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Registrar

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## SECOND RESPONDENT'S SUBMISSIONS ON APPEAL



No. NSD701 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: General

On appeal from the Federal Court of Australia

**BRUCE EMERY LEHRMANN**

Appellant

**NETWORK TEN PTY LIMITED & LISA WILKINSON**

Respondents

### **Trial judge's key findings on justification**

1. In coming to the conclusion that the imputation that Mr Lehrmann raped Brittany Higgins in Parliament House in 2019 was substantially true, the trial judge made the following findings:
  - 1.1 Mr Lehrmann told deliberate lies and was not accepted on anything he said except where it amounted to an admission, accorded with the inherent probabilities, or was corroborated by a contemporaneous document or a witness whose evidence the primary judge accepted: TJ[153], CA p144;
  - 1.2 Ms Higgins was a complex and in several respects unsatisfactory witness: TJ[259], CA p173;
  - 1.3 In Minister Reynolds' office in 2019, there was a clear pecking order, Mr Lehrmann was more senior than Ms Higgins in his role as policy advisor, while Ms Higgins was an administrative officer and junior media advisor: TJ[338], CA p192;
  - 1.4 The office was in a state of flux, there was no security in any of these jobs and Ms Higgins understood this to be the case: TJ[339], CA p192;

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- 1.5 Work hours were long and, like in many demanding professional offices, it was common for staff members to socialise outside work hours, including by having dinner and drinks: TJ[340], CA p193;
- 1.6 Mr Lehrmann was taken with Ms Higgins from the outset: TJ[344], CA p193;
- 1.7 On 22 and 23 March 2022:
- a. Ms Higgins arrived at The Dock at 7:19pm and joined a group of eight including Ms Lauren Gain and Major Nikita Irvine: TJ[380], CA p199;
  - b. Ms Higgins had a glass of wine before she arrived at The Dock: TJ[377], CA p199;
  - c. Mr Lehrmann arrived at The Dock with Mr Austin Wenke at 8:39pm: TJ[381], CA p199;
  - d. Ms Higgins consumed ten spirit based drinks at The Dock between 7:25pm and 11:50pm: TJ[395]-[396], CA pp202-204;
  - e. At around 10:09pm, Ms Higgins was showing apparent signs of impairment swaying back and forth and struggling to maintain balance while standing at the Bar while purchasing a drink for herself: TJ[397(3)], CA p205;
  - f. At around 11:08pm, after finishing a drink in one hit Ms Higgins looked a tad unsteady on her feet and seemed to be ebullient, putting her hands in the air and was self-evidently in high spirits: TJ[397(6)], CA p205;
  - g. Towards 11:20pm, Ms Higgins looked less than entirely steady on her feet: TJ[397(7)], CA p206;
  - h. Mr Lehrmann was personally aware that Ms Higgins had consumed six spirit based drinks between 8:51pm and 11:50pm including two he had purchased for her and another he handed to her. He actively encouraged her to finish her last drink, which she skulled: TJ[397], CA p204-206;
  - i. Mr Lehrmann was aware from Ms Higgins' stature that by her consuming the six spirit based drinks he observed, she was likely to have become significantly inebriated: TJ[398], CA p206;

- j. Mr Lehrmann spent most of the evening at The Dock with Ms Higgins. As the night wore on, he was aware of her drinking and, towards the end of the evening, was encouraging her to drink well beyond the bounds of sobriety: TJ[404], CA p207;
- k. Mr Lehrmann was keen to continue the evening and his interactions with Ms Higgins and as the events at The Dock were winding up, a plan was made for a group including Mr Lehrmann, Ms Higgins, Mr Wenke and Ms Gain to go the 88mph bar: TJ[406]-[407], CA p208;
- l. Mr Lehrmann, Ms Higgins, Ms Gain and Mr Wenke left The Dock for 88mph at 11:51pm: TJ[395], CA p204;
- m. Ms Higgins had at least two and possibly more 30ml alcoholic shots at 88mph: TJ[408], CA p208;
- n. At 88mph, Ms Higgins and Mr Lehrmann were quite touchy with one another and his hands were on her thighs, her hands were on his thighs and they engaged in a mutually passionate kiss: TJ[412], CA p209;
- o. Mr Lehrmann was acting upon his attraction to Ms Higgins and the less than sober Ms Higgins was sufficiently uninhibited to be a not unwilling participant in that intimacy: TJ[413], CA p209;
- p. At 88mph, Ms Higgins fell over and was required to be helped back up by Mr Lehrmann: TJ[414], CA p209;
- q. At 88mph, Ms Higgins was intoxicated: TJ[415], CA p209-210;
- r. By about 1:30am, the group resolved it was time to leave 88mph: TJ[416], CA p210;
- s. Ms Higgins and Mr Lehrmann left 88mph in an Uber and at some stage, with the acquiescence of the inebriated Ms Higgins, the plan was for the Uber to go to Parliament House following what Mr Lehrmann had said about whisky back in the Ministerial Suite: TJ[425]-[427], CA pp211-212; TJ[441], CA p214;
- t. Mr Lehrmann wanted to go to Parliament House with the aim of continued or enhanced intimacy with Ms Higgins: TJ[430]-[437], CA pp212-213;

- u. Upon arrival at the gate to the entry into Parliament House, Mr Lehrmann lied to the security about his reason for returning: TJ[443]-[445], CA pp214-215;
- v. At around 1:41am on 23 March 2019, Mr Lehrmann and Ms Higgins came into Point 8 at Parliament House attended by Security Officers Ms Nikola Anderson and Mr Mark Fairweather: TJ[447]-[449], CA p215;
- w. Mr Lehrmann completed the entry register at Point 8 for both himself and Ms Higgins: TJ[449]-[450], CA p215-216;
- x. Ms Higgins struggled to get her shoes back on coming through the metal detector due to her state of inebriation and walked barefoot through Parliament house and tossed her head back looking to the ceiling while she waited to be let into the Ministerial Suite: TJ[455], CA p217-218;
- y. Security officer, Ms Nikola Anderson escorted Mr Lehrmann and Ms Higgins to the Ministerial Suite which she opened with a key: TJ[457], CA p217.
- z. While Ms Higgins was in the Ministerial Suite she was a very drunk 24-year-old woman and her cognitive abilities were significantly impacted: TJ[522], CA p233;
- aa. Mr Lehrmann was aware of Ms Higgins' condition: TJ[523], CA p233-234;
- bb. Mr Lehrmann had at least three bottles of whisky and other alcoholic beverages in the Ministerial Suite: TJ[460], CA p218;
- cc. On 23 March 2019, Mr Lehrmann and Ms Higgins were alone in the Ministerial Suite for about 40 minutes between 1:48 and 2:30am: TJ[503], CA p229;
- dd. Mr Lehrmann did not answer six telephone calls from his girlfriend between 2:16 and 2:18am: TJ[504], CA p229;
- ee. On 23 March 2019, sexual intercourse between Mr Lehrmann and Ms Higgins took place with Mr Lehrmann on top of Ms Higgins on the couch in the Minister's office: TJ[554], CA p240;
- ff. The sexual intercourse and physical contact ended upon Mr Lehrmann ejaculating and he thereafter promptly left the Minister's office and the

Ministerial Suite towards the end of the period when both Ms Higgins and Mr Lehrmann were in the Minister's office and around or shortly after Mr Lehrmann's girlfriend was trying to telephone him: TJ[555], CA p240;

- gg. Ms Higgins was passive (like a log) throughout the entirety of the sexual act: TJ[556], CA p240;
- hh. Ms Higgins was unable to get up from the couch immediately following Mr Lehrmann leaving and she passed out into a deep sleep: TJ[557], CA p240;
- ii. Ms Higgins' oral evidence that she was not fully aware of her surroundings but then suddenly became aware of Mr Lehrmann on top of her, at which time he was performing the sexual act, was credible and had the ring of truth: TJ[583], CA p246;
- jj. Ms Higgins was not fully aware of her surroundings when sexual intercourse commenced; and did not consent to intercourse when she became aware Mr Lehrmann was "on top of her": TJ[586], CA p247;
- kk. Mr Lehrmann's state of mind was such that he was so intent upon gratification to be indifferent to Ms Higgins' consent, and hence went ahead with sexual intercourse without caring whether she consented: TJ[600], CA p251;
- ll. In the early hours of 23 March 2019, after a long night of conviviality and drinking, and having successfully brought Ms Higgins back to a secluded place, Mr Lehrmann was hell-bent on having sex with a woman he: (a) found sexually attractive; (b) had been mutually passionately kissing and touching; (c) had encouraged to drink; and (d) knew had reduced inhibitions because she was very drunk such that in his pursuit of gratification, he did not care one way or another whether Ms Higgins understood or agreed to what was going on: TJ[601], CA p251;
- mm. At about 2:33am, Mr Lehrmann departed alone through the Parliament House security gate and was collected by an Uber: TJ[505], CA p229;
- nn. Immediately after, or shortly after Mr Lehrmann left, Ms Higgins, having been affected by alcohol, fell into a very deep sleep on the couch in the Suite in a state of undress: TJ[506], CA p229;

- oo. Given no-one had seen Ms Higgins leave Parliament House, it was decided between Mr Fairweather, Ms Anderson and Mr Kevin Callan, their supervisor, that Ms Anderson should go up to the Minister's office to do a "welfare check"; which she then did, and at about 4:20am, Ms Anderson:
  - i. entered the Suite shouting "Security, hello security";
  - ii. went to the door of the Minister's office and said "Security. Hello? Security" and there was no answer;
  - iii. opened the door to the Minister's office and then saw Ms Higgins lying on her back on the couch in a state of undress such that she saw Ms Higgins' vagina and Ms Higgins' knees were up and slightly apart;
  - iv. Ms Higgins opened her eyes and looked at Ms Anderson but then proceeded to roll into the foetal position: TJ[507], CA p230;
- pp. From the incontrovertible facts at TJ[503]-[507], CA pp229-230 there are direct inferences that:
  - i. there was sufficient time for Mr Lehrmann and Ms Higgins to continue to drink whisky together and/or to have coitus;
  - ii. Mr Lehrmann was either engaged in sexual intercourse, conduct preparatory to this act, or some other activity between 2:16 and 2:18am and did not appreciate his girlfriend was calling him, or was aware of the calls but ignored them;
  - iii. by the end of the 40 minutes, Ms Higgins was sufficiently affected by alcohol not to leave the Suite to go home but in her state had come to be lying naked or semi-naked on the couch; and
  - iv. one hour and fifty minutes later, Ms Higgins was, although not in obvious distress, sufficiently discombobulated that when seen by a uniformed stranger, she did not interact verbally and did not move immediately to recover her modesty by putting on her dress or covering herself, TJ[509], CA p230;

- 1.8 Mr Lehrmann’s evidence about writing on Question Time folders on entering the Ministerial Suite was a transparent lie and yet it remains the only explanation Mr Lehrmann has offered to the Court for his presence in the Ministerial Suite for 40 minutes on 23 March 2019: TJ[472], CA\_p222;
- 1.9 On 26 March 2019 when Mr Lehrmann replied “*I don’t wish to get into that*” when asked by Fiona Brown “*what else [did you do] while in the [Ministerial Suite]?*”: TJ[472], CA\_p222;
- 1.10 On 26 March 2019, there was a message exchange between Mr Ben Dillaway and Ms Higgins where “*Was it just you and Bruce who went back there or a group of people? Did you hook up in there or did someone take advantage of you?*” to which Ms Higgins replied “*Yeah, it was just Bruce and I from what I recall. I was barely lucid. I really don’t feel like it was consensual at all*”: TJ[303], CA\_p184, TJ[493], CA\_p227, TJ[647(1)], CA\_pp261-263;
- 1.11 On Wednesday or Thursday after the incident, Major Irvine had a conversation with Ms Higgins where Ms Higgins said “*On the weekend, ... Bruce, Austin, Lauren and I went to 88. Bruce and I were in a[n] Uber to go home and he wanted to come back to Parliament House. He had some whisky to show me or something. When we came back to Parliament House, I fell asleep on the couch and I woke up and he was on top of me*”. Major Irvine said “*okay, was it*” before pausing and Ms Higgins said, “*Yes, definitely*”: TJ[293], CA\_p181, TJ[535], CA\_p235.
- 1.12 On about 28 March 2019, during a conversation between Mr Christopher Payne and Ms Higgins, Mr Payne asked Ms Higgins “*did he rape you?*” and her response was, “*I could not have consented. It would have been like f\*\*\*ing a log.*”: TJ[298], CA\_p182, TJ[493], CA\_p227;
- 1.13 On Thursday, 28 March 2019, Ms Higgins told Ms Fiona Brown that she recalled Mr Lehrmann “*being on top of me*”: TJ[538], CA\_p236-237;
- 1.14 On 3 April 2019 responding to Mr Dillaway’s offer to “*reach out to the PMO*” about the alleged rape which was accepted by Ms Higgins, and which led to a conversation with Mr Julian Leembruggen which was the subject of a contemporaneous record by Mr Dillaway:

*Spoke to PMO. He was mortified to hear about it and how things have been handled. He's going to discuss with COS [Dr John Kunkel] – no one else. I flagged need for councillor [sic] and desire to be closer to home during election: TJ[543], CA p237;*

- 1.15 Ms Kellie Jago (Ms Higgins' mother), Ms Hamer, Ms Alex Humphries (Ms Higgins' housemate) each observed a change in her demeanour in wake of the incident: TJ[541], CA p237;
- 1.16 There were prompt communications of allegations of rape with the AFP (TJ[671]), and the Sexual Assault and Child Abuse Team and subsequent counselling: TJ[539], CA p237;
- 1.17 Ms Higgins sent a message to Mr Samuel O'Connor (the Queensland MP and friend of Ms Higgins) where she represented that a "*super f\*\*\*\*\*ed up thing happened little while ago*" and had a subsequent telephone conversation where the word rape was used and she said that he had taken her back to Parliament House: TJ[540], CA p237;
- 1.18 Ms Cripps, the crisis counsellor observed Ms Higgins was distressed in their sessions after the incident: TJ[541], CA p237;
- 1.19 Ms Higgins' father did not hear from his daughter after his trip to Canberra at the end of March 2019 and felt something was wrong and on 2 February 2020 Ms Higgins sent him a message "*When you are free this week, we probably need to have a chat. So much has gone on in the past year, and I haven't fully kept you in the loop. You have to keep your cool, though, and back me up*" and they subsequently had a telephone call during which Ms Higgins told her father that she had been raped at Parliament House: TJ[545], CA p238;
- 1.20 Mr Lehrmann gave deliberately false answers to the AFP during his 19 April 2021 interview when he denied having alcohol in the Ministerial Suite: TJ[461], CA p241;
- 1.21 Mr Lehrmann lied when he denied in cross-examination he said to Fiona Brown that he "came back to have a drink": TJ[462]-[463], CA p241.

- 2 Almost all of those findings were made by reference to or in reliance on contemporaneous or documentary evidence including video recordings and the testimonial evidence from witnesses whose evidence was accepted without qualification, including Mr Lehrmann's witness Ms Fiona Brown.
- 3 It is not apparent from a review of the Amended Notice of Appeal or the submissions filed by the appellant on 4 March 2025 (**BL subs**) which, if any, of these findings of fact are said to be in error save for (possibly) those paragraphs listed in Annexure A to the BL subs, which are only a small sub-set of the facts listed above: [1.7(bb)], [1.7(ee)]-[1.7(hh)], [1.7(jj)]. No submission is made by the appellant as to why those factual findings are erroneous such as to warrant intervention by the Full Court.

### **Ground 1**

- 4 Appeal ground 1 is entirely misconceived.
- 5 The justification case that the primary judge accepted was that Mr Lehrmann was reckless to Ms Higgins' consent: TJ[602], CA p251.
- 6 The appellant's submissions do not address Wilkinson's Defence at [12], CA p40. Ms Wilkinson was entitled to succeed on proving the substantial truth of the defamatory sting of any imputations the Broadcast carried. Prior to the commencement of the trial it was agreed between the parties in the statement of agreed issues filed with the Court that the issue of justification depended on answering: "*Whether [Mr Lehrmann] raped Brittany Higgins in Parliament House in 2019?*": TJ[561], CA p241.
- 7 Ms Wilkinson's Defence at [12] put forward two alternatives: that Mr Lehrmann knew that Ms Higgins did not consent by reason of one or more of the particulars (a) to (d); or that Mr Lehrmann was reckless as to whether Higgins consented or not. No particulars were ever sought in relation to paragraph [12] of the Wilkinson Defence and nor was there ever an application to strike it out. His Honour found in accordance with Ms Wilkinson's pleading that Mr Lehrman raped Ms Higgins by finding that Mr Lehrmann was reckless as to whether Ms Higgins consented or not.

- 8 In written closing Ms Wilkinson’s case on recklessness was put at [477]-[479]:

*Recklessness is something lesser than knowledge and involves a failure to consider if the person is consenting. This could involve a failure on the part of Mr Lehrmann to take some step to ensure that Ms Higgins was consenting.*

*If the Court concludes that Mr Lehrmann was aware that Ms Higgins was intoxicated and failed to consider whether she was capable of consent, this would amount [to] recklessness.*

*Again, rushing out is consistent with this state of mind – leaving her there naked, drunk and alone without a care as to her well being or comfort.*

- 9 There could be no denial of procedural fairness for three further reasons.
- 10 First, Mr Lehrmann in evidence in chief denied having any sexual contact or similar intimate interaction with Ms Higgins when they returned to Parliament House: T163.44-45. On his version, when they entered the Minister’s suite they separated, and he did not see Ms Higgins again that evening – he said that he went left and she went right: T134.34-40; TJ[464], CA pp218-220. Under cross-examination Mr Lehrmann denied having sexual intercourse with Ms Higgins on the couch in Minister Reynold’s office: T317.42-44; c.f. TJ[554], CA p240. Senior counsel for Network Ten asked Mr Lehrmann whether he sought Ms Higgins’ consent to have sexual intercourse with him. Mr Lehrmann responded that he did not have sexual intercourse with her, and objection was taken when the question was put a second time on the basis that his denial to sexual intercourse made the question unfair: T319.6-13. Senior counsel for Network Ten asked Mr Lehrmann “*did Ms Higgins, at any time, consent to having sexual intercourse with you?*” Mr Lehrmann responded: “*I didn’t get consent because I didn’t have sexual intercourse*”: T319.44-45.
- 11 At trial Mr Lehrmann’s lawyers were of the view that it was unfair to ask him about consent because he had denied sexual intercourse. They now apparently take the view that it was unfair to him to not have asked him specific questions about consent, namely recklessness, presumably something like “*you didn’t care if she was consenting one or way the other did you*” and/or “*you knew she was drunk and impaired and not capable of consent and you forged ahead anyway*”. It is difficult to see what difference putting those propositions would have made or how Mr Lehrmann has been denied natural justice or procedural fairness by the fact that this line of questioning was not pursued.
- 12 Given his emphatic denials of sexual intercourse or any similar intimate interaction whatsoever, there was no lack of fairness in not putting to Mr Lehrmann that he was reckless to Ms Higgins’ consent when he had had sexual intercourse with her.

- 13 Second, Wilkinson pleaded the following relevant background facts at [10.6(a),(c)-(d)], CA pp38-39 of her Defence in mitigation of damages, further or in the alternative to proving that he raped Ms Higgins:
- 13.1 Lehrmann took an intoxicated Higgins to Parliament House on 23 March 2019 with the intention of having sexual intercourse with her, despite being in a monogamous relationship with a girlfriend. He engaged in intercourse with Higgins and left her there on her own at about 3am, effectively naked and in an intoxicated state. In that time, he ignored 8 telephone calls from his girlfriend;
- 13.2 Lehrmann gave a record of interview to the AFP on 19 April 2021 despite receiving the caution from police that he had the right to remain silent and that his answers could be used against him in criminal proceedings;
- 13.3 during that interview Lehrmann falsely denied having sexual intercourse with Higgins. His dishonesty was deliberate and knowing and occurred in the course of the investigation of a crime, which amounted to perverting the course of justice.
- 14 These were matters Wilkinson put Mr Lehrmann on notice of on 1 March 2023 by filing her defence. This was an alternative plea that was not based on an account given by Ms Higgins. This was referred to in opening (T572.42-573.3), was elaborated on in oral closing in chief in submissions relevant to the justification defence (T2273.42-2279.11, T2313.18-2322.13, T2322.47-2331.33) and [629] of Wilkinson's written closing submissions.
- 15 Third, Wilkinson made the following written closing submissions on justification on the basis that the Court would not believe Ms Higgins at [110], [112]-[115]:

*The Court should conclude that the applicant and Ms Higgins had sexual intercourse in the 40-minute period between about 1:48am and 2:33am in Minister Reynold's suite at APH on 24 March 2019 based on the unchallenged evidence alone.*

*If Ms Higgins' evidence is not accepted, then on balance, particularly having regard to the toxicology evidence, the Court would be satisfied that Ms Higgins was too intoxicated to give consent.*

*The only question remaining would be the applicant's state of mind on the issue of consent and the extent to which he knew or was reckless as to her consent. Given he was with her and was encouraging her to drink, he was in a position to comprehend her state of intoxication by the time they entered APH. She was unable to put on her shoes and was giggling and skipping down the hall after she passed the security check point.*

*In his favour is the fact that he was an immature 23-year-old man and she appeared lucid at that point in time on the CCTV. Earlier in the evening she had, arguably, indicated a sexual interest in him by kissing him.*

*On balance, having regard to the unchallenged evidence and objective circumstances, and assuming the Court forms the view that neither the evidence of the applicant or Ms Higgins is reliable, the Court would be satisfied that Mr Lehrmann was at least reckless as to Ms Higgins' consent to have sexual intercourse.*

- 16 Despite having the opportunity to reply to these submissions, Mr Lehrmann's lawyers made no complaint that they were taken by surprise or prejudiced by them.
- 17 Ground 1 of the appeal should be dismissed.

## **Ground 2**

- 18 Appeal ground 2 is similarly without merit.
- 19 Defamatory meaning was not in issue at first instance. The parties' agreed position in the statement of agreed issues was that on justification the only defamatory sting that needed to be proved true was: Mr Lehrmann raped Brittany Higgins in Parliament House in 2019.
- 20 As Wilkinson submitted below, the ordinary and reasonable person in February 2021 understood that a person who had sex with another person when reckless to their consent to that act in March 2019 committed rape.
- 21 The ordinary and reasonable person equates rape with non-consensual sexual intercourse. Non-consensual intercourse is inherently considered to be a sexual assault, a significant act of violence and a reprehensible violation of the victim. All rape, including the rape found by the primary judge, that involves non-consensual sexual intercourse, is a serious act of violence. The submission at AS[29] that there is non-violent rape involving non-consensual sexual intercourse or that the primary judge found a non-violent rape is misconceived and should be rejected outright.
- 22 There is no error in the primary judge's finding that the ordinary and reasonable person in February 2021 considered that a person having non-consensual sexual intercourse who was so intent upon gratification to be indifferent to a female victim's consent, and hence went ahead with sexual intercourse without caring whether she consented to that sexual act, had committed rape: at TJ[597], CA p250.

- 23 The ordinary and reasonable person as the primary judge recognised at TJ[564], CA\_p242 does not assess whether or not the applicant had committed a statutory or common law criminal offence.
- 24 There is also no error in the finding of the primary judge at TJ[627], CA\_p257 that the applicant's pleaded imputations do not differ in substance. As pleaded in Wilkinson's defence [4.5] (CA\_p33) the imputations pleaded in subparagraphs 4(a), (b), (c) and (d) do not differ in substance and contain gratuitous and irrelevant rhetorical flourish that adds nothing to the defamatory sting of rape. Mr Lehrmann plainly accepted that position at trial by agreeing with the respondents, as set out above, as to what needed to be proved by the respondents to succeed in the justification defence.
- 25 Given the parties' agreed position on justification, even if there was an error in relation to imputations, it could not in any way have impacted upon the outcome of the trial.
- 26 Ground 2 of the appeal should be dismissed.

### **Ground 3**

- 27 Ground 3 suffers from the same deficiencies as Grounds 1 and 2.
- 28 Wilkinson made detailed factual submissions in her written submissions at [94]-[157], [159] (also relying upon the specific references to the evidence in the first respondent's written submissions) and further submissions under the heading "justification" at [465]-[479].
- 29 These submissions were directed towards the possibility that the primary judge may accept all, some or none of the testimonial evidence of Ms Higgins: see Wilkinson's written closing at [94]-[108], [110] and [112]-[115] as set-out above, [122], [124], [128], [134]-[146], [151], [152], [154], [159], [466]-[470], [472], and [475]-[479].
- 30 The oral closing submissions also directly raised that justification could be proved without accepting Ms Higgins evidence: T2316.46-2317.4. Much of the written and oral submissions on behalf of Wilkinson were directed to highlighting the overwhelming contemporaneous documentary evidence from 2019 and testimonial evidence (other than from Ms Higgins) that established that Mr Lehrmann had non-consensual sexual intercourse with Ms Higgins in "*the 40-minute period between about 1:48am and 2:33am in Minister Reynolds' suite at [Parliament House] on [23] March 2019*".

- 31 The primary judge at TJ[90]-[145], CA pp128-142 directed himself by reference to the correct principles to apply in fact finding. The appellant has not identified any error in that reasoning and the BL subs are inconsistent with those principles and the application of those principles throughout the TJ. As raised in the NOC, the only arguable error in the application of those principles is that the primary judge may have been unnecessarily circumspect to the benefit of Mr Lehrmann.
- 32 It was plainly open to the primary judge to accept that part of Ms Higgins evidence (TJ[583], CA p246) that he found credible, and more significantly was directly corroborated by the documented records of contemporaneous complaint.
- 33 The findings of the primary judge were plainly open to his Honour on the civil standard of proof based on the objective and documentary evidence and the evidence from truthful and reliable witnesses.
- 34 The appellant has not identified any appealable error in relation to the finding that the justification defence was established and Ground 3 should be dismissed.

**NOC – Grounds 1(a) & 1(b) - consent**

- 35 By statement of notice of contention filed on 19 June 2024 (**NOC**), Wilkinson contends in Grounds 1(a) and 1(b) that the trial judge's finding on substantial truth was correct because, CA pp441-442:
- 35.1 Having found Ms Higgins was significantly intoxicated, that the appellant was aware of her significant intoxication and that at the time of sexual intercourse Ms Higgins was passive "like a log", his Honour should have found that the appellant had knowledge of Ms Higgins' lack of consent at the time of intercourse; and
- 35.2 The primary judge at TJ[591], CA p247 should have considered the ordinary person's understanding of the concept of knowledge of lack of consent in the natural and ordinary meaning of rape at the date of publication and found that Mr Lehrmann had such knowledge.
- 36 The publication and rape took place after the worldwide *#MeToo* movement in 2017. Even before then, the hypothetical ordinary person in Australia understood non-consensual sexual intercourse to be rape. There had been broad debate about the adequacy of criminal laws to prosecute rape, due to decisions such as *R v Lazarus* [2017] NSWCCA 279.

- 37 The outrage, advocacy and law reform that followed resulted in positive consent laws being enacted in some Australian jurisdictions which were said to reflect the modern meaning of rape that already existed.
- 38 The ordinary person has, for some time, understood that a person who has non-consensual sexual intercourse with a person, without a belief that the person was consenting, commits rape. The primary judge proceeded on a legalistic and arguably archaic understanding of knowledge of consent given that he was not satisfied that Ms Higgins verbally or physically resisted. That was not even the law in many Australian jurisdictions at the time of publication (c.f. *R v Lazarus*) and, with respect to the trial judge, not an ordinary understanding of knowledge of consent that existed by 2019. An example where the ordinary person's understanding is different to a legalistic approach were the directions to the jury in *Gillard v The Queen* (2014) 308 ALR 190; [2014] HCA 16 at [33]: “*An obvious example of [recklessness] might be if the accused person came across a sleeping woman and proceeded to have sex with her without bothering to turn his mind to whether she might agree or not agree to that.*” The ordinary person would consider that circumstance to be an obvious case of knowledge of lack of consent. The primary judge apparently accepted that as well: TJ[590], CA p247. It can be inherently problematic relying on criminal case law to make findings in civil defamation proceedings because what the ordinary person would understand often differs from legal norms.
- 39 Nonetheless, the primary judge positively concluded Mr Lehrmann had no belief either way in Ms Higgins' consent: TJ[591], CA p247. The ordinary person would consider that meant he had intentionally committed rape because he did not know whether she had consented and did not care one way or the other. It was therefore unnecessary for the primary judge to decide the defence on the alternative basis of recklessness – on the facts found by Lee J, an intentional rape had been proved by the respondents in so far as that word, rape, is understood by the ordinary person.
- 40 There are two further reasons that Mr Lehrmann's state of mind was such that he knew Ms Higgins was not consenting. First, as the primary judge found at TJ[556],[591], Ms Higgins was so affected by alcohol that she was “like a log” throughout intercourse and the primary judge found at TJ[523] that Mr Lehrmann was aware of Ms Higgins' significant inebriated state. Mr Lehrmann necessarily knew that Ms Higgins could not and had not consented to sexual intercourse.

- 41 There is no relevant distinction between Ms Higgins being asleep (which the primary judge accepted at TJ[590] would establish knowledge of lack of consent) and the condition which Mr Lehrmann knew Ms Higgins was in.
- 42 Second, Mr Lehrmann could have given evidence that he had sexual intercourse with Ms Higgins and he could have given evidence that he no knowledge she was not consenting or believed she was consenting. As the majority of the High Court in *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; [2011] HCA 11 at [64] (Heydon, Crennan and Bell JJ) explained:

“Depending on the circumstances, *when a party lies*, or destroys or conceals evidence, or attempts to destroy or conceal evidence, or suborns witnesses, or calls testimony known to be false, or fails to comply with court orders for the production of evidence (like subpoenas or orders to answer interrogatories), or misleads persons in authority about who the party is, or flees, the conduct can be variously described as an *implied admission or circumstantial evidence permitting an adverse inference*.” (Emphasis added.)

Mr Lehrmann’s false denial of sexual intercourse was an implied admission that he knew Ms Higgins was not consenting because “*I didn’t get consent*”.

- 43 It was not open to the primary judge to draw an inference favourable to Mr Lehrmann that he was unaware whether or not Ms Higgins was consenting and the primary judge should have found he knew she was not consenting in her “*log*” like inebriated state.

#### **NOC – Ground 1(c) – Fiona Brown**

- 44 The primary judge’s acceptance of evidence from Ms Fiona Brown was an important matter in assessing the credit of Ms Higgins: TJ[210]: CA p156, TJ[240], CA pp167-168. It was significant in assessing Ms Higgins’ credit because in accepting Ms Brown’s evidence the primary judge had direct evidence, rather than circumstantial evidence, directly contradicting Ms Higgins on a part of her narrative as to what occurred in 2019.
- 45 The acceptance of Ms Brown, where her evidence contradicted Ms Higgins, is an essential finding underlying the primary judge’s conclusion (at TJ[258], CA p173) that Ms Higgins’ out-of-court representations from 2021 and in court thereafter, were of a different character to her out-of-court representations in 2019, which he mostly accepted or found were not inconsistent with the conduct of a genuine victim of sexual assault.

- 46 Ms Brown was Mr Lehrmann’s witness and Mr Lehrmann relied upon the accuracy of her notes (TJ Annexure B) and her oral evidence to contradict Ms Higgins. The appellant made no submission that the Court would not accept Ms Brown’s evidence although she directly contradicted Mr Lehrmann in significant respects and gave evidence that incriminated him. Accordingly, this NOC ground can only positively affect the credibility of Ms Higgins.
- 47 A significant disagreement between the evidence of Ms Higgins and Ms Brown was, whether and, if so, when, Ms Higgins disclosed to Ms Brown that she had been sexually assaulted by Mr Lehrmann.
- 48 The documentary and testimonial evidence about the first meeting on 26 March 2019 and the events following that week were detailed in the first respondents’ submissions at trial at [533]-[584], see also Wilkinson’s written closing submissions at [122]-[129].
- 49 Ms Higgins gave evidence it was on 26 March 2019, at the meeting with Ms Brown, that she said “*he was on top of me...I was barely lucid*”: T642.43-643.41. Ms Brown denied that she was aware that Ms Higgins ever said to her that she had been sexually assaulted and recorded in her notes that Ms Higgins disclosed “*I recall him being on top of me*” in a meeting only 2 days later on 28 March 2019. The primary judge accepted the evidence of Ms Brown and her notes where it conflicted with Ms Higgins: TJ[271]-[275], CA p176-177.
- 50 Relevantly, Ms Brown’s notes were not in the strictest sense contemporaneous. The notes recorded events from 26 February 2019 to 5 April 2019 and included records from 29 March 2019 at the end of the document. The only metadata Ms Brown recorded was the date it was last accessed on 5 April 2019: T2112.36-2113.8. Ms Brown did not record the date the electronic document was created. There was no documentary record that the notes were created before 5 April 2019. It is apparent that the last page about events on 29 March 2019 must have been created on 5 April 2019 given events on 5 April were recorded earlier in the document.
- 51 Ms Brown accepted that on Tuesday 26 March 2019, she had advised Ms Higgins about 1800Respect.org.au. Ms Brown also accepted that she knew that was the national domestic family and sexual violence counsel service: T2133.44-2134.11. There was no reason for Ms Brown to provide that number to Ms Higgins if she had not disclosed an act of violence or sexual assault against her. The only rational conclusion is that Ms Higgins did disclose the sexual assault that day, prompting Ms Brown to provide her with the counselling number.

52 There was also significant contemporaneous evidence that Ms Higgins disclosed or believed she had disclosed the sexual assault to Ms Brown on 26 March 2019 and there were serious questions about the reliability, if not credibility, of Ms Brown’s evidence about that meeting that the primary judge did not address (c.f. TJ[646], CA p261):

52.1 immediately after the meeting on 26 March, Ms Higgins disclosed to Mr Dillaway in a text message conversation that she had “*Yeah it was just Bruce and I from what I recall. I was barely lucid, I really don’t feel like it was consensual at all*”: TJ[647(1)], CA p261-263;

52.2 in that conversation, Mr Dillaway asked: “*I hope you’re ok. That’s pretty serious horrible stuff. You probably need to report this.*” and Ms Higgins responded “*Fiona [Brown] our CoS knows. She follow up [sic] on the security report about it. Bruce has been terminated early (he was leave post-budget for a department job apparently) she said I can come back in tomorrow but I’m considering just going home got the GC.*”: TJ[647(1)]. The primary judge did not address in the TJ the conflict between Ms Higgins’ representation made on 26 March 2019 of what occurred in the meeting that day with Ms Brown’s representation in TJ Annexure B, that may have been created 10 days later on 5 April 2019;

52.3 At 5:10pm on 26 March 2019, Ms Brown sent Ms Higgins a text message: “*Hi Brittany, checking in to see how you are? I’m here if you need anything. Happy for you to work from home tomorrow or come into the office. Let me know what you’d like to do. Best, Fiona*”: Ex R83;

52.4 At 5:36pm on 26 March 2019, Ms Higgins replied to Ms Brown: “*Hi Fiona. Sorry I missed your call. I’m doing fine, just vocalising things in such a way is quite confronting. I’ll be in the office tomorrow – honestly I enjoy being busy. Plus there is plenty of work to be done for campaign prep and a front desk that needs to be covered*”: Exhibit R83. The primary judge did not refer in the TJ to this message from Ms Higgins or the message from Ms Brown to which it responded at all. The message represented that on 26 March 2019 Ms Higgins had vocalised something that was quite confronting, directly corroborating Ms Higgins’ account and contradicting Ms Brown’s evidence and her electronic note;

52.5 Ms Brown was cross-examined on these messages with Ms Higgins and her evidence was unsatisfactory giving an explanation that was not in her affidavit, notes or police

interview: T2073.46-2075.6; 2076.14-29. The primary judge should have had regard to these messages and the cross-examination of Ms Brown about them, or at least her answer at T2074.31-35.

- 52.6 At 7:17pm on 26 March 2019, Ms Higgins sent her father, Matthew Higgins, a text message in which she said: *“Hey dad, I’m fine, but just wanted to give you a heads up there was an incident with someone at work being inappropriate ...”*: Ex R882: c.f. TJ[545], CA p238.
- 53 The messages Ms Higgins sent on 26 March 2019 to her father, Mr Dillaway and Ms Brown corroborate her account that she had disclosed to Ms Brown the sexual assault that day.
- 54 There was also significant evidence in addition to the evidence described in paragraphs 49, 51, and 52 above that Ms Brown was aware that there was an allegation of sexual assault that week:
- 54.1 On 29 March 2019 at 1:44pm, she was informed that Minister Hawke wanted to report the allegation to the Police: Affidavit of Ms Brown (**Brown**) at [97]; T2131.8;
- 54.2 On 29 March 2019 at 2:59pm, Minister Reynolds told Ms Brown she wanted her to report the allegation to the Police: Brown [98];
- 54.3 On 29 March 2019 at 6:05pm, Ms Lauren Barons who had been speaking with Ms Brown since 26 March 2019, understood an allegation of sexual assault when she sent an email with her advice to Ms Brown advising her to tell Ms Higgins about 1800Respect.org.au if she had not done so already and providing advice about making a complaint to the police: Ex R88.
- 55 The primary judge should not have accepted the evidence of Ms Brown and her notes where they conflicted with Ms Higgins’ evidence and other contemporaneous documentation, and should not have found that Ms Higgins’ evidence was unsatisfactory where it conflicted with Ms Brown and her notes. The acceptance of Ms Brown’s evidence where it conflicted with Ms Higgins was central to undermining Ms Higgins’ credit on her representations from 2021 - both out of court and in court. The primary judge’s findings on Ms Higgins’ general credit should have been more favourable to her particularly in relation to her representations from 2021 about the rape. This provides an additional reason why this Court should uphold the finding that Mr Lehrmann raped Ms Higgins.

### **NOC – Ground 1(d) – Consciousness of guilt**

- 56 At TJ[613]-TJ[619], CA pp254-256, the primary judge identified three out-of-court lies by Mr Lehrmann that would have served to fortify the conclusion that Mr Lehrmann raped Ms Higgins had they been taken into account:
- 56.1 his account of no sex taking place;
  - 56.2 his account as to why he came back to Parliament House and what he did there; and
  - 56.3 there being no alcohol in the Ministerial Suite.
- 57 The primary judge correctly stated the principles about consciousness of guilt at TJ[139]-[145], CA pp141-142.
- 58 The primary judge found that each of the lies were material to the question as to whether sexual intercourse without consent took place: TJ[613]. The primary judge found that Mr Lehrmann made: the “*no sex*” lie “*fearing the truth*”; and the “*no alcohol*” lie knowing an admission he had sex with Ms Higgins, after she had been drinking heavily, could put him in some peril as implicating him in non-consensual sex.
- 59 Although the primary judge did not make an express finding as to Mr Lehrmann’s motivation to tell the “*why he came back*” lie, given the findings at TJ[430]-[437], CA pp212-213 the necessary conclusion is that he feared his real motivations also implicated him in non-consensual sex.
- 60 The most probable, if not the only rational, explanation for telling these lies, particularly given he had told Ms Brown (but not the AFP later) the truth about drinking alcohol in the Ministerial Suite, is his guilt.
- 61 Each of these matters is further evidence that reinforced the Primary Judge’s finding that Mr Lehrmann raped Ms Higgins and proved that Mr Lehrmann knew Ms Higgins was not consenting when he had sexual intercourse with her.

#### Ground 4 - damages

- 62 Irrespective of the outcome of the appeal the contingent finding the primary judge made that \$20,000 was the appropriate amount in damages that would have been awarded to Mr Lehrmann had he been successful was plainly open for the reasons given by the primary judge at TJ[1050]-[1090], CA pp391-399.
- 63 To uphold this ground the appellant must establish *House v The King* error (see *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327; [2003] HCA 52 at [62]-[64] per Hayne J, Gleeson CJ and Gummow J agreeing at [35]) , that is, not just that the provisional award was inadequate but that it was manifestly inadequate.
- 64 The appellant's submission about aggravated damages at BL subs [47] can be rejected for the reasons given by the Primary Judge at [1086]-[1088] in the context of this appeal ground. Nonetheless a more modest award than \$20,000 is supported by the submissions made by Wilkinson in relation to NOC Ground 3, found in paragraphs [108]-[113] of her submissions filed in this Court on 3 March 2025. Her conduct did not warrant any award of aggravated damages.

Sue Chrysanthou SC

7 April 2025

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