Federal Court of Australia

NSD 103 of 2023

BRUCE LEHRMANN

Applicant

NETWORK TEN PTY LIMITED & LISA WILKINSON

Respondents

SECOND RESPONDENT'S UPDATED AND AMENDED OUTLINE ON APPLICATION TO EXTEND LIMITATION PERIOD

A. INTRODUCTION

1. The second respondent Lisa Wilkinson opposes the application for an order extending the limitation period for alleged causes of action in defamation against her. The proceedings filed 7 February 2023 were commenced well out of time and unless this Court orders an extension of time the proceedings are not maintainable and ought be dismissed.

2. The application is brought in respect of three matters first published on 15 February 2021 – each constituting a segment from an episode of *The Project* television program Wilkinson presented on Network 10. Notwithstanding the elapse of time and delay the applicant, Bruce Lehrmann, did not attempt to give Wilkinson any notice of any potential action in defamation against her until service of the originating documents in this proceeding filed on 7 February 2023. Lehrmann did not notify any complaint about the now impugned matters to any publisher including the second respondent, Network Ten, until 16 December 2022. The applicant failed to make any earlier complaint notwithstanding:

   (a) producers to Network 10 informing him of the allegations to his personal email on 12 February 2021;

(b) his immediate belief on 15 February 2021, that the matters were defamatory (Ex A);

(c) his immediate belief on 15 February 2021 that the Project Episode was about him (T120.10);

(d) his wish from 15 February 2021 to sue Lisa Wilkinson (T120.14).

3. Wilkinson relies upon the affidavit of Anthony Jefferies sworn 10 March 2023 (**Jefferies**). She tenders a bundle of documents produced under notice to produce and subpoena and the statement of claim in *De Belin v Nationwide News Pty Ltd* NSD 167 of 2020. She also reserves the right to rely upon any other material produced under notice to produce or subpoena and the statement of claim. She also relies upon Exhibit A, the affidavits of Malia Saunders affirmed 10 and 15 March 2023 and any relevant evidence the other respondents may adduce.

4. For the reasons that follow, the application to extend time should be refused in relation to Wilkinson because the evidence does not establish that it was not reasonable for Lehrmann to commence proceedings within the one year limitation period in all the circumstances. Further, Lehrmann has so conducted himself towards Wilkinson by his unexplained delay and otherwise, that the Court should not exercise its discretion in his favour to extend time to 7 February 2023.

5. This outline has been amended and updated as a result of the evidentiary rulings, evidence and the applicant's forensic decisions on 16 March 2023 and additional oral submissions Wilkinson will make. Submissions that are now superseded have been removed without mark-up but all sentences that have been inserted or amended have been underlined. Paragraph numbering has not been retained.

B. PRINCIPLES

6. The pleaded matters were published before 1 July 2021.

7. Section 14B Limitation Act 1969 (NSW) provides that "*An action on a cause of action for defamation is not maintainable if brought after the end of a limitation period of 1 year running from the date of the publication of the matter complained of.*"

8. Section 14B was introduced by the *Defamation Amendment Ac*t 2002 (NSW) which introduced a separate limitation period for defamation distinct from other torts, for which the limitation period was and remains 6 years: Schedule 2, clause 2.2. That amendment was made with a suite of other changes, which included new objects to the Defamation Act 1974 promoting speedy and non-litigious methods of resolving disputes and the resolution of proceedings for defamation before the courts in a timely manner and avoid protracted litigation: Schedule 1, clause 1. The changes placed significance on prompt notice of defamation complaints and prompt determination of actions, thus the new 1 year limitation period needs to be considered in that context. Those changes and objects were replicated nationwide when the *Defamation Act* 2005 was enacted.

9. Section 56A relevantly provides the circumstances in which an extension of time must be granted:

> *(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).*

10. Section 56A was amended in 2005 when the uniform laws were passed. The test is far more stringent than its predecessor that was in place from 2002.

11. The application for an extension of time is seeking an indulgence from the Court: see *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 4)* [2018] FCA 74. Consistent with the approach taken under section 43 *Federal Court of Australia Act* 1976 in relation to applications for indulgences, s56C of the *Limitation Act* specifically recognises the potential costs consequences for a successful applicant.

12. The relevant general principles that apply to an application for an extension under s56A are well established: see *Landrey v Nine Network Australia Pty Ltd* [2023] FCA 27 at

[5]-[14] per Lee J; *Paule v McKay (No 2)* [2022] ACTSC 190; (2022) 18 ACTLR 135 at [17]–[34] per McWilliams AsJ; *Joukhador v Network Ten Pty Ltd* [2021] FCAFC 37; (2021) 283 FCR 1 at [49]–[51], [58]-[59] per Rares, Wigney and Bromwich JJ; *Barrett v TCN Channel Nine Pty Ltd* [2017] NSWCA 304; (2017) 96 NSWLR 478 at [69]–[72], [82], [87] per McColl JA, with whom Simpson JA and Payne JA agreed.

13. The following general principles may be summarised from those cases:

    a. The Court's task under s56A is to determine whether it has reached a required state of satisfaction "*that it was not reasonable in the circumstances for the [applicant] to have commenced an action"*. This is evaluative not discretionary: *Landrey* at [5]-[6], [8]. The burden is on the applicant to establish such circumstances: see *Paule* at [22(c)].

    b. The extension provision proceeds on the assumption that there may be relatively unusual circumstances where it will not be reasonable for an applicant to commence an action to vindicate his or her legal rights in accordance with the time limits provided by law. The provision poses an objective test, requiring evaluation of the circumstances as they appear objectively to the court, not as the claimant may have believed them to be: see *Barrett* at [70].

    c. Consideration of whether the applicant for an extension of the limitation period has established the not reasonable test must commence from the position that the *Limitation Act* lays down strict time limits for the commencement of proceedings for damages for defamation, demonstrating that the legislature has identified some public interest in the speedy commencement and determination of actions for defamation: see *Barrett* at [71].

    d. The not reasonable test is itself unusual, requiring the applicant to establish the difficult proposition that it would not have been reasonable to commence a defamation action within the one-year limitation period. The test is a difficult one to satisfy, requiring the applicant to demonstrate the failure to commence the defamation proceedings within the limitation period was the consequence of "*relatively unusual*", "*special*" or "*compelling*" circumstances: see *Barrett* at [71]-[72]. There is however no exhaustive list of the kinds of cases that will fall within the statutory criterion that the section prescribes: see *Joukhador* at [58].

e. Observations made in other cases based on bespoke facts cannot be elevated to inflexible rules of general application. The focus must always be on the circumstances revealed by the evidence and the nature of the statutory test: see *Landrey* at [10].

f. The question of what is not reasonable in the circumstances requires the court to evaluate all of the objective circumstances as a whole, not piecemeal. The Court is to consider the circumstances by weighing all of the evidence and the weight which is to be given to the united force of all the circumstances put together. That evaluation is a question of fact, but the assessment proceeds by reference to the claimant's position [including their actual reasons] and whether, objectively, it would not have been reasonable for him or her, in light of all of the circumstances, to commence the proceeding within one year of the publication complained of: see *Joukhador* at [51].

g. If the "*not reasonable*" test is satisfied the Court has an unfettered discretion under s56A as to the length of the extension up to 3 years from publication - a discretion confined only by the scope and purposes of the *Limitation Act*, in the latter respect being confined to the extent any extension cannot exceed three years from the date of publication, and also by the requirement that the discretion be exercised in the context of the rationales for the existence of limitation periods: see *Barrett* at [82].

h. The object of that discretion is to leave scope for the Court that is investigating the facts and considering the general purpose of the enactment to give effect to their view of the justice of the case including looking at every relevant fact and circumstance that does not travel beyond the scope and purpose of the enactment authorising an extension of the limitation period: see *Barrett* at [87].

14. Further, the NSW Court of Appeal in *Australian Broadcasting Corporation v Carey* [2012] NSWCA 176; (2012) 84 NSWLR 90 at [55] per Beazley JA observed that "*The statutory test does not direct attention to whether it was reasonable not to have commenced proceedings. It requires the court to be satisfied it was not reasonable to have commenced an action within one year from the date of publication of the defamatory matter*." This distinction is important because there are a range of legally

or factually reasonable decisions or actions that could provide an excuse for commencing an action late. Such matters are insufficient to meet the statutory test – Lehrmann must establish that commencement within the limitation period was not reasonable as a matter of fact.

15. That a decision not to commence is the most reasonable or best decision does not make commencement "*not reasonable*". Further, the Court's evaluation cannot occur with the benefit of hindsight.

16. "*Mere ignorance of the strict time limits fixed by the Act cannot afford a reasonable basis for not complying with them*": *Noonan v MacLennan* [2010] QCA 50; [2010] Qd R 537 at [22] per Keane JA. It may be not reasonable to commence if the applicant lacks the evidence to establish or plead a cause of action in defamation within the one year period: see *Noonan* at [17]. Ignorance by an applicant's lawyers about potential defences, however, cannot make it not reasonable to commence against a known publisher of defamatory matter: see *Ahmed v Harbour Radio Pty Ltd* [2010] NSWSC 676 at [52]-[53] per Simpson JA. The observations in *Joukhador*, stated more generally than necessary to determine that appeal, were made in the context of matters the applicant did not know of at the time he was charged, although he had notice may exist, that framed the ultimate evaluative assessment and reasonableness of investigating the eventual defamation action before resolution of the criminal prosecution: see [65].

17. This Court in *Landrey* at [13]-[14] explained the Full Court's observations in *Joukhador* at [52]-[57], noting that the Full Court was careful to observe that "*the mere fact that an extant criminal proceeding is on foot is not determinative; all the relevant circumstances fall to be considered*". The Full Court at [52] stated :"*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.*"

18. These general observations ought not be used as a presumption or rule that it would be ordinarily not reasonable for an applicant to commence civil proceedings which could allow forensic examination of their guilt or innocence where there are extant criminal proceedings and went beyond was was necessary to determine the appeal in *Joukhador*. To the extent that this Court considers that the general observations are a binding principle or rule on the Federal Court at first instance, for the purposes of appeal and for the reasons that follow the second respondent submits that such a rule is plainly wrong. Further, the observations on their terms ought not extend at all where there are just allegations of a criminal nature or even just an investigation:

    (a) First, the weight to be given to extant criminal proceedings, as explained in *Joukhador* and *Landrey*, can only be evaluated in all the circumstances.

    (b) Second, the prejudice or potential prejudice from forensic examination of guilt and innocence will not be equivalent between different charges, facts, individuals and circumstances.

    (c) Third, the question whether civil proceedings that overlap with a criminal proceeding would likely be stayed is subject to long standing authority that it is a matter of discretion based on a range of factors relevant to all parties to the civil litigation: see *CFMEU v ACCC* (2016) 242 FCR 153; [2016] FCAFC 97 at [26]-[27] per Dowsett and Tracey and Bromberg JJ; *McMahon v Gould* (1982) 7 ACLR 202 at 206-207 per Wootten J.

    (d) Fourth, the Full Court in *Joukhador* at [52]-[56] addressed the specific situation where the publication occurs simultaneously with or shortly after the laying of criminal charges, see particularly at [55]-[56].

19. In this case the criminal charges were not extant at the time of first publication. Contrary to a submission made on behalf of Lehrmann on 8 March 2023, that is not an unusual situation in defamation litigation. A significant percentage of serious defamation proceedings involve allegations of uncharged criminal conduct. Many of these proceedings are reasonably commenced, due to their seriousness, shortly after publication where investigations or calls for investigations may be ongoing. Superior Courts in this country have been replete with defamation cases where criminal charges were laid after the defamation proceedings were commenced (see for example *Peter*

Gregg v Fairfax Media Publications Pty Ltd [2017] FCA 440 and *McLachlan v Browne (No 9)* [2019] NSWSC 10), or investigations were ongoing or subsequently commenced, or there is an ongoing call from the media or public for an investigation or prosecution (the ongoing *Ben Roberts Smith* proceedings).

20. There is a large category of case where criminal conduct is alleged and never investigated or charged, some recent examples in this Court include: *Rush v Nationwide News (No. 7)* [2019] FCA 496; *Domican v Pan MacMillan* [2019] FCA 1384; *Bayles v Nationwide News Pty Limited* [2020] FCA 1213; *Hafertepen v Network Ten Pty Limited* [2020] FCA 1456; *Tribe v Simmons* [2021] FCA 930; *Nassif v Seven Network Ltd* [2021] FCA 1286; *Edwards v Nine Network* [2022] FCA 509; *Barilaro v Google LLC* [2022] FCA 650; *Burston v Hanson* [2022] FCA 1235; *Schiff v Nine Network (No. 2)* [2022] FCA 1120; *Kumova v Davison (No 2)* [2023] FCA 1; *Russell v Australian Broadcasting Corporation* [2023] FCA 38. Any suggestion that ordinarily it is not reasonable for an accused (but uncharged) person to commence defamation proceedings until investigations or potential investigations have concluded or a person is cleared by authorities is plainly not correct.

21. Whether an applicant or plaintiff who faces criminal charges files a defamation proceeding within the one year limitation or three year limitation period to preserve their rights should they be acquitted or the prosecution discontinued, like in *De Belin v Nationwide News Pty Ltd*, that action to commence cannot be not reasonable. Although, the Full Court in *Joukhador* observed that an immediate likely need to stay defamation proceedings ordinarily indicated it was not reasonable to commence this is often a consent position between the parties, see for example *Gregg* at [4]. It is the publishers who take the benefit of any conviction for their justification, contextual truth or honest opinion defences or reduction in damages relying on s42 *Defamation Act 2005* (NSW). The consent positions on stays, can be contrasted with the disputed position publishers inevitably take once the limitation period has expired. An important distinction, unlike this case, is that where a stay is sought then reasonable notice of the claim, in accordance with one year limitation period, has been given to the publisher.

22. The question under s56A is not whether or not it was reasonable for the applicant to commence in the Federal Court but in any Court with jurisdiction over the matter in Australia. In Queensland where the applicant in this case resided throughout much of

the one year limitation period a plaintiff has one year to serve his claim with the ability with cause to extend even longer: *Uniform Civil Procedure Rules 1999 (Qld)* s25.

23. In New South Wales, although under the *Uniform Civil Procedure Rules 2005* a plaintiff has six months to serve an originating process in the Supreme Court and one month in the District Court, they may seek an extension of that time without the need for a stay: see *Weston v Publishing and Broadcasting Ltd* [2012] NSWCA 79; (2012) 88 ACSR 80 at [20]. The Court of Appeal identified at [20(40),(7)] that notice to the defendant was an important factor in applications to extend time to serve a pleading after the expiration of the limitation period. Keane JA in *Noonan* at [16] observed that the non-litigious concerns notice provisions under Part 3 of the *Defamation Act 2005* providing early notice to the publisher informed the legislative intention of the equivalent of s56A in Queensland.

24. The applicant's submission that section 56A does not involve the consideration of any prejudice to the respondent as a result of the delay in commencing proceedings at AS[12] is incorrect in relation to the discretion as to the length of the extension: c.f *Carey* at [55]. *Carey* at [55] only describes the not reasonable test and did not address the discretion. McColl JA in *Barrett* (at [82]) held that the Court has an unfettered discretion to give effect to their view of the justice of the case including looking at every relevant fact and circumstance that does not travel beyond the scope and purpose of the enactment authorising an extension of the limitation period. In *Barrett* at [84], McColl JA expressly recognised that the fact the respondent was deprived of the benefit of an applicant's cause of action having been extinguished was a relevant factor to that discretion.

25. Pertinent to this case, the failures of an applicant to give earlier notice of an intention to sue, commence as soon as possible after it was claimed not reasonable to commence, take genuine steps as required before commencing, and presumed effect of delay on evidence, are all matters relevant to the justice of the case and the length of any extension the Court must grant.

26. Other than cases where the plaintiff has insufficient information to plead the claim within time, or it would be an abuse of process to do so (or some other legal impediment), failure to give notice during the 1 year limitation period to the publisher

of the complaint is a significant factor weighing against the plaintiff on the question of the discretion.

C. EVIDENCE

27. Wilkinson has supplied a bundle of the documents that she relies on (**TB**) and others are exhibited or annexed to the respondents' affidavits which includes the documents referred to below. Arising from the evidence on 16 March 2023 further notices to produce have been served and Wilkinson may rely upon any such documents answerable to those news notices.

28. Lehrmann gave evidence on 16 March 2023. For the reasons that follow the Court should not accept that evidence unless not bona fide in dispute, is supported by objective contemporaneous evidence, or is adverse to his interests on this application. Mr Svilans admitted under cross-examination at T151.19 that he no longer believes some of the information from Lehrmann in his affidavit sworn 1 March 2023 because of documents he had seen since.

29. Lehrmann's evidence in chief addressed the conversations he had with Warwick Korn on 15 February 2021 and following about defamation proceedings. It is not in contest that Lehrmann met with Warwick Korn on 15 February 2021.

30. Lehrmann gave evidence in conclusionary form, despite admonitions to repeat the words spoken to him, that Warwick Korn on 15 February 2021 advised "*[defamation proceedings] have to wait until we see what happens with the criminal matter*": T66.11. Each variation of this conversation Lehrmann described in his evidence was given in similar conclusionary form. Lehrmann gave evidence at T68.24 that he did not receive any different "*advice*" from Warwick Korn.

31. Further, notwithstanding that Warwick Korn assisted Lehrmann to prepare Mr Svilan's third affidavit Lehrmann has elected not to call him as a witness. Given his position as a lawyer, professional obligations and apparent independence from the matter, Mr Korn was a person reasonably expected to recall any advice he gave to Lehrmann on 15 February 2021 and following. There is an available *Jones v Dunkel* inference that any evidence from Mr Korn would not have assisted the applicant. Mr Korn's firm has produced no documentation under subpoena to support Lehrmann's version of events.

32. Absent the obvious fact that Lehrmann did not in fact commence defamation proceedings before 12 months passed, the objective facts and circumstances are contrary to a conclusion that Warwick Korn spoke to Lehrmann in the terms asserted on 15 February 2021 or at any relevant later time. If the Court is not satisfied that Korn did not speak the words Lehrmann claimed on 15 February 2021 given the emphatic terms in which Lehrmann gave that evidence, there is no reasonable basis to infer that such "advice" was given at a later time. Wilkinson submits that the appropriate course for the Court in such circumstances would be to disregard Lehrmann's evidence in its entirety.

33. Lehrmann admitted in his evidence that he intended to sue Wilkinson in defamation from 15 February 2021 when he first watched The Project: T119.15. He avidly pursued in his notebook in March 2021 the idea of defamation claims and a PR plan, and admitted that defamation proceedings were on his mind in March 2021: T123.4.

34. On 19 April 2021, Bruce Lehrmann voluntarily appeared before the Australian Federal Police for an electronically recorded interview, that is an interrogation, in relation to allegations that he had sexually assaulted Brittany Higgins at Parliament House on 23 March 2019. Prior to attending that interview he had no reason to believe that he was going to be charged: T118.4-9.

35. He participated in this interview notwithstanding he attended the Police station with a barrister John Korn. He participated in this interview notwithstanding a search warrant was executed on his person and his mobile telephone seized shortly before the interview commenced. Lehrmann did not attend the interview with a lawyer, although one was available for him, and his mental condition was such that he did not require a support person.

36. On 15 February 2021 at 11:29am, Harry Hughes sent Lehrmann a message with a hyperlink to the first matter in the News Life Media Pty Ltd proceedings asking "*Know this chick*?". Lehrmann replies at 11:39am: "*Yeah worked with her briefly. Was at team drinks etc*": Ex A CB 463.

37. In his evidence at T64.3, Lehrmann admitted having read the article that he considered it had something to do with him. Lehrmann admitted to his employer at 2pm on 15 February 2021 (see file note TB 16) that he had read the article that morning, but

contrary to his evidence in this Court claimed that he did not give any thought that the allegations were about him. Under cross-examination Lehrmann at T75.29 described the email from Ms Lewis discussed at that meeting as "*confirming I was the subject of the sexual assault allegations*".

38. At 12:49pm Lehrmann messages to his close friend John McGowan: "*You would have thought a proper process took place with PMO etc To stop it from getting to this, which appears to be very slanderous and defamatory*": Ex A CB469.

39. The text message conversation between Lehrmann and McGowan continued and at 1:35pm, McGowan sent Lehrmann a message: "*She's on the Project tonight which isn't exactly prime time stuff*". At 1:39pm, Lehrmann responded, with personal concern in two messages: "*They wouldn't name would they*" and "*Pretty slanderous*": Ex CB 470.

40. British American Tobacco suspended Lehrmann on full-pay at a meeting starting at 2pm on 15 January 2021: TB 16.

41. About 3:46pm and following, Harry Hughes and John McGowan introduced Lehrmann to Warwick Korn: see Ex A CB471A-471B. At about 4:01pm, Lehrmann was heading over to Warwick Korn's office having spoken to him.

42. From 5:56pm to 7:39pm on 15 February 2021 Lehrmann sent messages to his girlfriend Greta Sinclair (Ex A CB 471C-473A):

> *I'm still with Warwick Korn who has accepted to be my lawyer*
>
> *Having a scotch now*
>
> *He's very good*
>
> *I've been pretty upset*
>
> *You can Google him he seems good*
>
> *Doesn't want any money*
>
> *Reckons defamation is a definite [*T138.23]*
>
> *But we need to keep a close circle*

So I can't speak very much

But I trust you with my life

*If I am named tonight he says I'm up for millions as defamation [*T80.8]*

Warwick doesn't think I will be named

Harry may join us as well

I just can't be alone tonight

*If I am then he Channel 10 as well as the government/department are up for a lot of money [*T78.15]*

*I am a pawn Rick says as part of a bigger political hatchet job [*T139.19]*

43. From 8:55pm-9:00pm, after the Project broadcast, Lehrmann continued messaging Ms Sinclair:

I'm just getting reassurances

I want to be sure about things

*Criminal he says is completely off the cards completely [*T87.43]*

*One its false and second they have nothing [*T87.46]*

But we [have] civil

But I want to know if someone calls me I refer them to Rick

*And he said tonight I won't see the light of a courtroom this is outrageous [*T88.16]*

But I'm glad I told you anyway

He wanted me to keep it locked down

44. Lehrmann began messaging Tahlia Robertson about the allegations earlier in the night but at from 11:37pm-11:46pm sent the following messages to her (Ex A CB 476-478):

*I've got two lawyers now [*T93.33]*

*Criminal [*T93.33]*

*Who says it's [not] his realm yet [*T93.33]*

*And another who's says I'm up for a bit of money [*95.35]*

*He said I'm clear from criminal completely [*T94.35]*

*I've got criminal and a defamation [*T95.1]*

Haven't spoken to anyone as you advised which was amazing

Anyone who does they go through my lawyers

*Retained formerly [*T95.4]*

45. At 12:26-7am on 16 February 2021 (document produced on 20 March 2023), Lehrmann sent Ms Robertson messages that read: "Exactly although to Harry's credit he has provided a good lawyer I won't be going to prison and we have 2 lined up for civil".

46. The clear contemporaneous messages are unexplained in Lehrmann's evidence in chief and directly contradict the claim that he was told on 15 February 2021 that defamation would wait. Lehrmann claims first that he fabricated the content of messages he sent to Greta Sinclair to placate her. The applicant has not tendered any additional materials to support that claim. A review of the messages between Ms Sinclair and Lehrmann suggests to the contrary – it was Lehrmann not Sinclair who needed placating and reassurance. It was Lehrmann who was eager to share the good news he had received from Mr Korn – despite advice to keep things close.

47. Lehrmann also claims that he wanted to show Ms Robertson his house was in order and therefore fabricated the contents of messages to her as well. This was the same person who he asked "You got any gear" at 11:33pm to which she replied "No I am at home. You guys need to keep it clean enough!!!": Ex A CB475F. Lehrmann clearly was not attempting to portray to Ms Robertson that his house was in order in other communications.

48. Both Ms Sinclair and Ms Robertson were so close to Lehrmann that he confided with them about his darkest secret. It is implausible given that closeness and the nature of the communications with both women that Lehrmann was sharing anything other than the actual communications he had with Warwick Korn or his understanding from those communications. It is implausible that he fabricated each of the messages asterisked above with both women. The Court should reject his explanation that he was fabricating the contents of those messages and take the messages on face value as a contemporaneous record of Lehrmann's knowledge and state of mind at the time. The Court should otherwise have regard to the available adverse credit finding available against Lehrmann in construing those messages as he did when giving evidence.

49. Mr Lehrmann's state of mind admitted to in his evidence and supported by objective documentation is consistent with the advice from Warwick Korn he messaged Ms Sinclair and Ms Robertson on 15 February 2021 to the effect that he was at no risk of criminal prosecution.

50. The contents of the Blue Book (CB458) that Lehrmann created on 16 March 2013 are inconsistent with Lehrmann having received advice that he would have to wait and see in relation to defamation until the resolution of the criminal proceeding. Lehrmann recorded the references to Jarrett and Rush because of their connection to defamation actions (T122.7) in circumstances where he had intended to sue Wilkinson from 15 February 2021: T120.17.

51. Although, Lehrmann was notified on and before 19 April 2021 that an investigation was ongoing, his participation in that interview does not support any inference or anticipation that a criminal prosecution would eventuate. Other than the existing fact of an investigation there are no questions or statements in that interview from which a prosecution could be reasonably anticipated. Lehrmann admitted under cross-examination that he had no reason to believe before that interview that he was to be charged: T120.8. Mr Lehrmann told Police that "*[Barrister John Korn] hasn't been engaged in a sense because I haven't been, you know – it has just been a media report so, you know*": CB 146 A25.

52. By 18 June 2021 Lehrmann was confident that there was a resolution to clear the criminal allegations in the near future (T119.38) and he informed his employer of that

belief at that time: TB 26; T119.43. Lehrmann's admitted state of mind in April and June 2021 is consistent with the messages he sent on 15 February 2021.

53. The Court should not accept the evidence of Lehrmann and for the purposes of this application should proceed on the basis of the business records and contemporaneous documents and otherwise draw adverse inferences against Lehrmann in relation to such evidence of his as not been accepted or he could have given evidence about.

D. CONSIDERATION

54. It is now more than 2 years since the matters were published. The applicant took almost two years to commence these proceedings.

Not reasonable test not satisfied

55. As outlined above, on 15 February 2021 contemporaneous messages document that Warwick Korn advised, and Lehrmann believed, that any criminal allegations against him were hopeless and would not proceed to a prosecution. There is no evidence that before 7 August 2021 Lehrmann ever received any advice or additional information that there was any reasonable prospect that a criminal prosecution would eventuate and the evidence establishes that he did not any time reasonably anticipate that criminal proceedings would be commenced against him. There was thus no "extant" charges for half of the limitation period and no reasonable expectation on the part of Lehrmann that such charges were forthcoming. The charges thus do not establish that it was not reasonable for Lehrmann to commence defamation proceedings at some point during the limitation period of 12 months.

56. It might be considered a natural reaction that Lehrmann suffered stress when suspended from his job on 15 February 2021 (prior to the broadcast of the matters in these proceedings) due to an email to his employer from a journalist from *The Australian.* This court has heard evidence from many applicants about whom defamatory allegations have been made in the mass media. Some require medical attention, or otherwise do not eat, sleep or leave the house. However, each such applicant managed to commence their proceeding despite such reaction.

57. Lehrmann admitted himself voluntarily to Royal North Shore for 48 hours observation: see CB 270-272. His transfer to Northside Clinic for a planned 21 day voluntary admission from 4 March 2021, was cut short to 12 days (CB 264): see CB402. The referral letter from RNSH to Northside Clinic records "Bruce feels that he would benefit from a voluntary inpatient admission to Northside Clinic and has asked that we arrange a referral for him. Bruce may benefit from longitudinal follow-up with a clinical psychologist.": CB 292. There is nothing in those notes that suggests that Lehrmann was suffering under any incapacity.

58. This medical records must be also assessed in the context of the messages and conduct recorded in Exhibit A including arranging a lawyer. While in RNSH Lehrmann answered a call on 17 February from Josh Fett who had suspended him on 15 February 2021 and was willing and capable to participate in that call. A file note of their conversation is at TB18. At the time, Lehrmann was suspended on full pay and remained employed on full pay until 18 June 2021.

59. There is a complete absence of evidence of ongoing health concerns other than psychologists visits over the coming months. There is not sufficient evidence of health concerns to satisfy the "*not reasonable*" test. Commencing from 4 March 2021 and throughout (CB454-461) Lehrmann was able to plan a public relations campaign and prepare a list of publishers to target for potential defamation claims. In March 2021, Lehrmann was contemplating actively engaging with the media: T115.25. That is not a person who is incapable of giving instructions to commence defamation proceedings.

60. On 19 April 2021, Lehrmann voluntarily attended ACT Policing and participated without any lawyer or support person in a recorded interview where he was interrogated on the allegations Brittany Higgins made against him. He was not labouring under any incapacity that prevented him from participating.

61. Lehrmann's psychologist from 30 March 2021 in his report dated 1 June 2021 did not diagnose any underlying psychopathology. His report instead suggested an immediate gradual reintroduction to full time work but did not suggest that there was any medical condition incapacitating him at that time (or any earlier time) since leaving hospital. Taken at its highest Lehrmann was capable of full-time work by the end of June 2021. Lehrmann's participation in the interview with police on 19 April 2021 strongly

suggests that his health and mental condition were no hinderance to commencing proceedings and his health is thus not a circumstance that is of any weight on this application.

62. Although, Lehrmann was notified on and before 19 April 2021 that an investigation was ongoing, his participation in that interview does not support any inference or anticipation that a criminal prosecution would eventuate. Other than the existing fact of an investigation there are no questions or statements in that interview from which a prosecution could be reasonably anticipated. There was otherwise no basis on the facts disclosed in Lehrmann's evidence, either subjectively or objectively, in his circumstances to reasonably anticipate that criminal proceedings would be commenced against him before 7 August 2021. On 18 June 2021 he informed his employer "*my legal team and support network are confident of a resolution to clear this matter in the near future*".

63. Given the immediate concerns that Lehrmann had, and the reputational harm to his career, it would have been reasonable to commence proceedings at any time between late February and 6 August 2021. The applicant has not satisfied the Court that it was not reasonable to have commenced proceedings before 7 August 2021, or for the reasons that follow at any later time. To the contrary, there was objectively an immediate imperative, by reason of (according to him) untrue attacks on his reputation, which could have been ameliorated through prompt legal action. The first evaluative limb of the test ought fail.

64. There is nothing in what Lehrmann reported in messages on 15 February 2021 that Warwick Korn said that suggests any advice to delay to wait on defamation proceedings because of the criminal investigation. He was told criminal proceedings would not happen. The inference is that there were other undisclosed reasons why Lehrman subsequently did not commence shortly thereafter or before 7 August 2021 that would not satisfy the "not reasonable" test. This is illustrated by the complete absence of evidence about the two defamation lawyers Lehrmann disclosed to very close friends on 15 February 2021 other than the false claim that those messages were a fabrication.

65. The suggestion for the first time in cross-examination that Lehrmann did not have financial capacity in 2021 to commence defamation proceeding should be rejected but

in any event would not be a reason to make it not reasonable to commence as otherwise defamation limitation periods would be meaningless to persons with limited financial capacity. Lehrmann on his evidence made no inquiries to see what lawyers might be prepared to act for him on a contingent or pro bono basis or other basis which he could afford: T122.23-31. In any event, at that time Lehrmann was on full pay at British American Tobacco until 18 June 2021 (TB20-26), and Warwick Korn had agreed to act pro-bono for him: Lehrmann T130.5-15. At the time he commenced these proceedings he had been unemployed since 18 June 2021 such that his current financial capacity appears to be markedly worse than it was during the limitation period.

66. Conversations with Warwick Korn, who was not a civil lawyer, are completely insufficient to make it not reasonable for a professional person concerned about their reputation not to have taken further steps, made enquiries of defamation lawyers, given notice to the publishers or commenced defamation proceedings about such serious allegations. It is entirely unreasonable for a professional person so concerned about his reputation on 15 February 2021 to have obtained and relied upon such limited conversations with a criminal lawyer to make any decision not to commence. This is particularly the situation where there were non-litigious options, such as sending a concerns notice, letter of demand or complaint in respect of the publications that could not reasonably have affected future criminal proceedings. As submitted above the evidence about advice from Mr Korn should not be accepted and otherwise should have limited weight on this application.

67. On 19 April 2021, Lehrmann waived his right to silence and engaged in a comprehensive interview with Police that lasted four hours (T107.11). He did not withhold anything from them: T107.30. Lehrmann admitted under cross-examination that after the Police had access to his phone they had access to all documents in his possession that were relevant to the allegations the Police were investigation – "his entire life". He followed this up by emailing further documents to the police to support their investigation: CB 381-382. He did this notwithstanding that the Police had seized his mobile telephone. The abrogation of the right to silence and in circumstances where the police had seized his relevant documents means that it is more difficult for the applicant to satisfy the Court that forensic examination in a civil trial or pre-trial disclosure could likely prejudice the potential criminal proceedings. Wilkinson submits

that the comprehensive disclosure to the Police both under search warrant and voluntarily means that it is unlikely, if not impossible, for the interlocutory steps in defamation proceedings to prejudice the criminal trial. Further, any potential prejudice could only arise depending on the defences that would be raised, unknown to the Lehrmann at the time who on his evidence (and contrary to his contemporaneous text messages) had not sought any advice about civil claims.

68. [redacted] The applicant has given no explanation for this apparent inconsistency in his approach to the two matters. These circumstances illustrate why Joukhador should not be taken to reflect an ordinary rule or principal and why it was reasonable for Lehrmann to commence against the respondents within the one year limitation irrespective of facing charges – just as Jack de Belin (also accused and charged with rape) did.

69. Lehrmann has failed to establish that it was not reasonable to commence defamation proceedings against any of the respondents before 16 February 2022.

Discretion

70. Further, should the Court be satisfied of the first limb the Court must exercise an unfettered discretion as to the length of the extension. There are a number of factors why the Court would not extend time to commence to 7 February 2023.

71. *First*, Lehrmann did not issue a concerns notice, demand or complaint against Wilkinson during the limitation period although it was open for him to do so. On 15 February 2021, Lehrmann discussed the possibility of a defamation action. Had he sent such a notice, Wilkinson would have had notice of his claim and arranged her affairs accordingly. What changes would have been made are speculative, but fall within the notion of presumptive prejudice. The lack of notice within the limitation period entitled Wilkinson to presume that no such claim was being contemplated or would be brought.

72. Documents have not necessarily been preserved, but certainly memories have faded. One purpose of limitation periods is to overcome those difficulties. Some form of

notice might have alleviated those issued, noting that Part 3 of the Defamation Act expressly provides for a non-litigious process.

73. As illustrated in *Noonan* at [16] the purposes of the limitation period reflect these non-litigious processes that were introduced in New South Wales with the one year limitation period through the *Defamation Amendment Act 2002*. Wilkinson submits that in any circumstance where the plaintiff has sufficient knowledge of the defamatory publication to issue a concerns notice, that a failure to issue such a notice within the limitation period ought be a fatal barrier to any exercise of discretion in their favour. The legislature has deemed the one year limitation period important in defamation disputes, and has emphasised the need to take steps to remedy a damaged reputation promptly.

74. *Second*, Lehrmann elected not to issue a concerns notice to Wilkinson in December 2022 even though he sent a demand at that time to every other respondent involved in this present dispute, including Ms Maiden. Solicitors for the first respondent notified Lehrmann their response on 22 December 2022 who they acted for, that is persons other than Wilkinson: CB 97. Lehrmann elected to further delay commencing proceedings, expressly knowing it may affect his application for an extension, without ensuring that Wilkinson was a party to that process. There is no reasonable explanation for this delay in relation to Wilkinson. This is in circumstances where Lehrmann always intended to sue Ms Wilkinson and Ms Wilkinson was identified in a Daily Mail article that Lehrmann had authorised his current solicitors to give a quote for as a target for potential litigation. Lehrmann made a deliberate decision not to give a concerns notice to Ms Wilkinson. As Ms Saunders deposes to in her second affidavit at [11] the first respondent did not seek any input or instructions from Wilkinson because the notice was not addressed to her. Svilans accepted under cross-examination that there was nothing in the correspondence that suggested to him that Wilkinson was aware of or consented to any extension of time to respond: T154.36-38.

75. *Third*, Wilkinson was entitled to rely on the expiry of the limitation period, and as an individual is the subject of significant presumed effect when proceedings are sought to be commenced so late.

76. *Fourth*, the first respondent as her employer is vicariously liable for any liability Wilkinson may have to Lehrmann. In circumstances where Network 10 is also independently the publisher Lehrmann can proceed with his case in the same manner and with the same outcome (in the sense of amount of damages, if any) irrespective of whether proceedings are maintained against Wilkinson. This is a weighty factor on the question of discretion in this case because she was not notified of the claim in the limitation period, was not the recipient of a letter of demand in December 2022, and as an individual there is a greater presumed prejudice in delay compared to a corporate respondent.

77. *Fifth*, Lehrmann provides no explanation why he delayed until 12 December 2022 to meet his lawyers notwithstanding he authorised them to make public statements for apparent public relations purposes on his behalf to the Daily Mail on 7 December 2022: Svilans T152.16-41.

78. *Finally*, Lehrmann was under an obligation under the *Civil Dispute Resolution Act* 2011 to take genuine steps to resolve the dispute against Wilkinson before commencing action against her. The letter sent on 16 December 2022 was not addressed to her and made no offer that necessarily would have prevented Lehrmann from also suing Wilkinson. In these circumstances the Court would not be satisfied that genuine steps or bona fide steps were taken before commencing against Wilkinson and this is a further reason that time should not be extended to allow the proceedings to be maintained against Wilkinson.

79. If the first limb is satisfied – that it was not reasonable to commence within the 1 year time period, then the Court should not extend time in relation to Wilkinson beyond 16 December 2022.

E. CONCLUSIONS

80. The applicant's application for an extension of time should be dismissed.

81. Irrespective of the outcome, given the elapse of time and the importance of short limitation periods in defamation claims to parties and the public interest, Wilkinson's opposition to the extension has been reasonable – this is particularly the case given the applicant's multiple changes in forensic approach before and including on 16 March

2023. As the applicant seeks an indulgence he should pay Wilkinson's costs of this application.

Sue Chrysanthou 22 March 2023

Barry Dean

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