Federal Court of Australia

NSD103/2023

BRUCE LEHRMANN

Applicant

NETWORK TEN PTY LTD & Anor

Respondents

APPLICANT'S CLOSING SUBMISSIONS IN REPLY

1. These submissions address selected parts of the First Respondent's closing written submissions (**1RS**) and the Second Respondent's closing written submissions (**2RS**).

The discharge of the respondents' onus of proof

2. Network Ten contends that the Court would conclude that Mr Lehrmann's case theory is implausible, and in effect, that in light of rejecting Mr Lehrmann's case theory as implausible, the Court would conclude that the Respondents have discharged their onus of proof: see for example 1RS [108(b)], [525], [575], [621], [656] and [737].

3. There is no requirement upon a party not bearing an onus of proof to provide a "case theory". While Mr Lehrmann may have made submissions as to various plausible explanations or motives arising from the evidence that does not affect the burden on the Respondents.

4. It can be accepted that, while Mr Lehrmann bears no onus of proof in relation to the defence of justification, it is relevant that he did go into evidence and advance a version of events. As the Victorian Court of Appeal said in *Eumeralla Estate Pty Ltd v Chen* [2022] VSCA 78 at [54]:

> It is of course true – by definition – that the party that bears the onus must discharge that onus. But, as Santamaria JA observed in *Melbourne Orthopaedic Group Pty Ltd v Stamford Aus-Trade & Press Pty Ltd* [[2015] VSCA 150 at [109], Ashley JA and Digby AJA agreeing], "it is proper for a judge to assess which of several competing hypotheses is to be preferred provided the court always keeps in mind upon whom the onus lies". In considering whether a party has discharged its onus, it will often be appropriate, or even necessary, for the judge to determine whether the alternative version of events put forward by the opposing

> party is to be accepted; for if that alternative version of events were to be positively accepted, then plainly the party that bore the onus would not have discharged it.

5. It is necessary to consider in a little more detail, however, what this means in application to the present case.

6. For the reasons developed at ACS [47]-[58], to find that Mr Lehrmann raped Ms Higgins, the Court must feel actual persuasion that that occurred, and actual persuasion is not attained independently of the seriousness of the allegation, its unlikelihood, and the gravity of the consequences flowing from the finding sought.

7. In *Re B (Children)* [2009] AC 11 at [2], Lord Hoffman observed that:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

8. If the Court finds Mr Lehrmann's account implausible, that would not make Ms Higgins's version of events more persuasive in its own right. It might remove a barrier to the acceptance of particular aspects of Ms Higgins' version of events, but it would not make inevitable the conclusion that it is more probable than not that Mr Lehrmann raped her and that the Respondents have discharged their onus: *Chen v Zhang* [2009] NSWCA 202 at [50]-[51] per Sackville AJA (Campbell JA and Handley AJA agreeing).

9. The reason why rejection of Mr Lehrmann's account does not, in itself, necessitate that conclusion is that, between the two of them, their versions of events do not account for a range of other possibilities which present themselves on the facts as a matter of common sense. Mr Lehrmann denied that any sexual activity at all took place, whereas Ms Higgins alleged that he had intercourse with her whilst she was unconscious and that it was rape. Between those two poles lies a range of possibilities, including various permutations of consensual sexual activity (including anything from kissing or touching to sexual intercourse), or sex which was at law not consensual but which Mr Lehrmann's believed was consensual. Indeed, consistent with the rejection of the version of both individuals, the Court could also entertain scenarios where no sexual contact occurred despite a prior intention to engage in such activity on the part of either or both of them. Although such hypotheses were not explored in evidence, as a matter

of ordinary human experience they naturally arise as possibilities and they must be considered: *Martin v Osborne* (1936) 55 CLR 367 at 381 per Evatt J; *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 at 222-223 per Mahoney JA; *Palmanova Pty Ltd v Commonwealth of Australia* [2023] FCA 1391 at [23].

10. This point was illustrated by Perram J in *Palmanova* at [20]-[22]. In that exotic case, the Commonwealth seized an archaeological artefact imported into Australia under the *Protection of Movable Cultural Heritage Act 1986*, on the basis that it was a "*protected object of a foreign country*", specifically Bolivia. This required proof that the artefact was removed from Bolivia after 1906. There were numerous possibilities as to how the artefact got from the ruins of the city of Tiwanaku, where it was presumed to have been made, to Buenos Aires, where it first surfaced in the 1950s. His Honour observed:

> In a civil case where a party seeks to prove a fact indirectly from other circumstances this will involve demonstrating that the hypothesis that the fact occurred is more likely than not. In such a case the Court does not ask whether each of the posited circumstances individually proves that the hypothesis of the occurrence of the fact is more likely than not but rather whether all of the circumstances when considered together do so. Thus one does not ask whether the mere fact of Dr Casanova's archaeological expedition to Tiwanaku in 1934 shows that it is more likely than not that the Artefact was removed after 1906. Rather, one considers together all of the circumstances and asks whether it is more likely than not that the Artefact was removed from Bolivia after 1906. …
>
> The multiple competing hypotheses which must be assessed in this case give rise to a need for special care. Where there are only two competing hypotheses that between them account for the universe of possibilities open on the evidence, a court's satisfaction that one is more likely than the other will entail that the occurrence of the fact supported by the more likely hypothesis is proved on the civil standard. Whilst it is important not to approach the civil standard in an excessively arithmetical way in terms of numeric probabilities it can be useful to do so to illustrate some consequences in a circumstantial case where multiple hypotheses are in competition with each other. For example, where there are only two competing hypotheses and one is more probable than the other then it must follow that the more likely one is more likely than not. … But the logic of this breaks down where there are three or more competing hypotheses. … Thus the court will only be satisfied that a fact is established if the hypothesis supporting it is more likely than *all* of the others considered together... In particular, the mere fact that one of the hypotheses emerges as more likely than *each* of the others will not suffice, it must be more likely than *all* of them.
>
> In this case, for example, the Commonwealth's hypothesis is that the Artefact was removed from Bolivia after 1906 either because it was excavated in 1934 by Dr Casanova or because it was looted in or around 1950 as an unexpected consequence of Picasso's Primitivism Period. It is not enough for the Commonwealth to show that the hypothesis that the Artefact was removed from Bolivia after 1906 is more likely than each of the hypotheses that the Artefact was taken from Bolivia before 1906 by the Tiwanaku themselves, or exchanged with the Wari or carried away by whatever means by the Incas, the Aztecs, treasure hunters, archaeologists or other collectors. It must show that the hypothesis of removal after 1906

> is more likely than all of these other pre-1906 removal hypotheses raised by the evidence put together.

See also at [24] per Perram J.

11. Rejection of Mr Lehrmann's version of events as implausible would dispose of one of the proffered hypotheses about what occurred on the night of 22 March 2019, but it would not account for other available hypotheses inconsistent with the allegation of rape. For the Court to make the finding sought by the Respondents, it must be actually persuaded that the hypothesis that Mr Lehrmann had intercourse with Ms Higgins knowing she was not consenting is more probable than all the available competing hypotheses, not merely that it is more probable than Mr Lehrmann's evidence that there was no sexual activity at all.

The question of consent in the context of intoxication

12. At [1050] of the 1RS and [115], [475] and [477]-[479] of the 2RS a submission is made that if the Court were satisfied that sexual intercourse took place then it constituted rape on the basis that Mr Lehrmann's conduct was reckless as to consent because he observed Ms Higgins drinking throughout the night (1RS) and, additionally, he observed Ms Higgins' inability to put on her shoes at security (2RS). (The 2RS also says that Mr Lehrmann "saw her fall over" ([2RS[475]). Presumably this is a reference to Ms Higgins' allegedly falling over at 88MPH and referred to as indicative that Mr Lehrmann knew Ms Higgins was extremely intoxicated. Mr Lehrmann categorically denied having seen Ms Higgins fall over (see T296 L11-23)).

13. This submission as to recklessness should not be accepted. For the Court to find Mr Lehrmann 'raped' Ms Higgins on this basis, i.e. her intoxication vitiated any ostensible consent, the Court would first have to make findings that sexual intercourse took place and when any such sexual intercourse occurred.

14. As developed in the ACS and in these Reply submissions, Mr Lehrmann submits that the evidence cannot sustain a positive finding that any sexual activity took place. However, if the Court did find that sexual intercourse took place, the Court would then have to find, as an established fact, that at that time of the sexual intercourse, Ms Higgins was so intoxicated as to be unable to consent to sexual activity.

15. The Court would also need to make a positive finding that Mr Lehrmann himself, at that time, either knew or believed Mr Higgins was incapable of consenting to sexual

activity, or that he adverted to that possibility but nonetheless proceeded to engage in sexual activity.

16. In Mr Lehrmann's submission, even with the benefit of expert evidence on the subject and a detailed review of the available CCTV, the evidence simply does not permit a positive finding of fact that Ms Higgins intoxication was, at any relevant time, such that she could not consent to sexual activity. There is also no reliable evidence as to how much (if any) alcohol Ms Higgins consumed at 88mph.

17. Further, whilst there is a relatively confined period in which any sexual activity might have occurred, there is no cogent and reliable evidence as to Mr Lehrmann's state of mind at the time of any such sexual activity in relation to his knowledge, belief or advertence as to Ms Higgins' level of inebriation and ability to consent sufficient to permit the requisite finding of fact necessary to establish that rape or sexual intercourse without consent on the basis of intoxication occurred.

18. Finally, Ms Wilkinson appears to submit that Mr Lehrmann "rushing out [from APH] is consistent with" a state of mind of lack of consent. The submission is unsupported by any evidence, transcript or exhibit references. It is difficult to understand the submission that Mr Lehrmann's "rushing out" is in some way consistent with a guilty mind, when it is apparently uncontroversial (a) that he had already booked an Uber, and was going to meet it when he left APH (see 1RS [466]); and (b) he had by that time missed a number of calls from his then-girlfriend. If he was rushing, the wish not to keep the Uber driver waiting, or to get home in circumstances where he had missed calls from his girlfriend, are at least equally plausible and likely explanations.

Whether sexual activity, consensual or otherwise, took place

19. Network Ten submits that it is open to the Court to find that consensual sexual intercourse took place between Mr Lehrmann and Ms Higgins (see e.g. 1RS [1161] – [1162]).

20. In response, Mr Lehmann submits that there is an insufficient evidentiary basis for a positive finding to be made that any sexual intercourse, consensual or otherwise, took place. This point is made in Mr Lehrmann's written closing submissions (**ACS**) (see e.g. [153]) but warrants further remark given the emphasis the Respondents seek to place on this issue.

21. Mr Lehrmann maintains he did not rape Ms Higgins nor engage in any sexual activity with Ms Higgins. Even if the Court were to reject or put to one side Mr Lehrmann's evidence as to what occurred within the Minister's private office, the Court could not be satisfied that the Respondents have discharged their onus and established any sexual activity, consensual or otherwise, took place for several reasons.

22. Firstly, because of the lack of positive, objective, credible, reliable and independent evidence supporting such a finding, and, secondly, because there are simply too many other plausible possibilities as to what may have happened in the Minister's private office, and as to why Ms Higgins was found naked in that office, to permit the Court to make any conclusion as to what took place.

23. For example, at paragraph [362] of the ACS, it was indicated that one plausible explanation for why Ms Higgins was observed naked by Ms Anderson was Ms Higgins decided to remove her dress before she laid down on the couch, as she may have felt sick and did not want to risk vomiting on her dress, and after lying down she then passed out asleep.

24. Another explanation is Ms Higgins may have vomited on her dress at some point and took it off before lying down on the Minister's couch, and then passed out or fell asleep. In the morning she may or may not have attempted to wash off her dress in Minister Reynolds' bathroom, perhaps explaining why she took the jacket from Minister Reynolds' office (see T633 L43-47 and T634 L1) when she left APH to cover up her dress. In that regard, Ms Higgins told FA Thelning that she had 'got sick' and had seen "dark stains" all over her "shirt/top dress, dark stains" (see FA Thelning's official AFP Diary at R77, CB71, p2332). Even in Ms Higgins' draft book chapter she stated that she had "*wretched*' in the Minister's bathroom, after which she had looked down at her white dress, which was "*stained and marked*" (see Ex40, CB953 at p4862).

25. The critical point is there are a number of plausible explanations for why Ms Higgins, being affected by alcohol, took off her dress and lay down naked on the Minister's couch. The existence of these plausible alternative explanations, coupled with a lack of independent reliable evidence to support the Respondents' submissions, makes any positive finding to the requisite standard that sexual activity took place, consensual or otherwise, unable to be supported by the evidence. Mr Lehrmann submits that the facts and circumstances of this case are archetypal of a '*Palmanova*' situation – where no

one hypotheses emerges as more likely to be correct than all of the other possibilities considered together.

26. In these circumstances, Mr Lehmann submits the Respondents have not discharged their onus and proved any sexual activity (consensual or non-consensual) took place and accordingly, both the defence of justification and any collateral suggestion of an abuse of process on the part of Mr Lehrmann, must fail.

Mitigation and Damages

27. In Section H of the 2RS ('Events of Relevance to Damages'), commencing on page 74, reference is made to numerous other defamatory publications published by third parties about Mr Lehrmann (see e.g. [370], [372]).

28. A defendant cannot mitigate damages by relying upon evidence of other defamatory publications concerning the plaintiff: *Carson v John Fairfax and Sons Ltd* (1992) 178 CLR 44 at 99 per McHugh J, and *Dingle v Association Newspapers* [1964] AC 371 at 396 per Lord Radcliffe.

29. During the closing address, the Court asked whether, if it found that sexual activity did occur but fell short of finding that Mr Lehrmann raped Ms Higgins, Mr Lehrmann's false denial of sexual activity would amount to an abuse of process. Senior Counsel for Mr Lehrmann agreed that it would although that vindication for failure to justify the allegations would still be required: T2444 L26-T2445 L1

30. In the Respondents' oral submissions in reply, it was contended that it followed from this concession that Mr Lehrmann should receive no damages or merely derisory damages: T2446 L42-47. Such an extreme outcome does not follow from Senior Counsel for Mr Lehrmann's accedence to the Court's proposition, for the following reasons.

31. In *Russell v Australian Broadcasting Corporation (No. 3)* [2023] FCA 1223 at [467]-[472], the Court recently had occasion to consider the circumstances in which general damages can properly be reduced on account of the plaintiff's conduct in the litigation or concerns about his credit. At [469], the Court identified that disreputable conduct by the plaintiff is only relevant to the assessment of damages if it is in the same sector of the plaintiff's life as is affected by the defamation.

32. If the Court finds that Mr Lehrmann engaged in some form of sexual activity with Ms Higgins, and lied about it, there is no dispute that this is germane to the assessment of damages to at least some extent: see ACS [520].

33. The question presented by the oral submissions in reply, however, is whether the abuse of process concession warrants the conclusion that it would be appropriate to award Mr Lehrmann no damages, or only derisory damages. It is submitted that authority does not support such a conclusion.

34. Abuses of process can take many forms: *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256 at [9] per Gleeson CJ, Gummow, Hayne and Crennan JJ. While the categories are not closed, it usually involves one of the following:

    (a) the Court's processes being invoked for an illegitimate or improper purpose;

    (b) the use of the Court's processes being unjustifiably oppressive to a party or vexatious; or

    (c) the relevant use of the Court's processes bringing the administration of justice into disrepute.

    See *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2016) 243 FCR 474 at [97]-[147] per Foster J; *Perera v GetSwift Ltd* (2018) 263 FCR 92 at [73]-[77].

35. Given the different circumstances in which abuses of process can arise and the different ways in which the Court's processes can be abused, it is not the case that all abuses of process are necessarily of the same order of magnitude. An abuse of process constituted by commencing proceedings for a collateral or illegitimate purpose, for example, would usually be regarded as a much more serious matter than an abuse of process where the proceedings are unjustifiably oppressive, but were at least commenced properly and for a legitimate purpose. Nor does it follow, it is submitted, that the appropriate response to all abuses of process is the same.

36. Whatever else might be said of it, one way in which Mr Lehrmann's conduct *cannot* be characterised as an abuse of process is in the sense of invoking the Court's processes for an illegitimate purpose, or to obtain a remedy to which he is not entitled. This is not a case like *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612, where the proceedings were an abuse of process because the plaintiff complained of imputations

which were plainly true. A finding, contrary to Mr Lehrmann's evidence, that he did engage in some form of consensual sexual activity is clearly and qualitatively different from the allegation of rape. On those findings, it could not be suggested that Mr Lehrmann had no reputation to be further harmed because he had falsely denied that any sexual activity had occurred when the false allegation was that he raped Ms Higgins. The publication of that false allegation gave rise to a genuine and substantial cause of action which he had a legitimate interest in pursuing.

37. There is a line of English authority to the effect that a court may strike out a plaintiff's genuine claim, even after trial, on the ground of dishonesty. Those authorities do not appear to have been applied in Australia, and the English cases themselves emphasise that it is only in an exceptional case that such a course of action would be proportionate and reasonable. In ***Summers** v Fairclough Homes Ltd* [2012] 1 WLR 2004 at [49], for example, the Supreme Court held that:

> The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate.

See also at [33], [36] and [61]. The same reasoning is apt on the question of awarding a plaintiff no damages or derisory damages, given that to do so implies that the plaintiff had no reputation to be vindicated and suffered no substantive injury by reason of the defamation: see *Palmer v McGowan (No. 5)* [2022] FCA 893 at [499].

38. *Summers* was a personal injury case in which the plaintiff claimed to be unable to work and likely to remain so. He sought damages in the order of £800,000. Surveillance evidence obtained by the defendant demonstrated the plaintiff in fact was working, and was engaging in other activities like playing football. The plaintiff's allegation that he was unable to work was fraudulent. The trial judge, however, refused to strike out the whole claim because of this abuse of process, but instead, awarded damages for such injury and loss as he found to be genuine, in the sum of about £90,000. The employer's appeal was dismissed.

39. *Joseph v Spiller* [2012] EWHC 2958 was a defamation case in which the members of a musical act complained about a posting on a website which described them as "*not professional enough to feature in our portfolio*". A major element of their damages claim was the allegation that they had a booking cancelled because of the defamatory

post. That allegation was entirely fabricated. At [174]-[178], Tugendhat J concluded that the plaintiffs' dishonesty was such that there would be no injustice to them if they were awarded only nominal damages. This was so even though the abuse of process did not affect the whole claim, but only the special damages claim. His Honour held that the court's reasons were sufficient in the circumstances to vindicate the plaintiffs' reputation.

40. On any view, *Joseph v Spiller* is not analogous to the present case. The publication in that case could fairly be described as trivial and the fabricated special damages claim seems to have been the major component of the relief sought. Even if it is found that Mr Lehrmann was dishonest about engaging in (some) sexual activity, that dishonesty (serious as it may have been) falls very far short of fabricating a cause of action or a head of damages. The defamation, unlike in *Joseph v Spiller*, was very serious, and Mr Lehrmann was still in a position to suffer very serious reputational damage by reason of the publication of the false allegation of rape, notwithstanding such dishonesty.

41. To deprive Mr Lehrmann of damages in relation to a substantive cause of action which has been (on this hypothesis) established on the facts, would not be a proportionate or just response to the dishonesty involved in falsely denying any sexual activity with Ms Higgins. It would relieve the Respondents of a substantive liability in circumstances where they have failed to prove the truth of their publication and have failed to establish that they behaved reasonably in publishing it: compare *Summers* at [61].

42. If contrary to the above, the Court finds Mr Lehrmann did abuse the process of the court by falsely denying sexual activity with Ms Higgins, such an abuse of process can be more justly and proportionately addressed by other means short of an award of nominal damages, such as the drawing of adverse inferences against Mr Lehrmann on other issues, or a reduction in the amount of damages he might otherwise have been awarded in accordance with the principles for "mitigation" of damages, as Mr Lehrmann accepted was open to the Court at [488] of the ACS.

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