No. NSD 103 of 2023
NSD 104 of 2023

Federal Court of Australia
Registry: New South Wales

Bruce Lehrmann

Applicant

Network Ten Pty Ltd

First Respondent (in NSD 103/2023)

News Life Media Pty Ltd

First Respondent (in NSD 104/2023)

Lisa Wilkinson

Second Respondent (in NSD 103/2023)

Samantha Maiden

Second Respondent (in NSD 104/2023)

APPLICANT'S REVISED SUBMISSIONS

1. In NSD 103/2022 (**the Network Ten proceedings**), Mr Lehrmann sues in respect of three defamatory matters which were each published on 15 February 2021. In NSD 104/2022 (**the News Life proceedings**), he sues in respect of two defamatory matters which were also published on 15 February 2021. Both proceedings were commenced on 7 February 2023, outside the 1-year limitation period applicable in defamation.

2. By Prayer 1 of the Originating Applications, Mr Lehrmann seeks orders under s 56A of the Limitation Act extended the limitation period to 7 February 2023.

3. Mr Lehrmann relies on the Affidavits of Paul Svilans sworn on 1 March 2023 (**Svilans**) and 14 March 2023 (**Svilans 2**), and on the oral evidence given by Mr Lehrmann himself on 16 March 2023.

Applicable legal principles

4. On 1 July 2021, the *Defamation Amendment Act 2020* (NSW) commenced, making significant amendments to the *Defamation Act 2005* (NSW) and the provisions of the

Limitation Act 1969 (NSW) dealing with defamation. Those amendments only apply "*in relation to the publication of defamatory matter after the commencement of the amendment*": Defamation Act, Sch 4 cl 7; Limitation Act, Sch 5 cl 11. In *Barilaro v Google LLC* [2022] FCA 650 at [376]-[381], Rares J construed these transitional provisions to mean that the amendments to the Defamation Act and the Limitation Act did not apply when defamatory matter was first published before the commencement date but remained available for download after commencement. His Honour considered that the amendments applied only when the first publication of the defamatory matter occurred after the commencement date.

5. In this case, all of Mr Lehrmann's causes of action accrued on 15 February 2021, before the commencement of the Amendment Act. Therefore, the amendments do not apply in these proceedings.

6. The limitation period for defamation actions is 1 year from the date of publication of the matter complained of: Limitation Act s 14B.

7. Prior to its amendment, s 56A of the Limitation Act provided as follows:

> ***56A Extension of limitation period by court***
>
> *(1) A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period for the cause of action.*
>
> *(2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 14B to a period of up to 3 years running from the date of the publication.*
>
> *(3) A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).*

8. The relevant test is whether it was "*not reasonable… to have commenced an action in relation to the matter complained of*" within the first year after publication. The focus must be on the reasonableness of the applicant commencing proceedings within that first year. Section 56A does not require the applicant to prove that it was reasonable to allow the limitation period to expire (or to ignore the limitation period). Nor does it require the applicant to prove that it would have been positively unreasonable to

commence proceedings within the limitation period: *Houda v State of New South Wales* [2012] NSWSC 1036 at [12]-[14] per McCallum J.

9. Justice McCallum's view that an applicant does not need to prove that it would have been positively unreasonable to have commenced proceedings within the limitation period was inconsistent with what was said by Chesterman JA in *Noonan v MacLennan* [2020] 2 Qd R 537 at [51]. With respect, however, Chesterman JA's view puts a gloss on the words of the statute, and for this reason was criticised in *Jamieson v Chiropractic Board of Australia* [2011] QCA 56 at [19]-[20] per White JA (Muir JA and Philippides J agreeing). Justice McCallum's view should be preferred, and indeed was preferred in *Casley v Australian Broadcasting Corporation* [2013] VSC 251 at [10] per Beach J, *Barrett v TCN Channel Nine Pty Ltd* [2016] NSWSC 1663 at [42] per Davies J (upheld on appeal), and *Schoch v Palmer* [2016] QSC 147 at [13] per Applegarth J.

10. The test in s 56A(2) is whether it was not reasonable "*in the circumstances*" to have commenced proceedings. This means the objective circumstances, taken as a whole, not the applicant's subjective beliefs: *Joukhador v Network Ten Pty Ltd* (2021) 283 FCR 1 at [50]-[51] per Rares, Wigney and Bromwich JJ; *Noonan v MacLennan* [2010] 2 Qd R 537 at [19]-[20] per Keane JA. However, the objective nature of the test does not exclude consideration of the applicant's motivations or thought processes. To describe the test as objective means that an applicant cannot bring themselves within s 56A(2) by proving only a subjective belief that it was not reasonable to commence proceedings, but it does not mean that the Court should not enquire into the applicant's actual reasons: *Carey v Australian Broadcasting Corporation* (2012) 84 NSWLR 90 at [56]-[61] per Beazley JA (McColl JA and Sackville AJA agreeing on point).

11. Consideration of the kinds of circumstances which might render it not reasonable for an applicant to commence proceedings within the limitation period must be informed by the purpose for which the limitation period exists: *Noonan* at [22] per Keane JA.

12. If an applicant establishes that it was not reasonable to have commenced proceedings within one year from the date of publication, s 56A(2) provides that the Court "*must*" extend the limitation period. Section 56A does not involve the consideration of any prejudice to the respondent as a result of the delay in commencing proceedings: *Carey v Australian Broadcasting Corporation* (2012) 84 NSWLR 90 at [55] per Beazley JA.

13. However, while some extension of the limitation period is mandated by s 56A(2), the Court has a general discretion as to its length. If the applicant is dilatory in commencing proceedings after it becomes reasonable to do so, s 56A(2) does not oblige the Court to extend the limitation period all the way until the date on which he or she does eventually commence proceedings. The Court may extend the limitation period for a shorter period, including a period which is insufficient to bring the action within time: *Barrett v TCN Channel Nine Pty Ltd* (2017) 96 NSWLR 478 at [4], [74]-[75], [82], [106] per McColl JA (Simpson and Payne JJA agreeing).

The year from the date of publication – 15 February 2021 until 14 February 2022

14. The limitation period began running on 15 February 2021, the date on which each of the matters complained of was published.

15. Mr Lehrmann became aware of each of the matters complained of on the day they were published. He also became aware on that day that he had been identified, at least in relation to the first matter complained of in the News Life proceedings, even though it did not expressly name him: Svilans at [9]-[12].

16. Around 2pm on 15 February 2022, Mr Lehrmann was suspended from his employment after his employer received an email from a journalist at *The Australian* stating that "*government sources*" were identifying him as the man accused of sexually assaulting Ms Higgins: Svilans at [11].

17. In the afternoon of 15 February 2021, Mr Lehrmann spoke to a solicitor, Warwick (Rick) Korn of Korn Tlais Defence Lawyers: Tcpt 64.15-33. That evening, Mr Lehrmann sought Mr Korn's advice about commencing defamation proceedings in relation to the two articles by Ms Maiden (the matters complained of in the News Life proceeding) and the story on *The Project* (the first matter complained of in the Network Ten proceeding). ~~Mr Korn gave him the following advice~~. Mr Lehrmann gave the following evidence as to the advice given to him by Mr Korn.

> ~~*Higgins has spoken to the AFP. We have to assume she will now go to the AFP given she has gone to the media first with this. They will have defamation cases to answer, but we need to wait until we see what happens with the criminal allegations first.*~~
>
> *Can you recall… what was the nature of your enquiry?* --- *Well, I wanted to commence defamation proceedings. It was that outrageous at how this allegation was advanced before a complaint had been reagitated with the AFP.*

> *Before that day had you known that there had been any complaint at all, in any event? --- No.*
>
> *Okay. Did Mr Korn give you any advice in relation to your inquiries about defamation? --- He did.*
>
> *What was that advice? --- That advice was that defamation proceedings would be – could happen but we need to wait until the resolution of any criminal proceedings or any investigation.*
>
> *…*
>
> *In relation to this potential criminal allegation, best you can recall, what did you ask and what did Mr Korn say in relation to that? --- … from what I can recall I was outraged by the material I was seeing and asked about commencing defamation proceedings. …*
>
> *What did he say, best you can recall? --- Well, I mean, to the best that I can recall is that they have to wait until we see what happens with the criminal matter.*
>
> *Do you recall whether there was any reference to how long you could wait or whether there are any time periods or anything like that? --- No.*

~~Svilans at [13] [15]~~. Tcpt 65.17-66.15.

~~18. In the days following 15 February 2021, Mr Lehrmann said to Mr Korn, on multiple occasions, words to the effect of "*How can they be doing this? It's outrageous. It's completely defamatory*" Mr Korn again gave him advice to the effect of "*We will deal with that later. We have to deal with the criminal allegations first. Any civil proceedings will be afterwards*". Mr Korn gave substantially the same advice on subsequent occasions over the following weeks and months: Svilans at [20] [23].~~

19. Mr Lehrmann gave evidence that he often raised the media reports with Mr Korn. He said "*Every time an article would come out or a Four Corners report or whatever, there was outrage… and it was a mixture of being upset, angry and I wanted to fight back against the media*". He said that Mr Korn "*kept maintaining his position that any defamation would be considered after a resolution to the criminal matter*". Mr Korn's advice did not change at any time: Tcpt 68.1-24.

20. Mr Lehrmann did not get advice about potential defamation proceedings from anyone other than Mr Korn before the conclusion of the criminal proceedings: Tcpt 68.15.

21. The Respondents apparently seek to establish that Mr Korn did not give the advice which Mr Lehrmann said he gave. To this end, Mr Lehrmann was cross-examined at considerable length about text messages he sent to his then-girlfriend and other friends on the evening of 15 February 2021. In some of these messages, Mr Lehrmann said things to the effect of "*criminal is off the cards completely*", and expressed the view that he would recover a substantial amount in damages if he sued for defamation. In cross-examination of Mr Lehrmann, the Respondents sought to suggest that Mr Korn's advice was actually to this effect, namely, that criminal charges were off the cards and that he was never likely to be charged. Mr Lehrmann rejected these suggestions and maintained that Mr Korn never advised him that criminal charges were off the cards. He said that he misrepresented the effect of Mr Korn's advice in the messages sent to his then-girlfriend because he wanted to reassure and placate her, as she was naturally extremely anxious about the allegations about to made against Mr Lehrmann. The passage at Tcpt 87.36-89.19 is representative of this type of cross-examination.

22. Mr Lehrmann's evidence should be accepted and the Respondents' suggestions to the contrary ought to be rejected, for the following reasons:

    (a) The advice which Mr Lehrmann said was given by Mr Korn, i.e. that defamation proceedings should not be contemplated until after criminal proceedings had been resolved, is exactly the advice one would expect a responsible criminal solicitor to have given.

    (b) Conversely, the assertions in Mr Lehrmann's text messages, such as "*criminal is off the cards completely*" are not advice which any responsible solicitor could or would have given as of 15 February 2021. It would have been reckless in the extreme for any solicitor to have asserted with confidence, at that time, that there was no prospect of Mr Lehrmann being charged.

    (c) Mr Lehrmann's explanation that he was trying to placate his then-girlfriend by misrepresenting Mr Korn's advice is plausible: see Tcpt 80.7-9; 82.31-34; 89.13-17; 91.13. It is also entirely plausible that he would seek to put on a brave face with professional acquaintances such as Tahlia Robertson: Tcpt 93.29-30; 94.9-13.

    (d) In cross-examination, the Respondents put to Mr Lehrmann that he "*fabricated*" conversations with Mr Korn for this purpose, which Mr Lehrmann frankly

admitted. To characterise the messages as "*fabrications*", however, was somewhat tendentious. A more neutral term to describe these messages would be "*white lies*". It is a perfectly understandable human reaction for a person in Mr Lehrmann to sugar-coat the situation when speaking to his friends, and particularly his girlfriend, for the sake of putting on a brave face and projecting an attitude of unconcern and assurance that he would be vindicated.

(e) To the extent that Mr Lehrmann's recollection of events was imperfect in some areas, it is readily explained by the passage of time, the stress of the situation, and the fact that he became intoxicated during that evening: Tcpt 87.27-34.

23. Ultimately, whatever one makes of the text messages on the evening of 15 February 2021, the Respondents are left with the inescapable fact that Mr Lehrmann did not in fact take any steps to publicly vindicate himself or tell his story until after the criminal proceedings were resolved. The Respondents obligingly adduced significant evidence that Mr Lehrmann very much *wanted* to vindicate himself: Tcpt 112.7-113.12; 115.15-117.41. The fact is, however, that he took no steps to do so. The most straightforward and plausible explanation for why he failed to do so is that he was following the advice given to him by Mr Korn: see Tcpt 146.21-34.

24. It is even more unlikely that Mr Lehrmann believed or was advised that criminal proceedings were off the cards in light of what happened soon afterwards. On 18 February 2021, the AFP issued a public statement confirming that there was an open investigation into the allegations: Svilans 2 at [10]. Then, on 22 March 2021, the AFP Commissioner issued another public statement announcing that he had advised Phil Gaetjens (Department of Prime Minister & Cabinet) to stop conducting interviews until the AFP could determine whether the criminal allegation would traverse matters covered by the PMC investigation: Svilans 2 at [14]. On 7 April 2022, the AFP announced that a team of five officers had been assembled to investigate Ms Higgins's allegations: Svilans 2 at [15]. Then, on 24 May 2021, the AFP Commissioner told a Senate hearing that a brief of evidence was to be provided to the Director of Public Prosecutions imminently: Svilans 2 at [17].

25. In light of the progressive announcements by the AFP throughout March, April and May, any suggestion that Mr Lehrmann believed that criminal proceedings were off the

cards is inconceivable. In the context of those announcements, there is no way that a person in his position would not have taken the prospect of criminal charges seriously.

26. In the immediate aftermath of the publications, Mr Lehrmann became severely depressed and experienced trouble sleeping. On the evening of 16 February 2021, he attended Royal North Shore Hospital for psychiatric care and was subsequently admitted to another health facility for a period of 12 days. In early March, his mother made arrangements to relocate him from Sydney to live with her in Queensland: Svilans at [18]-[19]; Svilans 2 at [6]-[9]; Tcpt 66.37-67.27.

27. On 19 April 2021, Mr Lehrmann was interviewed by the Australian Federal Police in relation to Ms Higgins' allegation: Svilans at [24]-[27].

28. In late June 2021, at the conclusion of his medical leave, Mr Lehrmann's employer terminated his employment. In late 2021, Mr Lehrmann applied for unemployment benefits. He has continued to be unable to work since that time: Svilans at [28], [31].

29. On 7 August 2021, Mr Lehrmann was charged with one count of sexual intercourse without consent. On the same day, he was publicly identified by mainstream media as the person accused by Ms Higgins of sexually assaulting her: Svilans at [29]-[30].

30. The criminal charge against Mr Lehrmann remained pending for the balance of the 12 months following the publication of the matter complained of.

31. It was not reasonable for Mr Lehrmann to have commenced proceedings for defamation in the year following the publication of the matters complained of for two significant reasons.

32. **First**, Mr Lehrmann was given clear advice by a solicitor, as early as the evening of 15 February 2021 and on more than one occasion thereafter, to wait until the criminal allegations against him had been resolved before undertaking any civil action. It would not have been reasonable for Mr Lehrmann to have acted contrary to a solicitor's advice, particularly a competent criminal solicitor, by commencing defamation proceedings before the criminal allegations were resolved.

33. A similar issue arose in *Spedding v Dailymail.com Australia Pty Ltd* [2018] NSWSC 1963. The plaintiff wished to bring proceedings for defamation in respect of an article which referred to him as a "*convicted paedophile*". At the time of publication, he was facing historical charges of child sexual abuse, but had not yet been convicted. He was

given advice "*in the strongest terms*" by counsel not to commence proceedings for defamation until after the conclusion of criminal proceedings against him, even though counsel also advised that he would have a reasonably strong cause of action against the publisher: at [34]-[36]. At [37], McCallum J held that the plaintiff "*was entitled to act on the advice received and it would not have been reasonable to do otherwise*".

34. In *Akbari v State of Queensland* [2022] QCA 74, the plaintiff sought to bring defamation proceedings against a hospital and a doctor in relation to a complaint against him to the Health Ombudsman. He received advice from a solicitor which he understood as meaning that he should not sue for defamation until after an AHPRA investigation had run its course. This was in fact a misunderstanding of the solicitor's advice, but the trial judge held that the plaintiff's misunderstanding was reasonable. The advice was ambiguous, but it was reasonably open to the plaintiff's interpretation of it, namely that he should not sue for defamation until after the AHPRA investigation: at [16]. The trial judge held that the receipt of this advice was relevant, and that in the circumstances, it was not reasonable for the plaintiff to have commenced proceedings until after the end of the investigation: at [16]-[17]. On appeal, McMurdo JA (Mullins JA and Callaghan J agreeing) held that the trial judge was correct to the conclude that the limitation period had to be extended in these circumstances: at [18]-[22], [27]-[28], [61].

35. **Second**, within the year following publication of the matters complained of, Mr Lehrmann was in fact charged with a serious criminal offence which carried a maximum sentence of 12 years' imprisonment if he had been convicted of it. That charge remained pending throughout the rest of the 12-month limitation period, and ultimately (as detailed below) until 2 December 2022.

36. There are several reasons why it would not have been reasonable for Mr Lehrmann to have commenced defamation proceedings while a criminal charge was pending:

    (a) By reason of s 42(1)(a) of the Defamation Act, if Mr Lehrmann was convicted in the criminal proceedings, it would have been conclusive evidence that he did sexually assault Ms Higgins, supporting defences of justification or contextual truth. Mr Lehrmann and his legal representatives therefore could not have made a reasonable assessment of his prospects of success in defamation proceedings before the outcome of the criminal proceedings was known: *Houda v State of New South Wales* [2012] NSWSC 1036 at [19], [29] per McCallum J. The

uncertainty as to whether the Respondents might ultimately have conclusive evidence of the substantial truth of the defamatory stings would have inhibited any responsible solicitor from certifying the pleadings prior to the resolution of the criminal charge against Mr Lehrmann. No matter the strength of a criminal defendant's view about the justice of his or her position, the outcome can never be known with certainty. That circumstance alone means it will often not be reasonable for a claimant to bring defamation proceedings prior to resolution of criminal proceedings. See *Joukhador v Network Ten Pty Ltd* (2021) 283 FCR 1 at [56]. This is such a case.

(b) There is a complete overlap between the subject matter of the criminal charge and the substance of the imputations pleaded by Mr Lehrmann in the defamation proceedings. Both squarely concern the allegation that he sexually assaulted Ms Higgins at Parliament House on 23 March 2019. If he had commenced civil proceedings which raised a concurrent issue as to his guilt or innocence of the criminal charge, the usual requirements to plead and particularise his case, give discovery and serve evidence would have exposed him to the real risk of prejudicing his defence of the criminal charge, in which he was entitled to exercise the right to silence: see *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 at [36]-[47]; *Gregg v Fairfax Media Publications Pty Ltd* [2017] FCA 440 at [15]-[21] per Rares J; *McLachlan v Browne (No. 9)* [2019] NSWSC 10 at [38]-[41] per McCallum J. Apart from participating in an interview with the AFP on 19 April 2021, Mr Lehrmann has consistently exercised his right to silence in respect of Ms Higgins' allegations: see Tcpt 146.27 ~~Svilans at [42]~~.

(c) Given the overlap between the subject matter of the criminal charge and the defamation, it is likely that if Mr Lehrmann had commenced defamation proceedings within time, they would have been stayed: compare *Zhao* at [42]-[43]; *Gregg* at [8]-[10], [23] per Rares J; *McLachlan* at [54] per McCallum J.

(d) The Court can take judicial notice of the fact that the criminal charge would have imposed a major strain on Mr Lehrmann because his liberty was at stake. ~~The Court is entitled to take judicial notice of this (fairly obvious) proposition, but there is also evidence to that effect: Svilans at [16] [18], [32].~~ It would not have been reasonable for Mr Lehrmann, as a private individual with limited

> resources, facing such personal strain, to expose himself to battles on two fronts – against the Crown on the one hand, and against well-resourced media organisations on the other.

37. Each of these factors was held to be relevant in *Joukhador v Network Ten Pty Ltd* (2021) 283 FCR 1. In September 2017, Mr Joukhador, a solicitor, was arrested and charged with offences related to making unauthorised, fraudulent deductions from clients' settlement monies. On the night of his arrest, Network Ten broadcast defamatory matter about him. Mr Joukhador was aware that some defamatory material had been published about him in connection with his arrest but was not aware of the Network Ten matter until September 2019. Charges against him were withdrawn in July 2019.

38. The trial judge held that it was reasonable for Mr Joukhador to have commenced proceedings in respect of the Network Ten matter within 12 months from September 2018, and accordingly, her Honour declined to extend the limitation period. The Full Court (Rares, Wigney and Bromwich JJ) held that her Honour erred. At [52]-[53], their Honours held (citations omitted):

> *Where a person is facing a criminal charge, and the allegedly defamatory publication raises questions about his or her guilt or innocence that would be likely to cause any trial of, or interlocutory processes (such as discovery in the defamation claim) to be stayed, ordinarily, it will not be reasonable for him or her to commence civil proceedings of a kind that, realistically in the circumstances, could allow forensic examination of matters bearing on his or her guilt or innocence that could prejudice the claimant's defence of the criminal proceeding.*
>
> *The Limitation Act does not evince an intention that, at all costs, a claimant must commence a defamation action within one year of the publication. The interests of justice, usually, will not require that a claimant commence, or continue with, a defamation action that raises concurrent issues with a criminal prosecution against him or her while there is a real risk of prejudice to his or her defence of the unresolved criminal charge.*

39. Had Mr Joukhador discovered the defamatory publications and brought proceedings on them within the limitation period, it is likely that the defamation proceeding would have been stayed because of the objection overlap between its subject matter and that of the criminal proceeding. The Full Court observed that it was difficult to identify any legislative purpose that might be served by requiring an applicant to commence civil

proceedings timeously in circumstances where they were likely (albeit not certain) to be stayed anyway: *Joukhador* at [66] per Rares, Wigney and Bromwich JJ.

40. The Full Court also held that the emotional strain placed on Mr Joukhador by the criminal charges was relevant. It was not reasonable in the circumstances for him to embark on proceedings for defamation "*that his emotional state could not cope with or support*": *Joukhador* at [68] per Rares, Wigney and Bromwich JJ.

41. For the Applicant, such emotional strain was exacerbated by the intensive media discourse surrounding the allegations throughout the 12 months from 15 February 2021.

42. In *Houda v State of New South Wales* [2012] NSWSC 1036 at [34], McCallum J came to the same conclusion.

43. In *Landrey v Nine Network Australia Pty Ltd* [2023] FCA 27 the Court held that it would have been reasonable for the applicant to have commenced defamation proceedings within the limitation period, notwithstanding the existence of criminal charges (or anticipated criminal charges) against the applicant. At [66], the Court observed that:

> *This is a fact-dependent decision and should not be taken as in any way disputing or undermining the notion that prior to the long stop, it will* ordinarily *not be reasonable to commence a defamation action if that realistically could allow forensic examination of matters bearing upon guilt or innocence in extant or reasonably anticipated criminal proceedings. But as I have explained, this is no ordinary case.*

44. The factors which took *Landrey* out of the ordinary and informed the Court's conclusion included the following:

(a) Mr Landrey had made forensic and strategic decisions in his defence of the criminal proceedings which substantially prolonged them, to such an extent that he not only needed to obtain orders under s 56A(2) to commence defamation proceedings, but also required a stay as the criminal proceedings were adjourned due to a special leave application initiated by Mr Landrey: at [34].

(b) It was Mr Landrey who formed the view that he should await the outcome of the criminal proceedings before commencing defamation action. It was not a view informed by advice Mr Landrey received from his solicitor: at [37].

(c) Mr Landrey had been "*anything but shtum*" since learning of the allegations against him. He had taken active steps in two ongoing civil proceedings which

partly concerned the same factual substratum as the criminal charges, including by affirming affidavits in which he gave detailed accounts of his version of events: at [40]-[45]. These affidavits were affirmed at a time when the criminal proceedings against Mr Landrey had already been commenced. He also made complaints to the Law Enforcement Conduct Commission and the Australian Taxation Office in which he likely gave detailed accounts: at [47].

(d) Although the Court was prepared to accept that the criminal charges would have weighed upon Mr Landrey, and he was elderly and suffered from some health problems, his active engagement in other civil proceedings concerning the same factual substratum suggested that he did not have any real difficulty in being able to fight on multiple fronts: at [53]. There was no adequate explanation as to why Mr Landrey was too burdened to commence defamation proceedings, but was not too burdened to engage actively in the other civil proceedings which were on foot: at [65].

45. The outcome in *Landrey* turned on the absence of a rational connexion between Mr Landrey's decision to defer commencing defamation proceedings and the protection of his forensic position in relation to his criminal defence, in circumstances where he had not been reticent about going into evidence or making other voluntary, non-privileged representations as to the factual substratum common to the criminal charges and the alleged defamatory imputations: at [39].

46. This case, however, is completely different:

(a) The possibility of a conviction in circumstances where both the criminal and defamation proceedings have at their heart an overlap on the critical issue of Mr Lehrmann's guilt or innocence of the sexual assault charge, is itself enough to establish it was not reasonable to commence defamation proceedings. There were no other civil proceedings or any of the other factors present in *Landrey* such as to cloud this issue.

(b) Aside from one interview with the AFP at an early stage of the investigation, Mr Lehrmann consistently exercised his right to silence. Participating in this interview, in which Mr Lehrmann strenuously denied the allegations did not result in some ongoing 'waiver' of the right to silence. If the AFP had called Mr Lehrmann the following day to indicate they wished to put some further

matters to him, he would have been entitled to refuse to participate. He did not give evidence at the trial, made no public commentary about Ms Higgins' allegations, despite the intense media discourse surrounding the case. The only delays in the criminal process arose from the unavailability of counsel due to illness and a temporary stay granted for reasons unrelated to any conduct of Mr Lehrmann. If he had commenced defamation proceedings before the criminal charge was resolved and if those proceedings had not been stayed, he would have undermined his forensic position by exposing himself to the obligations to give discovery, answer interrogatories and serve outlines of evidence or affidavits, in addition to the broader necessity to reply to the defences of justification and contextual truth which in all likelihood would have been raised against him.

(c) In addition to those considerations, he was consistently advised by solicitor, starting on the day the matters complained of were published, that he should await the resolution of any criminal charges before commencing civil proceedings. That he received such advice is hardly surprising. He was entitled to rely on that advice, but moreover, it would not have been reasonable for him to have acted contrary to legal advice.

(d) Moreover, the strain placed upon Mr Lehrmann by the accusations against him and the media attention was such that he had to receive in-patient psychiatric care from as early as 16 February 2021.

47. In those circumstances, it was not reasonable for Mr Lehrmann to have commenced proceedings for defamation within the year from publication of the matters complained of, i.e. by 14 February 2023. If the Court is satisfied of this, it follows that the Court "*must*", by reason of s 56A(2), extend the limitation period.

Chronology from 15 February 2022 until 7 February 2023

48. The question which then arises is how long an extension the Court should grant. On this issue, the Court has a general discretion.

49. Mr Lehrmann's trial was listed to commence in the Supreme Court of the ACT on 27 June 2022, but it was vacated by McCallum CJ on 21 June 2022 following statements made about Ms Higgins at the Logies Awards and prejudicial media coverage a week out from trial: Svilans at ~~[35]~~ [37].

50. On 4 October 2022, the trial commenced. It concluded on 27 October 2022, when McCallum CJ discharged the jury because of juror misconduct: Svilans at [38]-[39].

51. It did not become reasonable for Mr Lehrmann to commence defamation proceedings as soon as the jury was discharged, however, because the likelihood at that time was that he would be retried. Following the discharge of the jury, McCallum CJ allocated a provisional date of 20 February 2023 for a second trial and stating that as the proceedings were still extant, journalists needed to be responsible in reporting the matter. On 31 October 2022, the Director of Public Prosecutions confirmed publicly that he did intend to proceed to a second trial: Svilans at [39]-[40].

52. It was not until 2 December 2022 that the Director of Public Prosecutions announced that he would not proceed further with the prosecution: Svilans at [41].

53. On 12 December 2022, Mr Lehrmann conferred with his current solicitors in relation to defamation proceedings. On 16 December 2022, they issued concerns notices on his behalf in relation to the matters complained of: Svilans at [43]-[44].

54. In correspondence, Mr Lehrmann's solicitors agreed to grant the solicitors for the Respondents in both the News Life proceedings and the Network Ten proceedings an extension until 20 January 2023 to respond to the settlement offer contained in the concerns notice, on condition that the Respondents not rely on the extended period in any opposition to an application by Mr Lehrmann for an extension of the limitation: Svilans at [45].

55. On 7 February 2023, Mr Lehrmann filed the Originating Applications and Statements of Claim in both proceedings.

56. In the circumstances of this case, it is submitted, it is just and reasonable to extend the limitation period to the date on which Mr Lehrmann ultimately commenced proceedings. He acted promptly after the announcement on 2 December 2022 that the prosecution would be discontinued and could not realistically have commenced proceedings any sooner after the end of the criminal proceedings against him.

Reply submissions to the Submissions of Network Ten Pty Ltd, News Life Media Pty Ltd and Samantha Maiden (the Respondents)

57. The Applicant responds to the Respondents' Submissions (**RS**) as follows:

(a) At the outset, throughout the Respondents' Submissions it is variously submitted that Mr Lehrmann could have commenced defamation proceedings "*immediately*" (see RS at [40]), that he should have been "*urging immediate action*" (see RS at [42]), and "*there was a period of around six months following publication and prior to the changes… when Lehrmann could have commenced proceedings for defamation*" (see RS at [51]). Such submissions overlook the relevant test, namely whether it was "*not reasonable… to have commenced an action in relation to the matter complained of* ***within 1 year from the date of the publication***" [emphasis added]. With respect, the period of principal importance is therefore the period immediately preceding the expiry of the twelve month period, and not the period at the commencement of that period (although clearly any advice given at the commencement of that period may be relevant as to the circumstances facing Mr Lehrmann during the period immediately preceding the expiry of the twelve month period – such as advice to wait until potential criminal proceedings against him have been dealt with prior to instituting of any defamation proceedings). It is also significant that during the 7 month period preceding the expiry of the twelve month period, Mr Lehrmann was facing prosecution, having been charged with a serious criminal offence on 7 August 2021: see Svilans at [29]. Adopting the language of the Respondents, no competent solicitor would recommend to his or her client facing a serious criminal charge of sexual assault to institute proceedings for defamation over the allegations subject of that charge, because any proceedings instituted for defamation would be likely to have prejudiced or undermined Mr Lehrmann's "right to silence" (see below).

(b) At RS [54], it is submitted that Mr Lehrmann "*has not demonstrated how commencing defamation proceedings might have prejudiced his defence of the criminal charge brought against him*" and that "*the circumstances were such that the commencement of defamation proceedings against the respondents could not have prejudiced or undermined Lehrmann's right to silence in any criminal process pertaining to the alleged rape of Higgins*". With respect these

submissions belie a misapprehension of the 'right to silence.' The Respondents have not outlined what they say a person's "right to silence" is. In *X7 v Australian Crime Commission* (2013) 251 CLR 196, French CJ and Crennan J observed at [41]-[42] (in dissent but not in point of principle):

> *41 Two immunities or rights encompassed by the expression "the right to silence", which operate in different ways in the criminal justice system, were referred to in the plaintiff's submissions. The first was the immunity of a person suspected of a crime from being compelled on pain of punishment to answer questions put by the police or other persons in authority, which is no wider than the privilege against self-incrimination.*
>
> *42 The second, upon which the plaintiff's submissions critically depended, was the specific immunity of an accused person at trial from being compelled to give evidence or to answer questions, which reflects not only the privilege against self-incrimination, but also the broader consideration that a criminal trial is "an accusatorial process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt*.

Further, in *Lee v NSW Crime Commission* (2013) 251 CLR 196, Gageler and Keane JJ observed at [318]:

> *What is often referred to as a "right to silence" is rather "a convenient description of a collection of principles and rules: some substantive, and some procedural; some of long standing, and some of recent origin", which differ in "incidence and importance, and also as to the extent to which they have already been encroached upon by statute". The most pertinent for present purposes are: the right of any person to refuse to answer any question except under legal compulsion; the privilege of any person to refuse to answer any question at any time on the ground of self-incrimination; the right of any person who believes that he or she is suspected of a criminal offence to remain silent when questioned by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played; and the right of a person charged with a criminal offence to a fair trial, "more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial*.

The Respondents' submission that "*the commencement of defamation proceedings against the respondents could not have prejudiced or undermined*

Lehrmann's right to silence in any criminal process" is misconceived and overlooks the following:

(i) Mr Lehmann did not give evidence at the trial he was facing in relation to the alleged sexual assault of Ms Higgins: Svilans at [43].

(ii) Any proceedings for defamation instituted by Mr Lehmann over the publication of allegations that he sexual assaulted Ms Higgins would involve discovery and, in particular, interrogation of Mr Lehman as to the circumstances of the alleged sexual assault of Ms Higgins. The proceedings would also involve Mr Lehrmann giving evidence in chief at the defamation trial, and then be subject to cross examination as to the circumstances of the alleged sexual assault of Ms Higgins.

(iii) The processes referred to in the preceding paragraph would have required Mr Lehrmann's to make representations, contrary to his "right to silence" when facing criminal proceedings, from being compelled on pain of punishment to answer questions put by persons in authority and his immunity from being compelled to give evidence or to answer questions. To commence defamation proceedings, he would have not only exposed himself to compulsory court processes, but in any pleadings, reply, particulars etc been required to make representations that would have been available to be deployed against him in the criminal proceedings. It is for these reasons, amongst others, that, and as submitted above, no competent solicitor would have advised Mr Lehrmann to have instituted proceedings for defamation whilst he was facing criminal prosecution for precisely the same allegation that any proceedings for defamation would be over.

(iv) The Respondents at RS [39] submit that by the time Mr Lehrmann had done the things referred to as specified in RS [37], the commencement of proceedings for defamation by Mr Lehrmann could not have compromised or undermined his "*right to silence*", and that *"... there was no further prejudice to his defence of the criminal proceedings capable of being caused by the commencement of a defamation case*" (see RS at [61]). As noted, these submissions reveal a fundamental

misunderstanding of the right to silence. Mr Lehrmann, as was his continuing right, chose not to give evidence at the criminal trial he was facing. For the reasons above, any proceedings for defamation that he may have brought would have compromised or undermined that right – and were capable of undermining his position in the criminal proceedings. It cannot be seriously suggested that cross examination of Mr Lehrmann in any defamation proceedings would be limited to things stated in his interview with police.

(v) At RS [64], the Respondents submit that if Mr Lehrmann had commended defamation proceedings prior to or after being charged, "*… it would be open to him to seek a stay of those proceedings if he was concerned about, and could have persuaded a Court of some, prejudice to his criminal proceeding…*". The difficulty with this submission is that the Respondents in any such proceedings are at liberty to oppose a stay on precisely the same grounds that the Respondents are opposing the present application, and if a stay was ultimately not granted, Mr Lehrmann would be faced with the prospect of either discontinuing those proceedings (with a likely costs penalty) or potentially compromising his position in relation to the ongoing criminal proceedings.

(c) At RS [30] it is submitted that "*Lehrmann had not been contacted or interviewed by police*" in the "*almost two years since the alleged rape and the publications on 15 February 2021*. The relevance of this statement is unclear. The first time Mr Lehrmann became aware of Ms Higgins allegations was 15 February 2021. He could have had no information as to what if any investigations might have been conducted by the AFP. If the suggestion is no criminal proceedings were ever likely to be brought against Mr Lehrmann, such a submission betrays a fundamental misunderstanding of criminal processes and indeed what occurred. The first matter complained of itself in the NSD 104/2023 proceedings quotes ACT Policing as stating that a police investigation that has halted can be recommenced at the later time at the request of a victim (see paragraphs [100] – [103] of Annexure "A" to the Statement of Claim – emphasis added).

(j) The reference to a second legal adviser is similarly irrelevant where no second legal adviser was ever instructed to provide defamation advice, nor even identified let alone spoken to by Mr Lehrmann: see Tcpt 93.33

(k) At RS [31] and [34], the Respondents make various submissions as to what they consider should have been the content of advice provided to Mr Lehrmann. It assumes specific knowledge on the part of Mr Korn about matters it is submitted Mr Lehrmann should have been told particular to defamation law, in circumstances where Mr Korn was providing advice about potential and subsequently extant criminal proceedings, and other than the need to deal with criminal proceedings first, no other specific advice about possible future defamation proceedings was given. These submissions ignore the fact that the issue of primary importance to a solicitor acting for a client facing allegations of serious criminality - namely the liberty of the client - is paramount.

(l) [redacted]

(m) At RS [69], reference is made to Mr Lehrmann's admission to Royal North Shore Hospital, with the Registrar noting that he presented with suicidal ideation. Mr Lehrmann was subsequently admitted to Northside Clinic for a period of about 14 days: see Svilans 2 at [9]. It is a rather extraordinary submission that it is precisely during this period that the Respondents seem to suggest that Mr Lehrmann should have instituted proceedings for defamation (see RS [40], [42] and [51]).

Reply submissions to the Submissions of Ms Lisa Wilkinson (the Second Respondent)

58. Mr Lehrmann responds to the Second Respondents' Submissions (**2RS**) as follows:

(a) At 2RS [47] and [48], the Second Respondent makes light of Mr Lehrmann's hospitalisation, and submits that he had a "… *financial interest to remain on medical or "gardening" leave and delay the meeting proposed* [with his employer]". The basis for such a submission, essentially making a positive allegation of malingering, is not known to the Applicant. Mr Lehrmann trusts that it is not suggested that his seeking of medical treatment at Royal North Shore Hospital (where he presented with suicidal ideation), his subsequent admission to the Northside Clinic, and relocation to return to live with his mother were disingenuous or manufactured.

(b) At 2RS [52] the Second Respondent repeats the submissions of the other Respondents that *"… it would have been reasonable to commence proceedings at any time between late February and 6 August 2021*". This suggests the Second Respondent accepts that it would not have been reasonable for Mr Lehrmann to have commenced his proceedings after 6 August 2021. The Applicant otherwise repeats his submissions at [50(a)-(c)] above.

(c) At 2RS [58], reference is made to Mr Lehrmann not having issued a Concerns Notice during the limitation period. Although the Second Respondent refers to presumptive prejudice, it is noted that the Second Respondent does not refer to any actual prejudice.

(d) At 2RS [58], reference is made to Mr Lehrmann not having issued a Concerns Notice to the Second Respondent. However, a Concerns Notice was issued to the employer of the Second Respondent, with the Concerns Notice containing a settlement offer. That settlement offer was not accepted, and it was consequent upon that failure that Mr Lehrmann instituted these proceedings. It should be noted that it was open to the Second Respondent to make an Offer of Amends in response to the claims by Mr Lehrmann, with his Statement of Claim constituting a Concerns Notice for that purpose (See *Mohareb v Booth* [2020] NSWCA 49 at [11], citing its previous judgment to this effect in *Zoef v Nationwide News Pty Ltd* [2016] NSWCA 283; (2016) 92 NSWLR 570 at [92]).

Conclusion

59. Orders should be made pursuant to s 56A(2) of the *Limitation Act* extending the limitation periods in both the Network Ten proceedings and the News Life proceedings until 7 February 2023.

60. The Respondents should pay Mr Lehrmann's costs of and incidental to this application.

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