NOTICE OF FILING

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Important Information

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IN THE FEDERAL COURT OF AUSTRALIA **NSD701/2044**

REGISTRY: NEW SOUTH WALES

DIVISON: GENERAL

BRUCE LEHRMANN

Appellant

NETWORK TEN PTY LIMITED and another

Respondents

Applicant's Outline of submissions

on the Application for a Stay of Enforcement of Costs Order pursuant to r36.08

1. This is an application for a stay on the enforcement of costs, seeking an order that Order 2 made by Justice Lee in the Federal Court of Australia on 27 June 2024 for the amount of $2,000,000.00 be stayed pursuant to r 36.08(2) of the Federal Court Rules.

2. The Applicant relies upon the affidavit of Zali Burrows affirmed 1 August 2024 in support of the application.

Relevant Principles

3. The overriding principal is the court has a discretion and needs to look to the interests of justice and the balance of convenience.

4. The New South Wales Court of Appeal held in *Alexander v Cambridge Credit Corp Ltd (Receivers Appointed)* (1985) 2 NSWLR 685 at 694-5, a decision which has been applied in respect of applications under r 36.08(2) of the *Federal Court Rules*, in an application for a stay of orders pending appeal:

(a) the onus is on the applicant to demonstrate a proper basis for a stay that will be fair to all parties, and the filing of an appeal will not, of itself, provide a reason or demonstrate an appropriate case, nor will it discharge the onus which the applicant bears;

(b) the Court has a discretion whether or not to grant the stay and, if so, as to the terms that would be fair;

(c) in the exercise of its discretion, the Court will weigh the balance of convenience and the competing rights of the parties before it;

(d) where there is a risk that, if a stay is granted, the assets of the applicant will be disposed of, the Court may, in the exercise of its discretion, refuse to grant a stay;

(e) it is not at all unusual for the Court, in the exercise of its discretion, to grant a stay on terms that the appellant give to the judgment creditor security in terms defined by the Court as appropriate to the fair adjustment of the rights of the parties;

(f) where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay. Thus, where it is apparent that unless a stay is granted an appeal will be rendered nugatory, this will be a substantial factor in favour of the grant of a stay;

(g) although Courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, this does not prevent consideration of the specific terms of a stay that will be appropriate fairly to adjust the interests of the parties, from making some preliminary assessment about whether the appellant has an arguable case.

5. In a recent decision in the Federal Court of Australia[1] (date of publication of reasons 4 September 2024), a summary of the relevant principles governing the application of r.36.08 was given as follows:

6. A successful party is prima facie entitled to the benefit of the judgment which it has obtained: *Powerflex Services Pty Ltd v Data Access Corp* (1996) 67 FCR 65 at 66 (Burchett, Heerey and Whitlam JJ). Nevertheless, the Court has power to order a stay under r 36.08(2) of the Rules.

7. There must be "a reason or an appropriate case" to warrant the exercise of discretion in favour of granting a stay: *Powerflex* at 66.

8. The onus is on the applicant for the stay to demonstrate a proper basis for a stay that will be fair to all parties: *Alexander v Cambridge Credit Corporation Ltd (recs apptd)* (1985) 2 NSWLR 685 at 694 (Kirby P, Hope and McHugh JJA).

9. The general rule is that a stay will be granted where there is a likelihood that a successful appeal would be rendered nugatory: *Australian Competition and Consumer Commission v BMW (Australia) Limited (No 2)* [2003] FCA 864 at [5] (Finkelstein J) citing *Wilson v Church (No 2)* (1879) 12 Ch D 454 at 458.

10. In addition to considering whether or not the grant of a stay would render a successful appeal nugatory, it is also well established that the Court should consider (a) the balance of convenience, (b) the competing rights of the parties, and (c) whether either party will be prejudiced by the stay: *BMW* at [5] citing *Marconi's Wireless Telegraph Co Ltd v Commonwealth (No 3)* (1913) 16 CLR 384 at 386; *Phillip Morris (Australia) Ltd v Nixon* [1999] FCA 1281 at [17].

11. A stay should not be granted unless the appeal is at least arguable, however, it is usually inappropriate to speculate as to its prospects of success: *In-N-Out Burgers, Inc v Hashtag Burgers Pty Ltd (No 2)* [2020] FCA 722 at [25] (Katzmann J); *BMW* at [5].

[1] *Master Wealth Control Pty Ltd v Australian Competition and Consumer Commission* (Stay application) [2024] FCA 1024 at [24] to [33]

12. The degree of confidence which a Court needs to have in an appeal's prospects will most likely vary with all of the circumstances of the case including the potential prejudice which might be suffered by the parties as the result of the granting or refusal of the stay: *Stefanovski v Digital Central Australia (Assets) Pty Ltd* [2017] FCA 1121 at [4(e)] (Derrington J); *Redbubble Ltd v Hells Angels Motorcycle Corporation (Australia) Pty Ltd* (2022) 168 IPR 74; [2022] FCA 1039 at [35(e)] (Derrington J).

13. There is a strong reason for refusing a stay where it is established that there is a real risk that the granting of a stay may prevent the successful party at trial from obtaining the full benefits of their judgment if the appeal were unsuccessful: *Stefanovski* at [4(h)]; *Redbubble* at [35(h)].

Arguable grounds of appeal

14. *Woolridge v Australian Securities Commission* (2015) 106 ACSR 551; FCA 349 observed at [18] that, in exercising its discretion,

> *"the Court will need to make some assessment of the prospects of success of the appeal, but only to the extent necessary (which would not normally involve a detailed consideration of the merits of the appeal). If the prospects of success of the appeal are so strong or overwhelming that the interests of justice could only be served by granting a stay, a stay would be the appropriate order."*

15. The Amended Appeal filed 13 September 2024 states the grounds of appeal:

> 1. The primary judge erred in upholding the defence of justification because the justification case found had not been pleaded, was different to the justification case which had been pleaded, had not been the subject of submissions, had not been argued by the Respondents and had not been put to the relevant witnesses contrary to the principles of procedural fairness and natural justice.

2. The primary Judge erred in determining the meanings conveyed to an ordinary reasonable person by the publication complained of.

3. The primary Judge erred in determining that the Respondents had established the defence of justification.

4. The primary Judge erred in determining that the Applicant (if he had succeeded in his case) was entitled to a mere $20,000.00 in damages.

16. Each of the appeal grounds are arguable. As one example, where a case is found by a judge against a party which is clearly outside the pleading and particulars, the judgment cannot stand, even more so when it is not the case that the Applicant had fair notice of what the unpleaded case was and therefore given a fair opportunity of responding to that unpleaded case. For example and certainly not exhaustive:

Ground 1: Example: how the rape occurred is very different from the facts the judge found, the first respondent ("BL") did not run that case, and it was a case that was not put to the Applicant nor to Ms Brittney Higgins ("BH") which amounts to a denial of natural justice and procedural fairness, some comparisons:

(i) the case pleaded at [34] involved "forceful sexual intercourse" but the case found involved no force.

(ii) case pleaded at [34] involves BL "audibly slapping against" BH but the judge makes no such finding.

(iii) the case pleaded at [34] involves BH being awoken by a sharp pain in the thigh, but the case found does not involve BH being asleep (or unconscious) or that BH causes a pain to her thigh. Indeed the finding of the bruising to the thigh was not accepted at [559].

(iv) the case pleaded at [35] involves BH being raped whilst asleep or unconscious, but the judge finds merely that she was prone to drowsiness at [523].

(v) the pleaded case at [34] involves BL's knee being crushed against BHs' thigh, but the judge makes no such finding.

(vi) the pleading at [34] refers to BHs' legs being held open by BL, but there is no such finding.

(vii) The pleading at [34] refers to BH being pinned into the corner of the sofa but the judge makes no such finding.

(viii) the pleading at [35] says BH was incapable of consent because she was too intoxicated, but the judge makes no such finding.

(ix) the pleading at [35] says BH was incapable of consenting because she was asleep or unconscious, but the judge makes no such finding.

(x) the pleading at [36] refers to no communication by words or actions of any consent, whereas the judge finds only that she did not consent at [586].

(xi) the pleading at [37] says that LB knew that BH was to intoxicated to consent but the judge makes no such finding.

17. The second part of the rape pleaded by the first Respondent is even more starkly different from the case found by the judge. That second case involves BH saying no half a dozen times and telling the first respondent to stop. It also refers to her crying and being too intoxicated to give her consent. It also maintains that LB knew that she didn't consent by reason of his knowledge of the following six maters:

    1. BH had said: "No";
    2. BH had told him to stop;
    3. BH was crying;
    4. BH had ben passed out, either asleep or unconscious, immediately before the words and actions particularised in subparagraphs (a)-(c) above;
    5. BH was to intoxicated voluntarily and freely to give her consent; and
    6. BH had not communicated to BL, either in words or by actions, any consent to BL continuing to have sexual intercourse with her.

    Ground 2: The Gazette of Law and Journalism article titled “Did Justice Lee get it wrong?” by Graham Hryce dated 7 May 2024 supports the merits of this ground.

Ground 3: The case found by the judge was never put to Lehrman or put to any other witness including Ms Higgins, She gave no evidence to support it and it is contrary to her evidence. The case found assumes she is a serial liar.

Ground 4: $20,000 for a false charge of rape is manifestly inadequate and the Applicant should be awarded either a seven-figure sum or at least hundreds of thousands dollars.

Additional considerations to flaws in the judgment

18. The Respondents have both filed Notice of Contentions that clearly support the Applicant's view that the judgment is flawed.

19. On 19 June 2024 the Second Respondent filed a Notice of Contention to the judgment of the Federal Court dated 15 April 2024, of 2 grounds relied on being justification and qualified privilege, totalling 8 pages[2].

20. On 21 June 2024, the First Respondent filed a Notice of Contention to the judgment of the Federal Court dated 15 April 2024[3], of 2 grounds relied on being that the primary judge ought to have found that the Appellant knew that Ms Higgins did not consent to having sex, contrary to the finding at [591] of the primary judgment and that the primary judge ought to have found that, if it had been necessary to assess damages in favour of the Appellant, the appropriate award was no or nominal damages, of 1 page.

Real risk the Appeal will prove nugatory if the Appellant succeeds and a stay is not granted and competing rights of the parties

(a) Applicant is on a Centrelink income

21. If an order for a stay is not granted it will render the appeal nugatory on the basis that the Applicant cannot afford to pay the $2 million costs order. The Applicant has been a recipient of Centrelink income since the commencement of the proceedings below.

[2] Affidavit of Zali Burrows affirmed 1 August 2024, ZB3 pages 14-23
[3] Affidavit of Zali Burrows affirmed 1 August 2024, ZB4 pages 24-26

Affidavit of Zali Burrows affirmed 6 September 2024 ZB3 page 12 states he received Centrelink income since 1 January 2022. It was certainly bought to the First Respondent's attention in the Affidavit of Paul Victor Svilans sworn 1 March 2023, filed in the proceedings below and is on the public file court portal.[4] The affidavit states at paragraph [31]:

In late 2021, Mr Lehrmann applied for unemployment benefits and he has continued to be unable to work since that time

(b) Channel 10 (first respondent) came in with eyes wide open as to costs

22. In considering the competing rights between the parties, namely any prejudice to the first Respondent in being able to continue its pursuit of enforcement action against the Applicant, it may be construed as disingenuous as the first respondent being concerned with recovering costs from the Applicant when it must know that it cannot recover $2,000,000.00 from him, the risk of not recovering costs from a party on a Centrelink income is apparant, thus it is considered a tactic, a procedural play to hinder the Applicant's ability to appeal.

23. In support of this assertion, 2 other media companies News Life Media Pty Limited and Australian Broadcasting Corporation appeared to have made a commercial decision to settle the defamation proceedings. The deeds of settlement are on the public court file in the proceedings below: Exhibit R62 Deed of Settlement of Release Bruce Lehrmann and News Life Media Pty Limited & Samantha Maiden[5] for $295,000 dated 25 May 2023 and Exhibit R63 Deed of Settlement & Release – Bruce Lehrmann and Australian Broadcasting Corporation[6] for $150,000 dated 21 November 2023.

[4] https://www.fedcourt.gov.au/__data/assets/pdf_file/0018/107730/Affidavit-of-Paul-Svilans-Ten-sworn-on-1-March-2023_Redacted.pdf
[5] https://www.fedcourt.gov.au/__data/assets/pdf_file/0007/114010/Exhibit-R62.pdf
[6] https://www.fedcourt.gov.au/__data/assets/pdf_file/0013/114007/Exhibit-R63.pdf

(c) A refusal of a Stay may result in a sequestration order against him

24. The First Respondent has initiated enforcement action for $2,000,000.00 against the Applicant with a bankruptcy notice BN272060, that was issued by ITSA on 23 July 2024[7], just 26 days after the costs judgment given on 27 June 2024. The commencement of enforcement action is likely to result in an application for a sequestration order in the Federal Circuit and Family Court of Australia.

25. If a sequestration order is made against the Appellant, s. 60(2) *Bankruptcy Act 1966* applies in respect of any legal action commenced by the bankrupt is automatically stayed until the Trustee in Bankruptcy makes an election in writing as to whether to continue the proceedings or not. This does not include proceedings for personal injury yet may stultify the Appellant's ability to seek credit to fund necessary disbursements in the Appeal or ability to brief Counsel.

26. If a sequestration order is made against the Appellant and the Appellant is successful in the appeal, any damages he may receive are not likely to be enough to satisfy the Creditor (the First Respondent) debt of $2,000,000. If the Appellant is successful on appeal, it will not form a proper basis at law to reverse a sequestration order made against the Appellant, prior to the outcome of the Appeal. The damage will have been done. If the Appellant is declared a bankrupt, it is likely to result in a further stain on his character, and a label that cannot be corrected by any vindication from a successful outcome in his Appeal.

27. On a further note, it is unusual in appeal proceedings for a respondent would hastily seek to enforce a costs order from the judgment appealed from when they are on notice that there is an appeal on foot. In most cases costs are on an as agreed or assessed basis which in some instances can take longer to determine than the appeal. One would assume in the ethos of saving its client costs, the First Respondent would wait for the outcome of the Appeal prior to engaging in the expensive exercise of costs enforcement.

[7] Affidavit of Zali Burrows affirmed 1 August 2024 ZB5 pages 29-32

28. In an alternative view, given the first Respondent opposes the application for a stay on enforcement of the costs order pending outcome of the appeal, it has filed an application for security of costs in these Appeal proceedings for $200,000.00 which indicates the First Respondent is concerned with the accumulation of costs in this matter. Thus, this supports the Court ordering a stay on the enforcement as to save the First Respondent's lawyers from incurring unnecessary costs on enforcement of the $2,000,000.00 in the event the Applicant is ultimately successful in the Appeal.

(d) Appealing from the finding of criminality and he should be entitled to clear his name

29. The Applicant is appealing from the finding of the criminality of being found a 'rapist'. Thus in accordance to his interests, and in accordance with natural justice and Article 14 (5) ICCPR , he should be entitled to clear his name and pursue his appeal without the bullying tactics of costs enforcement against him.

(e) General rule poverty is no bar to a litigant

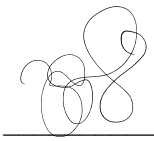
30. In the view of the ethos of access to natural justice, Bowen LJ in *Cowell v Taylor*[8] said "The general rule is that poverty is not bar to a litigant" and thus respectfully seek the Court's consideration to the power imbalance between the Applicant and the First respondent in assessing the competing interests of the parties. There must be hundreds if not thousands of personal injury cases being appealed notwithstanding the plaintiff is impecunious and the Courts have granted stays of enforcement of costs in order for those plaintiffs to run their appeals.

The Respondent's evidence

31. In opposition to this application for a stay, the First respondent has filed an affidavit of Marlia Ruth Saunders affirmed 13 September 2024 that attaches 2 media articles published on www.smh.com.au and www.dailymail.co.uk. It is unclear at this stage to the Applicant the relevance of these articles in opposing this application for a stay.

[8] (1885) 31 Ch D 34 at 38

32. For reasons stated above, the Applicant respectfully seeks the Court makes the order that Order 2 made by Justice Lee in the Federal Court of Australia on 27 June 2024 for the amount of $2,000,000.00 be stayed.



Zali Burrows
19 September 2024