IN THE FEDERAL COURT OF AUSTRALIA No. NSD 103 of 2023
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

BRUCE LEHRMANN
Applicant

NETWORK TEN PTY LTD and another
Respondents

RESPONDENTS' SUBMISSIONS
CROSS-EXAMINATION AS TO CREDIBILITY

Duration, credit and case management

1. Ms Higgins, a third party, began her evidence late in the afternoon on 28 November 2023.

2. Senior Counsel for the Applicant began his cross-examination of Ms Higgins at around 10:47am on Thursday, 30 November 2023, and continued for the whole of that day and the whole of Friday, 1 December 2023. He has indicated that the cross-examination will continue for a full third day. If that is right, the length of the cross-examination will exceed that of the cross-examination of the Applicant.

3. Objections have been raised by the Respondents on a number of occasions under s 41 of the *Evidence Act 1995* (Cth) in relation to the repetitiveness of the questioning.

4. Although credit is an issue, that does not entitle the Applicant to endlessly cross-examine on every (apparent) credit point he has conceived. The entitlement to cross-examine under s 27 of the *Evidence Act* is not unrestricted (and in fact is specifically constrained by the Act) and should be limited so as not to be oppressive to the witness.

5. Further, the Court must conduct civil proceedings in accordance with the overarching purpose of civil practice as set out in s 37M *Federal Court of Australia Act* 1976 (Cth).

6. The common law entitlement to cross-examine on credit was not subject to any strict limitations. That is not so under the *Evidence Act*. Evidence that is said to relate to credibility (s 55(2)(a)) is not admissible unless a relevant exception applies: s 102.

7. In order to fall within the exception in s 103(1), the evidence can only be adduced in cross-examination of a witness if the evidence "*could substantially affect the assessment of the credibility of the witness*". In determining that matter, the Court may have regard to (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Conduct after aborted criminal trial

8. During the afternoon of 1 December 2023, an objection was taken by the Respondents, on the grounds of relevance, to a series of questions put to Ms Higgins about a speech she gave outside the Supreme Court of the Australian Capital Territory on 27 October 2022, following the mistrial of Mr Lehrmann's criminal proceedings (T875.4-876.2).

9. In response to that objection, on a *voir dire*, the Court asked Senior Counsel for the Applicant to articulate the ultimate proposition he wanted to extract from Ms Higgins (T876.16-18) from the relevant line of cross-examination.

10. Senior Counsel for the Applicant indicated that the ultimate proposition he intended to make would be that there was a "*course of conduct [by Ms Higgins] designed to manipulate the court processes so as to avoid a possibility which would undermine her financial interests of Mr Lehrmann being found not guilty in proceedings where there was a higher standard of proof and a preference to go ahead, as was indicated before the complaint even came, to proceed in civil proceedings where there was a lower standard of proof*" (T882.33-38).

11. The pathway to that ultimate submission was said to involve the following steps:

    (a) Senior Counsel for the Applicant intended to play Ms Higgins part of a video recording of the speech she made on 27 October 2022 after the jury had been discharged and a new trial date fixed in the criminal proceedings (T877.25) (Exhibit #VD1). He indicated that the proposition he intended to advance was that Ms Higgins was doing everything she could to make sure there would not be another (criminal) trial (T877.40-41). He said that he intended to advance the proposition that the assertions made by Ms Higgins were "*contrary to administration of justice and contained false statements*" (T882.2-5).

(b) He intended to refer to the provision of medical evidence to the Director of Public Prosecutions which led to the discontinuance of the criminal proceedings by reason of the ongoing trauma associated with the prosecution and the unacceptable risk to the life of the complainant. The Respondents understand that this is intended to support a proposition that, in substance, Ms Higgins feigned health difficulties in order to convince the DPP not to proceed with a retrial (T879.5-10).

(c) He intended to refer to social media posts made by Ms Higgins following media reports some six weeks later, on or about 7 December 2022, that the Applicant was intending to file the present defamation proceedings. Senior Counsel for the Applicant said that he intended to refer Ms Higgins to Instagram posts in which she expressed a willingness to appear as a witness in any potential civil proceeding and alluded to the issues being determined in a "*slightly more favourable court*" (T882.7-27, CB1048). He also referred to Ms Higgins "*expressing opinions [in the first meeting with Ms Wilkinson and Mr Llewellyn] that she thought she would be okay on the balance of probabilities but not beyond a reasonable doubt…*" (T882.29-33).

12. Senior Counsel for the Applicant has advised that the Applicant also intends to rely upon (i) an embedded video in an ABC news report of a statement made by the ACT DPP concerning the fact and circumstances of the discontinuance of the criminal proceedings, and (ii) two articles from December 2022 reporting on a prospective defamation claim by the Applicant.

13. As Senior Counsel for the Second Respondent submitted, an immediate and obvious problem with the second step along the articulated path is the disconnect between any representations about Ms Higgins' health as disclosed in the medical reports provided to the DPP and any statements made by Ms Higgins about her own health and ability to proceed (T884.5-11). The unstated contention must be that Ms Higgins somehow misled and fooled the authors of the medical reports and the DPP. Those medical reports are not, to date, available to the parties or the Court, so it is unclear how far this proposition could properly be advanced.

14. There is a further fundamental objection to this line of cross-examination.

15. The central fact in issue in this proceeding is whether the Applicant raped Ms Higgins on 23 March 2019. No attempt has been made by Senior Counsel for the Applicant to

articulate how an alleged motive on the part of Ms Higgins to prevent the Applicant from being retried after his criminal trial ended due to juror misconduct in October 2022, or her statement some six weeks later that she would be prepared to give evidence on oath in defamation proceedings on behalf of a third party, are related to that fact.

16. Even if the ultimate proposition referred to in [10] above and the three steps said to support that proposition set out in [11] above could be established, the Court would still have to be satisfied that those matters were rationally connected to the determination of the ultimate fact in issue in respect of the justification defence - namely whether the Applicant raped Ms Higgins on 23 March 2019.

17. There is no such connection. The submissions put on behalf of the Applicant in support of the line of cross-examination betray a lack of coherence.

18. Assuming "*the worst*" (as his Honour put it during argument on at T881.11), the more rational explanation is that Ms Higgins sought to avoid reliving the trauma of the criminal trial, with the continued risk that a result would not be reached again. Ms Higgins' comments on social media about telling the truth "*no matter how uncomfortable or unflattering*" to the Court in the criminal proceedings, the "*asymmetrical criminal justice system*" and the general imbalance of her having to be cross examined at length while the Applicant stayed silent and detached (CB 1048, p 5363-5364) are consistent with the hypothesis that she was seeking to avoid having to go through the same experience again, rather than the (far fetched) conclusion that she did so because she has fabricated that she was raped.

19. Avoiding a repeat of the unsatisfactorily concluded criminal trial is a wholly rational (and understandable) motive, which does not impugn Ms Higgins' credit at all. That hypothesis is logically consistent and more probable than that advanced by Senior Counsel for the Applicant in the sense of being more than a mere conjecture: *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, 5; cited most recently in *Peck v Australian Automotive Group Pty Ltd* [2023] FCA 1413, [202] (per Cheeseman J).

20. If the ultimate proposition is that Ms Higgins did the things referred to by Senior Counsel for the Applicant so that the controversy would be determined in a civil law setting with a lower standard of proof, that conclusion necessarily involves a willingness on the part of Ms Higgins to participate in a further juridical enquiry as to whether the rape occurred. It is indicative of Ms Higgins' continued preparedness to maintain her allegation on oath

in further proceedings – which contradicts the point that the Applicant apparently seeks to make. If Ms Higgins had fabricated the rape allegation, why would she be volunteering publicly to give evidence, on oath, that the rape had occurred (and subject herself to less restricted cross-examination in a civil context) in order to assist a media organisation in a defamation dispute to which she is not a party?

21. From a case management perspective, having regard to the issue of oppression, the "*path*" articulated on behalf of the Applicant involved many steps and would necessarily take some time. This is a further relevant consideration.

22. Questioning on the topics articulated by Senior Counsel in support of the ultimate proposition for which he contended should not be allowed.

Michaelia Cash tape

23. The Applicant also apparently seeks to cross-examine Ms Higgins by playing a 15 minute tape of a conversation with Senator Michaelia Cash and Daniel Try recorded on 5 February 2021 (T853.46) that was possibly obtained in contravention of the *Listening Devices Act* 1992 (ACT) - although note the exception in s 4(3)(b): T854.1

24. The operation and effect of that legislation, including the prohibition set out in s 10, were accurately summarised by Lee J and Senior Counsel for the parties shortly after the issue arose: T857.1

25. Neither of the two other participants to the conversation are intended witnesses in the proceedings. Senior Counsel for the Applicant stated from the Bar Table that "*I have the consent of Minister(sic) Cash to have this conversation published*": T854.44. Apparently Senator Cash is in the Applicant's camp, a matter that will likely be the subject of further submissions on behalf of the Respondents later in the trial. No documents evidencing the communication of that consent were produced in answer to a call: T855.1.

26. In any event, however, given s 10 gives rise to criminal liability, admissible evidence of consent is necessary to establish the exception in s 10(2). Consent to "*publish*" the conversation does not appear to meet the criteria.

27. It ought always to have been apparent to the Applicant that there was an issue with the admissibility of the recording. The Applicant closed his case without calling Senator Cash or Mr Try. In order to adduce evidence of their consent to reliance on the recording,

the Applicant would need leave to reopen his case. If granted, the Respondents would have a *prima facie* entitlement to cross-examine Senator Cash and Mr Try.

28. Further, no attempt has been made by the Applicant to identify the alleged credit issue to which the recording relates. It is also unclear why any credit issue would require the tape to be played in order to be deployed: T858.22.

3 December 2023

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