predecessor established a culture of collegiality, honesty and open communication at the School (paragraph 10) is insufficiently precise. It is, on its face, a broad conclusory plea about a state of affairs that (if it did obtain) was likely to have been the result of a large number of individual actions and reactions. It is impossible to know from the plea how it will be proved and, so, how it could be countered.

88 The respondents submit that it is unnecessary to plead (or prove) what Professor Winn's predecessor did to establish that culture or any 'metric for concluding that culture existed'. Whether or not there was such a culture is a matter for trial. If it is difficult to prove such a broad claim, it is the respondents who will suffer the consequences.

89 I do not accept that submission. If facts, matters and things said to lead to the conclusion that the culture existed at the relevant time are not alleged with more particularity, then at trial Professor Winn (and the Court) will be all at sea. It will be impossible to know what, out of a large number of specific facts, are relied on, and what therefore may usefully be the subject of evidence adduced by Professor Winn. He will be prejudiced in the preparation of his response to the defence of substantial truth.

90 The respondents also pointed out that the breadth of the allegation is a consequence of the breadth of the imputation pleaded. Professor Winn has chosen to plead imputations about the culture of the School, and to establish that they are substantially true may require a broad range of evidence. That is so, but it does not detract from the need to put Professor Winn on proper notice of the case he needs to meet, by pleading the material facts, circumstances, matters and things which, it is said, show that the culture of the School was not toxic before he became Executive Dean. Paragraph 10 does not do this but, instead, makes a broad conclusory plea.

91 The respondents will not be given leave to rely on paragraph 10 of the Schedule.

92 I also agree with Professor Winn that paragraph 13 of the Schedule is insufficiently particular. Without knowledge of which persons are said to have felt undervalued and alienated, and which Associate Deans were reluctantly delivering bad news, it will be difficult if not impossible for Professor Winn to prepare to meet those allegations. Leave to rely on that paragraph will not be given, for that reason. Senior counsel for the respondents suggested that the remedy for that concern could be to order further and better particulars. But given the overall outcome of the application, it is preferable to say that leave will not be granted due to a lack of particularity. If the respondents are able to remedy that when they replead, so be it.

93 I do not accept Professor Winn's complaints about paragraph 14 being insufficiently particular. It specifies three emails, and says that Professor Winn did not respond to them. He can address those allegations. His counsel expressed concern over paragraph 14(d), which says that further particulars may be provided after discovery. But to reserve a party's position in that way is commonplace in a pleading and the scope of any discovery, and the appropriateness of any particulars sought to be added after discovery, are matters which the Court can deal with at the appropriate time.

94 I do not agree that paragraph 15 is impermissibly precise and broad. It may appear that way but it is pleaded as a conclusion based on the previous paragraphs (and on things said to have happened at a staff meeting in June 2021). If those paragraphs were pleaded with sufficient particularity, then paragraph 15 could stand.

95 As for the wider question of whether this part of the pleading is sufficiently relevant to the pleas of substantial truth of the imputations, I consider that it falls within the category of necessary background forming part of the narrative for the purpose of justifying the defamatory imputations. As already mentioned, the plea as to the culture of the School under



Professor Winn's predecessor is a necessary prelude to the allegation that Professor Winn created (or fostered) a different culture. The other allegations in this part of the pleading provide context for the alleged truth of how Professor Winn's leadership is said to have created or fostered that culture.

***Investigation into honorarium***

96 The fact that the respondents do not have a copy of the letter referred to at paragraph 29(c) of the Schedule is not a cause for complaint about the pleading. They allege the existence of the letter and summarise its contents, and presumably have a reasonable factual basis for doing so. If the letter is not subsequently obtained by way of discovery or subpoena, that will have forensic implications. But that is a matter for another day.

97 There is no inconsistency between that view and the principle that respondents should have material sufficient to plead justification at the time of filing their defence and should not be permitted to await subpoenas before making the necessary allegations. Here they (presumably) have that material, in the form of evidence of the contents of the letter, albeit not a copy of the letter itself. To seek to obtain that copy may be a permissible purpose for discovery or the issue of a subpoena: see *Chau Chak Wing* at [140].

98 I do not agree with Professor Winn that this part of the pleading does not allege any conduct by him. It does, albeit that it is not alleged that Professor Winn spoke directly to Dr Lowe. Whether Professor Winn's alleged conduct 'behind the scenes', considered in context with all the other alleged matters, is bullying or is merely 'reasonable management action' is a matter for trial.

99 I also do not agree that further particulars of the causal connection between Professor Winn's alleged conduct and the alleged toxic culture are required. There is no basis for an assumption that the process described was entirely private. In any event, bullying and intimidating a given member of staff (if that is what happened) is capable of contributing to the culture, without more. If, at trial, the respondents seek to rely on further facts to bolster the causal connection, the applicant will be able to object to that, since those facts will not have been disclosed in the Schedule.

100 Save for the problem of the allegation as to gaslighting (para 33), I would have given the respondents leave to rely on paragraphs 16 to 33 of the Schedule.

### ***DFAT Funding***

101 I do not accept that paragraph 47 is insufficiently precise. While it does not give a specific date for the conversation in question, it does give its substance, the people allegedly involved and an inferred approximate timing (around the time when Dr Allen's funding application in January 2020 was refused), which equips Professor Winn to answer it.

102 I accept in part Professor Winn's submission that paragraph 48 does not falsify the reason for denying the funding application which is attributed to him in paragraph 47. That reason was that research could not be conducted in Indonesia without the approval of the Indonesian government. If, as alleged in paragraph 48, the proposed trip did not include research, that would make the allegation false. But I agree that the second part of paragraph 48 - that Dr Allen had previously been approved to travel to Indonesia for the same purpose - does not falsify paragraph 47, because it does not say that this occurred in circumstances where the approval of the Indonesian government had not been obtained. I would therefore not give leave to rely on paragraph 48(b) in its current form.

103 Once again, it is not correct to say that this part of the pleading does not allege conduct by Professor Winn. It makes several allegations that he did things. That some of those things were allegedly done through Dr Jones as an intermediary is not to the point.

104 Professor Winn's affidavit contained evidence suggesting that it would be unduly prejudicial to him to have to respond to the allegations about Dr Allen's DFAT funding due to the involvement of numerous (unspecified) witnesses and documentary evidence. I do not accept that. It appears, on the face of the pleading, to raise issues of no remarkable scope about the conduct of a small number of people surrounding a specific pool of funds. I would not deny leave to rely on this part of the pleading on that basis.

### ***Emails from Dr Prout***

105 I do not accept Professor Winn's submission that the allegation in paragraph 55 that he failed to offer support to staff is vague. He submitted that countering it would require him to prove each time he offered support to staff on any occasion throughout his tenure as Executive Dean. That is not correct. The allegation needs to be read in the context of what precedes it, concerning Dr Prout's circular email of 4 December 2019. The issue raised is whether Professor Winn was prompted by that email to offer support to staff. If he did, Professor Winn will be able to adduce evidence of that.

106 I agree, however, that Professor Winn's alleged conduct in not responding to an email (paragraph 57 of the Schedule) is not capable of *constituting* bullying or gaslighting, that being the allegation at paragraph 57A. That is so even if the conduct is considered in the context of all the other allegations. It could, perhaps, be necessary background to the allegations about Professor Winn's role in creating or fostering a toxic culture of fear, or about the reason why he refused to allow Dr Prout to tutor a unit. But it is put in stronger terms in paragraph 57A. As presently pleaded, I would not give leave to rely on that paragraph.

107 Paragraphs 52 to 57, however, also serve a function as necessary background to paragraphs 57B to 57E (see next section). For that reason, the respondents should have leave to rely on them.

***Refusal to allow Dr Prout to tutor***

108 The objections to this section (paras 57B-57E) have already been addressed in the overview as to whether the Schedule discloses a reasonable defence (see [64](4) above), including the observations there about the inferences pleaded. Leave to rely on this section would have been granted.

109 Professor Winn's affidavit says it would be prejudicial to him to have to adduce evidence about these matters. But in circumstances where I have found that the allegations are allowed to stand as part of a reasonable defence, there is no reason to believe that the cost or effort involved in meeting these allegations will be oppressive.

***Staff survey***

110 I accept Professor Winn's submission that it would be oppressive for him to be required to respond to the allegations of fact in this section, which amount to allegations that staff satisfaction did decline during his tenure, based on the survey responses. To respond to that could involve the examination of the potentially voluminous records behind the survey, expert evidence on the statistical methods involved, and cross examination of numerous survey respondents.

111 That is all in circumstances where the survey results, even if soundly based, do not rise to the level of establishing serious imputations such as bullying, intimidation or the creation or fostering of a toxic workplace culture of bullying and fear.

112 Senior counsel for the respondents submitted that the 2020 survey results did indeed go to the imputations of the creation or fostering of a toxic culture of fear. She said that it was relevant for the Court to understand how staff felt and whether or not there was such a culture. Senior counsel submitted that to the extent that the evidence of staff members was necessary, that may be unfortunate, but reliance on the survey is the only way to respond to an imputation which is put as to culture.

113 The problem with this is that the survey results as pleaded, at their highest, do not establish any such culture. Even considered cumulatively with all the other allegations in the Schedule they would establish, at most, that staff satisfaction and opinions of management declined during Professor Winn's period as Executive Dean. But correlation is not causation, and additional facts that would make it so are not pleaded.

114 This pleading dispute must be resolved in a manner so as to best promote the overarching purpose of the Court's civil practice and procedure provisions: *Federal Court of Australia Act 1976* (Cth) s 37M(3). That purpose includes the objectives of efficient use of the Court's resources and efficient disposal of its overall case load, and of proportionality: see s 37M(2). It would be inconsistent with those objectives to permit the respondents to pursue a case based on the survey results, which would open up broad areas of forensic inquiry, when those results are only tangentially relevant (if at all) to the substantial truth of the imputations. And to the extent that the survey results do have any relevance to that issue, the Schedule fails to make that clear.

115 Senior counsel for the respondents submitted, once again, that the need to rely on the survey results and thus to forensically examine the survey is the result of the breadth of the imputation that has been pleaded by Professor Winn. I accept that the breadth of that imputation does create a need on the part of the respondents to establish that a toxic culture of bullying or fear was created or fostered by him. But the Court still needs to assess whether the survey results (as pleaded) are so relevant to the imputation as to mean that it is proportionate, and justified, to conduct the wide-ranging forensic exercise that is likely to be required to meet the allegations based on the results.

116 In my view, they are not. Leave to rely on paragraphs 58 to 66 will not be given.

### ***Events following the survey***

117 I accept Professor Winn's submission that his conduct at the staff meeting in May 2021, as pleaded at paragraph 68, cannot constitute bullying or gaslighting, and could not have contributed to a toxic culture of fear. That is so even when it is considered cumulatively with all the other allegations. Whether or not it could have constituted relevant background to different particulars supporting the substantial truth of the imputation about the toxic culture, that is not how it is pleaded. It is pleaded to constitute bullying etc. It is incapable of doing so. Leave to rely on paragraph 68 will not be given.

118 Professor Winn submitted that the rest of this part of the Schedule (paras 67-71), along with subsequent paragraphs, are hearsay. As discussed below at [122], I agree that the respondents should not be able to rely on these particulars for the purpose of establishing the truth of those matters, and senior counsel for the respondents accepted this. As Professor Winn raised no further objections to this part of the Schedule, I will say no more about it, other than to refer back to my comments at [42] above. No doubt they will be taken into account in any attempt to replead.

### ***Three specific decisions***

119 I have already addressed Professor Winn's complaints that paragraphs 72 to 74 do not disclose any bullying, intimidation or gaslighting behaviour. Taken at their highest and taken along with all the other allegations, they do (save in respect of gaslighting).

120 I do not accept Professor Winn's further submission that the allegations at paragraph 72 are insufficiently particular. The allegations are that in September to October 2021, a person with a theology degree was not approved to teach an IT class. Those circumstances are sufficiently specific to permit Professor Winn to identify how to meet the allegations. Professor Winn's response to it in his affidavit confirms that is so. More broadly, since the allegations stand as part of a reasonable defence, assertions of prejudice to Professor Winn in his affidavit, because he will expend money and effort in responding to them, are not to the point.

121 Leave to rely on paragraphs 72 to 74 would have been given.

### ***Investigation into the School of Education***

122 It will be recalled that under this heading above, the respondents plead four occasions on which written allegations about the culture at the School of Education were made by Dr Prout, Dr Allen and the NTEU. Senior counsel for the respondents made it clear at the hearing that

her client did not rely on those communications as establishing the truth of the allegations they contained. So when the Schedule pleads, for example, that the NTEU sent a letter to the university about working conditions at the School of Education, that is not pleaded so as to contend that the things the letter says were true.

123 The difficulty is that the Schedule does not make that clear. It simply recounts the making of the allegations. It then pleads that the Vice-Chancellor announced Professor Winn's departure and that it is to be inferred that ECU had concluded, following its cultural review, that Professor Winn was responsible for the alleged toxic workplace culture. I interpret Professor Winn's submission that these allegations are 'hearsay' as a complaint that the respondents ought not be permitted to plead the contents of these communications for the purpose of establishing the truth of those contents. I agree, and senior counsel for the respondents properly disclaimed that purpose.

124 If the pleading were to make it clear that the allegations in those four communications are not relied on, the further question would arise as to what purpose they serve. When asked that question, senior counsel for the respondents was only able to say that they were factual context for the events leading up to the termination of Professor Winn as Executive Dean.

125 I do not accept that is a good reason for the presence of those allegations in the Schedule. Such matters should not be permitted to lay in a pleading when they have no clear purpose, that is, no clear link to proof of the substantial truth of the imputations. That would risk creating a 'climate of prejudice'. It would also raise false issues that would lead to much wasted time and money in ultimately futile forensic contests.

126 The respondents should not have leave to include pleas as to those four occasions in their current form, that is, to include paragraphs 75, 76, 80 and 82 to 86 of the Schedule.

127 The remaining significance, if any, of what would be left from this section (paras 77-79, 81, 87-88) would be uncertain, to say the least. It would amount to a plea that an investigation was conducted, and Professor Winn subsequently ceased to be Executive Dean, and from that it can be inferred that he was terminated because ECU had concluded that he was responsible for the toxic workplace culture. Those bare facts are insufficient to justify that inference. And any attempt to rely on the investigation would potentially open up a wide and oppressive area of forensic inquiry.

128 Senior counsel for the respondents submitted that these pleas would not necessarily open up that area of inquiry, because specific individuals could be called to testify as to the reasons that Professor Winn was 'dismissed' (her word for what occurred). But that does not appear from the facts pleaded. Those facts are an investigation and the communication about 'passing the baton'. Unless the conduct and findings of the investigations are canvassed, it is difficult to see how the inference can be justified.

129 The respondents should not have leave to rely on any part of this section (paras 75-88) as currently pleaded. If they truly wish to allege that Professor Winn's employment as Executive Dean was terminated as a result of what the investigation found, they would need, at least, to say what it found, and to draw a link between that and the termination. And of course, they cannot seek discovery and subpoenas with a view to fishing for those things. And any attempt to invoke the investigation, even on a reasonable factual footing, would be scrutinised carefully, in view of the potentially wide field of forensic dispute that it would provoke.

130 Given these conclusions it is not necessary to rule on Professor Winn's specific complaint about the plea that he failed to respond to Dr Prout's communication of 14 October 2021.

### **Outcome**

131 As I have already said, the number and nature of the deficiencies I have found to exist in the proposed amended defence makes it inevitable that leave to rely on it will be refused.

132 As has also been said, it was not abundantly clear whether Professor Winn opposed granting the respondents leave to replead in that situation. The thrust of his submissions was that, nine months after the proceeding was commenced, the respondents have been unable to plead a reasonable defence. Since I have found that they have pleaded a reasonable defence, that falls away.

133 Professor Winn also pointed to the prejudice that he says he has suffered as a result of the publication. As already mentioned, his affidavit contains evidence of the effect of the publication on his physical and mental health and deposes to an incident concerning members of his family. Of course, if these matters are established at trial, they may be relevant to the question of damages. But they do not present any unusual circumstance which would warrant, in effect, ending the proceeding now, certainly not in light of the mixed findings I have made above. And while the Court should always be astute to minimise the impact of delays in litigation, particularly the impact on individuals, Professor Winn's counsel rightly accepted that

the delay in this proceeding to date is neither remarkable, nor to be sheeted home to fault on the part of the respondents.

134 In any event the nature of the deficiencies in the proposed amended defence - broadly, a lack of particularity that will tend to prejudice Professor Winn and the Court in the conduct of the proceeding - mean it is not clear that they cannot be fixed.

135 The respondents will have leave to replead. I will allow four weeks for that. A case management hearing will be listed at a time after the minute of further amended defence is filed to assess the position. At that hearing, counsel for the parties should be prepared to address the Court on the appropriate costs order in relation to the matters determined in these reasons.

I certify that the preceding one hundred and thirty-five (135) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson.

Associate:



Dated: 12 April 2024