

**User Name:** Dominic Brunello

**Date and Time:** Thursday, 7 March 2024 11:41:00AM AEST

**Job Number:** 218865144

## Document (1)

1. [LITTLEFIELD v PEMBLE](#)

[BC202316593](#)

**Client/Matter:** -None-

**Search Terms:** littlefield and pemble — [2023] fedcfamc1a 198; bc202316593

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**LITTLEFIELD v PEMBLE**  
**BC202316593**

Unreported Judgments Federal Circuit Court of Australia (formerly Federal Magistrates Court of Australia) · 49 Paragraphs

Federal Circuit and Family Court of Australia — Division 1 Appellate Jurisdiction

Tree, Christie and Strum JJ

HBC 275 of 2017

9, 17 November 2023

Littlefield & Pemble [2023] FEDCFAMC1A 198

## Headnotes

**FAMILY LAW — Appeal — Leave to appeal — Where the father seeks leave to appeal an order dismissing his application to release single expert reports for use in criminal proceedings — Implied Undertaking — Whether the primary judge erred by failing to apply correct legal principles — Discussion of legal principles applicable to release of single expert reports — Where the enquiry as to whether the single expert reports are within the scope of the implied undertaking is whether the circumstances under which the father obtained them mean that he cannot disclose them without leave of the court — Where no question of “privilege” nor s 121 of the Family Law Act 1975 (Cth) is applicable — Where appeal has merit — Substantial injustice — Leave to appeal granted — Appeal allowed — Discretion re-exercised — Leave given to release single expert reports — Costs certificates issued.**

(CTH) Family Law Act 1975 s 121

(CTH) Federal Circuit and Family Court of Australia Act 2021 s 28

(CTH) Family Law Rules 2004 (repealed) rr 15.04, 15.45, 15.46, 15.49

r 7.05 (CTH) Federal Circuit and Family Court of Australia (Family Law) Rules 2021

[\[2018\] FamCAFC 144](#)

*Hearne v Street*

;

*Liberty Funding Pty Ltd v Phoenix Capital Ltd*

ALR 283; [\[2005\] FCAFC 3](#)

*Bhatnagar*

&

*Riju*

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(2008) 235 CLR 125; [\[2008\] HCA 36](#)

(2005) 218

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*Medlow & Medlow* (2016) FLC 93-692; [\[2016\] FamCAFC 34](#) ; *Pace & Halkias* ;  
 [2021] FamCAFC 81 ;  
*Re W: Publication Application* (1997) FLC 92-756; [1997] ;  
 FamCA 8 ;  
*Sahadi & Savva* (2016) FLC 93-704; [\[2016\] FamCAFC 65](#) ;  
 ;  
*Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217; [1992] FCA 720 , cited

## Tree, Christie and Strum JJ.

### INTRODUCTION

**[1]** By his Amended Notice of Appeal filed 27 October 2023, Mr Littlefield (“the father”) sought leave to appeal, and if leave was granted, to appeal from an order made on 15 September 2023 by a judge of the Federal Circuit and Family Court of Australia (Division 1) in extant parenting proceedings in which he is the applicant. That order dismissed the father’s application to release two single expert reports (“the single expert reports”) obtained in those parenting proceedings for use in criminal proceedings in which he is the defendant.

**[2]** Neither Ms Pemble (“the mother”) nor the Independent Children’s Lawyer (“ICL”) opposed leave to appeal, with both conceding the appeal and ultimately agreeing to orders releasing the single expert reports to the Magistrates Court of Tasmania.

**[3]** On 9 November 2023 we made orders in accordance with the parties’ agreed position, for reasons to be published later. These are those reasons.

### BACKGROUND

**[4]** The parenting proceedings are listed for a five day trial before the primary judge commencing in December 2023. A significant issue in them is whether the father poses an unacceptable risk of sexual harm to the parties’ now nearly 8 year old child. In the pending criminal proceedings in the Magistrates Court of Tasmania, the father is charged with offences in relation to the child.

**[5]** The hearing of the criminal proceedings commenced in August 2023 but was adjourned part heard to enable the father’s application to the primary judge in relation to the single expert reports, and is next listed in November 2023.

**[6]** On 11 September 2023, the father filed the subject application which sought that he be granted permission to rely on and produce in the Magistrates Court of Tasmania proceedings the following documents:

- (a) The single expert report of Dr E dated 22 December 2020;
- (b) The single expert report of Dr F dated 21 September 2021; and

(c) Orders made by the Federal Circuit and Family Court of Australia (Division 1) dated 4 October 2021.

[7] The father's application came before the primary judge on 15 September 2023. Orders were then made granting him leave to produce the 4 October 2021 interim parenting orders, but his application seeking to produce the single expert reports was dismissed. The father sought leave to appeal from that dismissal.

### LEAVE TO APPEAL

[8] Whilst s 28 of the Federal Circuit and Family Court of Australia Act 2021 (Cth) imposes the requirement for leave to appeal an interlocutory order, it does not set out the requirements to be met for a grant of such leave, and thus the Court's discretion to grant leave remains unfettered.

[9] The test adopted in this Court, which was confirmed in *Medlow & Medlow* (2016) FLC 93-692 (*Medlow*) provides that ordinarily leave to appeal will only be granted where:

- (a) The decision of the primary judge was "attended by sufficient doubt" to warrant its reconsideration; and
- (b) If leave were refused, a "substantial injustice" would ensue.

[10] It is therefore convenient to consider the merit of the grounds of the proposed appeal before returning to the question of whether leave should be granted. Even though the appeal was conceded by the mother and the ICL, we nonetheless must be satisfied of error for ourselves (*Bhatnagar & Riju* [2018] FamCAFC 144).

### The merits of the proposed appeal

#### The grounds

[11] The four grounds articulated in the father's Amended Notice of Appeal filed 27 October 2023 are as follows:

1. His Honour erred by failing to apply correct legal principle, by finding that the Harman Undertaking was not "relevant" to the [father's] Application in a Proceeding filed 11 September 2023.
2. His Honour erred by applying erroneous principles, in concluding finding that privilege and/or s 121 of the Family Law Act 1975 (cth) were applicable principles in respect of the [father's] Application in a Proceeding filed 11 September 2023.
3. His Honour erred by applying erroneous principles, in concluding that it is for the Family Law Court to determine relevance and probity before the single expert reports could be released.
4. His Honour erred by applying erroneous principles, in concluding that there was no "legitimate forensic purpose" argued in respect of the release of the reports.

(As per the original)

[12] It will therefore be appreciated that all grounds engage with the question of what are the legal principles which govern the potential release of the single expert reports, and hence it is convenient to address that question in the broad before considering the individual grounds.

### Dr E's report

[13] On 11 August 2020, Judge Baker (as her Excellency then was) ordered as follows:

...

2. There be orders, declarations and notations made in terms of the document entitled "*Minutes of Proposed Orders*", signed by the solicitors for the parties and the Independent Children's Lawyer and dated 10 August 2020 as set out hereunder:
  1. Pursuant to Rule 15.09 of the Federal Circuit Rules 2001, [Dr E], is appointed as Court Expert ("the Court Expert") upon terms as agreed between the parties or as ordered by the Court.
  2. Pursuant to Section 102A of the Family Law Act 1975, leave is granted to the Court Expert to examine the Child, ...
  3. The parties will jointly provide the Court Expert with a brief of the facts and circumstances giving rise to this Order and **will make available such documents from the Court file, including subpoenaed documents or other documents which may otherwise be in the possession of the Independent Children's Lawyer, as the parties jointly agree.**
  4. **The parties will provide a general authority to the Court Expert to:**
    - a. **Access any medical, police, psychiatric, psychological, education or other files touching upon either of the parties and/or the Child;**
    - b. **Discuss the parents and/or Child with any relevant offices of any health, welfare or educational provider or agency;**
    - c. **Contact and discuss either of the parties and/or the Child with anyone who has provided or is providing the parties and/or the Child with therapy.**

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3. The Court Expert has leave to peruse the Court file in these proceedings and to request that any documentation upon the Court file be copied and provided.
4. **Leave is granted to the Court Expert to inspect and copy all material produced to the Federal Circuit Court pursuant to Subpoenas issued in these proceedings.**
5. The Court Expert will deliver her report, together with three (3) copies to the Registrar of the Federal Circuit Court at [City B] as practicable.
6. The Court Expert's cost of the assessment and report will be born by the Legal Aid Commission of Tasmania for the Independent Children's Lawyer in the sum of \$2,4000, the Applicant father in the sum of \$1,000 and the Respondent Mother in the sum of \$1,000.

**TERMS OF REFERENCE FOR [DR E], COURT EXPERT**

The Court Expert is asked to enquire into and report upon the following:

1. An assessment of each of the parties' mental and emotional health.
2. An assessment and comment upon the allegations made by the Child and by the Mother with respect to the Father and the extent to which those allegations should influence the nature and extent of the Father's time with the Child and if so, to what nature and extent.
3. Any ill treatment, family violence or other abusive behaviour reported by any person interviewed or evidence from other sources, and the likely impact of this upon the Child and the parenting capacity of the parties.
4. Whether the Child, ... is at an unacceptable risk of:
  - a. Physical or emotional abuse; and/or; witnessing physical or emotional abuse; in the care of either of the parties;
5. An assessment of the relationship between the parties with reference to their attitudes towards each other and whether these have any relevance to their capacities to provide for the needs of the Child.
6. An assessment of the nature and quality of the relationship each party has with the Child.
7. An assessment of each of the parties' proposals for the care of the Child and for the time which the Child should spend with the other parent.
8. Any other matter which the Court Expert considers to be relevant.

(As per the original) (Bold emphasis added)

**[14]** Now true it is that strictly speaking whilst there was no direction requiring either party to attend for an interview with Dr E, in the overall scheme of things there is inevitably some practical compulsion to do so, as failure to submit to an interview would be potentially highly adverse to the party who does not attend. Nonetheless attendance does

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not carry with it an obligation to reveal facts (Sahadi & Savva (Sahadi) at [57]). (2016) FLC 93-704

**[15]** In due course Dr E produced a report dated 22 December 2020. Although no record of any order releasing that report to the parties appears on the court file, the usual course is for such reports not to be released without order, and we are content to assume such an order was made here.

**[16]** At that time, the relevant rules relating to expert reports were rr 15.45 and 15.46 of the *Family Law Rules 2004* (Cth), which provided:

**15.45****Order for single expert witness**

- (1) The court may, on application or on its own initiative, order that expert evidence be given by a single expert witness.
- (2) When considering whether to make an order under subrule (1), the court may take into account factors relevant to making the order, including:
  - (a) the main purpose of these Rules (see rule 1.04) and the purpose of this Part (see rule 15.42);
  - (b) whether expert evidence on a particular issue is necessary;
  - (c) the nature of the issue in dispute;
  - (d) whether the issue falls within a substantially established area of knowledge; and
  - (e) whether it is necessary for the court to have a range of opinion.
- (3) The court may appoint a person as a single expert witness only if the person consents to the appointment.
- (4) A party does not need the court's permission to tender a report or adduce evidence from a single expert witness appointed under subrule (1).

**15.46****Orders the court may make**

The court may, in relation to the appointment of, instruction of, or conduct of a case involving, a single expert witness make an order, including an order:

- (a) requiring the parties to confer for the purpose of agreeing on the person to be appointed as a single expert witness;
- (b) that, if the parties cannot agree on who should be the single expert witness, the parties give the court a list stating:

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- (i) the names of people who are experts on the relevant issue and have consented to being appointed as an expert witness; and
- (ii) the fee each expert will accept
- for preparing a report and attending court to give evidence;
- (c) appointing a single expert witness from the list prepared by the parties or in some other way;
- (d) determining any issue in dispute between the parties to ensure that clear instructions are given to the expert;
- (e) that the parties:
- (i) confer for the purpose of preparing an agreed letter of instructions to the expert; and
- (ii) submit a draft letter of instructions for settling by the court;
- (f) settling the instructions to be given to the expert;
- (g) authorising and giving instructions about any inspection, test or experiment to be carried out for the purposes of the report; or
- (h) **that a report not be released to a person or that access to the report be restricted.**

(Emphasis added)

**[17]** It is almost inevitable that in the order releasing Dr E's report to the parties, an order prohibiting the release of the report, or providing access to it to any person other than (relevantly) the parties and their lawyers, was also made, and again we are content to assume that occurred.

**[18]** In Dr E's report dated 22 December 2020 at paragraph 3 she listed her information sources as follows:

3. I have been privy to the following sources:

- Instructing email
- Minutes of Consent 10 August 2020

Dominic Brunello

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of Reference	•	Order dated 11 August 2020 including Terms
	•	Initiating Application filed 18 February 2020
2020	•	Amended Initiating Application filed 12 May
	•	Affidavit of [the father] filed 6 April 2020
	•	Affidavit of [the father] dated 11 August 2020
	•	Affidavit of [the mother] filed 18 February 2020
	•	Affidavit of [the mother] filed 12 May 2020
	•	Response filed 6 April 2020
	•	Interim Order made 27 July 2020
	•	Order 29 October 2018
	•	Notice of Risk filed 18 February 2020
	•	Notice of Risk filed 6 April 2020
	•	<b>Review of subpoenaed materials from:</b>
	•	<b>Child Safety Services</b>
	•	<b>Tasmania Police</b>
	•	<b>[Health records]</b>
September 2020	•	[City B] Children's Contact Service report 16
September 2020 (2.5 hours)	•	Interview with [the mother in City B] on 21
assessments by [the mother]	•	Completion of three psychometric
September 2020 (duration 1.5 hours)	•	Interview with [the father in City B] on 22
October 2020 (duration 45 minutes)	•	Interview with [the father in City B] on 28
father]	•	Follow-up email correspondence with [the
assessments by [the father]	•	Completion of three psychometric

•  
October 2020 (30 minutes)

Interview with [the child in City B] on 1

(Emphasis added)

### Dr F's report

[19] On 19 May 2021, McClelland DCJ made the following orders:

...

6. Pursuant to r 15.49 of the Family Law Rules 2004, a single expert psychiatrist be appointed to prepare a report addressing the matters of the mother's mental health and, insofar as issues may be identified as to the mother's mental health, the causation of the mother's mental health challenges.
7. In the event that the parties are unable to agree upon a single expert psychiatrist within 28 days of these order, then the Respondent father, in consultation with the Independent Children's Lawyer, shall forthwith nominate three psychiatrists Report writers (by providing a copy of the CV for each nominated psychiatrist writer together with their nominated costs for undertaking the preparation of the Report and the time frame in which they are able to complete a Report) and within 14 days of such nominations the Applicant mother shall select one of the three nominated psychiatrists to be retained and instructed by the parties.
8. The parties are to equally share the costs of the single expert psychiatrist report including the costs of the single expert giving evidence in the proceedings.
9. **Leave be granted to the Independent Children's Lawyer to uplift and remove all documents produced on subpoena for the purpose of photocopying such documents to provide those documents to the single expert psychiatrist and the mother's treating psychiatrist and psychologist, with such documents to be returned to the Registry within 48 hours of having been uplifted.**

...

(Emphasis added)

[20] The reference to r 15.49 is likely mistaken, and it appears that the order was more likely made under r 15.45 and r 15.46, recited earlier.

[21] Again, whilst it appears that there was no order compelling the mother to attend upon Dr F, it was nonetheless practically imperative, but as with Dr E, no obligation to disclose information was imposed. That the mother did so

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submit to an interview is plain from the first paragraph of Dr F's report, and a second interview was thereafter conducted on 13 September 2021.

[22] Although not contemplated by the 19 May 2021 orders, as well as assessing the mother, Dr F also assessed and reported on the father, who was interviewed on 30 August 2021 and again on 13 September 2021.

[23] In addition to material sourced in those interviews, Dr F also had regard to a plethora of documentation, including a family report, Dr E's report, many documents obtained by subpoena, and various affidavits filed in the parenting litigation.

[24] In due course, Dr F's report was provided to the Court. On 27 September 2021, a registrar made the following orders:

1. Pursuant to rule 15.04 of the *Family Law Rules 2004*, copies of the report by [Dr F] dated 23 [sic] September 2021 may be given to:
  - (a) the parties;
  - (b) the lawyer(s) for the parties;
  - (c) the lawyer(s) representing the child/ren in the proceedings under s 68L of the Act (if appointed), and
  - (d) if a party is legally aided, to employees of the legal aid body providing financial assistance to the party, but only upon a request from an employee of the legal aid body, for a copy of the report.
  
2. **Except with the Court's permission, no person is to release the report, or provide access to the report, to any person other than those mentioned in paragraphs (a), (b), (c) or (d) of the previous order.**

(Emphasis added)

[25] We need not trouble ourselves with the erroneous reliance upon a, by then repealed rule, or the fact that r 15.04 only applied to family reports, not single expert reports, as Order 2 is nonetheless separately supportable by r 7.05(h) of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth), and hence was validly made.

### Relevant Legal Principles

[26] It can therefore be seen that, at the least, there were court orders in place which bound the father and precluded him from releasing the single expert reports "[e]xcept with the Court's permission".

[27] Quite apart from the effect of the orders of the Court restricting release of the single expert reports, in certain

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circumstances, there is a separate obligation which restrains parties from releasing or publishing confidential court documents beyond the immediate litigation, commonly referred to as an “implied undertaking”. The High Court in *Hearne v Street* (2008) 235 CLR 125 at [96]–[97] said as follows:

96. Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, witness statements served pursuant to a judicial direction and affidavits. The appellants did not dispute the existence of this principle, and in particular did not dispute its potential application to the affidavit of Mrs Hesse and the witness statement of Dr Tonin.

97. It is common to speak of the relevant obligation as flowing from an “implied undertaking”.

(Footnotes omitted)

[28] That case involved the disclosure to a third party by officers of a company of an expert report served on the company by the plaintiff in the course of court proceedings. In concluding that the disclosure was in contempt of court, the plurality observed at [108]:

108. Hence Hobhouse J was correct to conclude:

The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information.

[29] It can therefore be seen that the enquiry as to whether the single expert reports are within the scope of the implied undertaking is whether “the circumstances under which [the father] obtained” them mean that he cannot disclose them without leave of the court. To his credit, the father correctly recognised that such circumstances existed here, and hence his application to the primary judge.

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[30] At this point it is convenient to deal with s 121 of the Family Law Act 1975 (Cth). Section 121(1) is in the following terms:

(1) A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates **to the public or to a section of the public** by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:

(a) a party to the proceedings;

(b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or

(c) a witness in the proceedings;

commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

(Emphasis added)

[31] The release of the single expert reports to the Magistrates Court of Tasmania is not publication or dissemination "to the public or to a section of the public" and hence s 121 is not engaged (*Re W: Publication Application* (1997) FLC 92-756 ).

[32] In any event, s 121(9)(a) provides:

(9) The preceding provisions of this section do not apply to or in relation to:

(a) the communication, to persons concerned in proceedings **in any court**, of any pleading, transcript of evidence or other document for use in connection with those proceedings; ...

(Emphasis added)

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[33] Self-evidently, even if s 121 were engaged, that exception applies here, and thus s 121 need not be further considered ( *Pace & Halkias* [2021] FamCAFC 81 (Pace & Halkias) at [27]).

[34] We then turn to consider the relevant considerations which are engaged where a party seeks leave to use material impressed with the implied undertaking for a purpose other than that for which it was given or created. (We do not apprehend that leave under any relevant order of the court would engage any different considerations).

[35] As *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283 at [31] the Full Court of the Federal Court said:

31. In order to be released from the implied undertaking it has been said that a party in the position of the appellants must show "special circumstances": see, for example, *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 110 ALR 685

. It is unnecessary to examine the authorities in this area in any detail. The parties were not in disagreement as to the legal principles. The notion of "special circumstances" does not require that some extraordinary factors must bear on the question before the discretion will be exercised. It is sufficient to say that, in all the circumstances, good reason must be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of a party in another piece of litigation or for other non-litigious purposes. The discretion is a broad one and all the circumstances of the case must be examined. In *Springfield Nominees*, Wilcox J identified a number of considerations which may, depending upon the circumstances, be relevant to the exercise of the discretion. These were:

- the nature of the document;
- the circumstances under which the document came into existence;
- the attitude of the author of the document and any prejudice the author may sustain;
- whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;
- the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information);
- the circumstances in which the document came in to the hands of the applicant; and
- most importantly of all, the likely contribution of the document to achieving justice in the other proceeding.

[36] That statement was adopted by this Court in *Pace & Halkias* at [17].

[37] Finally, in determining whether or not to give leave to use the material subject to the implied undertaking in other proceedings, the court ought not embark upon a consideration of its admissibility in the other court, or the purpose to which it may be put, as that is properly a matter for the other court (*Sahadi* at [69]).

### Consideration

[38] At [8]–[10] the primary judge said as follows:

8. The relevant reports are prepared and provided for family law proceedings between the parties. Those proceedings remain ongoing. I understand that there exists a protocol for exercise of a discretion in judges of these courts to release such reports on occasion and if appropriate. I have determined that this is not one of those occasions and that the reports should not be released thereby maintaining their privilege pursuant to the Family Law Act 1975 (Cth) (“the Act”) including consideration of section 121 of the Act.
9. Counsel for the applicant father argued that the report should be released to the relevant Magistrate with that Magistrate then being empowered to determine relevance and hence admission of the contents of the report. I disagree. The report is obtained in sensitive parenting matters by this Court for the purposes of assisting this Court’s determination. I am of the view that, *prima facie*, it is for this Court firstly to determine issues of relevance and probity before such a report can be released with the discretion sitting with this Court.
10. Counsel for the applicant father briefly mentioned issues of the ‘Harman’ undertaking. I am not persuaded that this consideration is relevant where the documents in question are not obtained by discovery or subpoena or under any compulsion but rather is an issue for the discretion of the Court.

[39] As we have observed, the primary question is whether the circumstances under which the father obtained the single expert reports mean that, either by virtue of the orders releasing them to him, or because they are subject to an implied undertaking, he cannot disclose them without leave. The primary judge’s rejection of the implied undertaking in [10] was misconceived. At the very least, as we have explained, both single expert reports relied on material which had been produced pursuant to subpoena, and hence itself subject to an implied undertaking. Further, no question of “privilege” applied, nor did s 121. It is therefore plain that the test which the primary judge applied was erroneous. The appeal therefore has merit, and Grounds 1 and 2 would necessarily both succeed.

[40] It is unnecessary to consider Grounds 3 and 4.

### Substantial injustice

[41] Having shown likely error by the primary judge, such that the first limb of *Medlow* is satisfied, the question then is whether substantial injustice would result if leave to appeal were not granted. As to that, the father says that the injustice is the lost opportunity to have the discretion to grant leave to use the documents in his criminal proceedings properly considered. We accept that is indeed a substantial injustice.

### Outcome

[42] On 9 November 2023, we therefore granted leave to appeal.

### THE APPEAL

[43] In discussing the grant of leave to appeal, we have explained why the appeal is meritorious and must succeed, and hence the appeal was allowed.

### RE-EXERCISE

[44] In the event the appeal succeeded, given the urgency of the matter, and the fact that we are in as good a position to determine the matter a single judge would be, all parties agreed that we should re-exercise the primary judge's discretion, and ultimately agreed that the single expert reports ought be released. That concession was sound.

[45] We have already set out the list of potentially relevant considerations articulated by Wilcox J in *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217. Here it seems to us that the pre-eminent consideration is whether there is a real possibility that the expert reports may contribute to the administration of justice in the father's criminal proceedings.

[46] The father points to the potential use of statements by the mother to both Dr E and Dr F, in the cross-examination of her in the criminal court, as satisfying the relevant test, particularly given the considerable overlap between the issues in the criminal proceedings and the parenting proceedings. As but one example, Dr E notes that the mother withheld significant relevant mental health history from her, which is a matter upon which the mother might legitimately be cross-examined. There is also the possibility that the professional opinions expressed by the authors may be in some way relevant to the criminal proceedings.

[47] It is in the public interest that there be the proper administration of justice in the criminal proceedings, and we were satisfied that the opportunity to rely on the two single expert reports may assist in that.

[48] Leave was therefore granted in terms sought by the father's Amended Notice of Appeal filed 27 October 2023.

### COSTS

[49] In the event the appeal succeeded on a question of law, to which the mother did not contribute, quite correctly the father only sought a costs certificate for the appeal, as did the ICL. We were satisfied that certificates were appropriate here, and therefore issued them.

## Order

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1. Leave to appeal the order of a judge of the Federal Circuit and Family Court of Australia (Division 1) made 15 September 2023 is granted.
2. The appeal is allowed.

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3. Order 2 of the orders of the Federal Circuit and Family Court of Australia (Division 1) made 15 September 2023 is set aside.
4. The appellant is released from the Harman Undertaking for the purposes of his criminal trial only, next listed on [...] (“the criminal proceedings”) in respect of the following documents:

(a) The Report of Dr F dated 21 September 2021;

(b) The Report of Dr E dated 22 December 2020;

and for the purposes of this Order, the appellant is permitted to provide these documents to his criminal lawyers and/or to tender the documents in the criminal proceedings.

5. The appellant is granted a costs certificate pursuant to s 9 of the *Federal Proceedings (Costs) Act 1981* (Cth), being a certificate stating that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant in respect of the costs incurred by him in the appeal.
6. The Independent Children’s Lawyer is granted a costs certificate pursuant to s 6 of the *Federal Proceedings (Costs) Act 1981* (Cth), being a certificate stating that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the Independent Children’s Lawyer in respect of the costs incurred by her in the appeal.

The respondent appeared in person.

Counsel for the appellant: *Ms Seric*

Counsel for the independent children’s lawyer: *Ms Mallett KC*

Solicitors for the appellant: *Butler McIntyre & Butler*

Solicitors for the independent children’s lawyer: *Pagett & Associates*

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