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Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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IN THE FEDERAL COURT OF AUSTRALIA **NSD701/2024**

REGISTRY: NEW SOUTH WALES

DIVISON: GENERAL

BRUCE LEHRMANN

Appellant

NETWORK TEN PTY LIMITED and another

Respondents

APPELLANT'S REPLY TO RESPONDENT'S APPLICATION FOR SECUITY OF COSTS

1. The first Respondent seek security of costs in respect of an appeal by the Appellant for the amount of $200,000.

2. The Applicant relies upon the affidavit of Zali Burrows affirmed 13 September 2024 in support of opposing the application.

Relevant Principles

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

4. The Federal Court website states: Case management in the Federal Court of Australia Modern approaches to case management are driven by the need to reduce delay and contain costs. Modern courts are focussed on delivering justice efficiently. There are many reasons for this, not least the high cost of inefficiency. In civil proceedings there are statutory obligations to do so (in our court in Part VB of the *Federal Court of Australia Act 1976* (Cth)). The obligation is a mutual one. Judges and registrars must exercise their powers and carry out their duties in the way that best promotes the quick, inexpensive and efficient disposition of disputes and parties and their lawyers must conduct themselves in a way which is consistent with that purpose. For parties

and their lawyers, that means focussing on the real issues and doing so at a very early stage, putting fewer issues in dispute, undertaking no greater factual investigation than is genuinely required, and keeping interlocutory skirmishes to a minimum. Costs sanctions may be imposed on parties and practitioners who do not do so.

5. The relevant rule in respect of Security of costs is Rule 36.09 Federal Court Rules.

6. The relevant section is s56 of the Federal Court Act.

7. The Appellant also adopts the relevant principals stated in the first Respondent's submissions on security for costs being the provisions of the FCA and FCR above provide the Court with a broad and unfettered discretion: Callan, [12]. There is no general rule, because each case depends upon its own circumstances: Cooper v Universal Music Australia Pty Ltd [2006] FCA 642 (Cooper), [11].
   Relevant matters to be considered include:
   (a) the prospects of success of the appeal;
   (b) the likelihood (or quantum of risk) that a costs order will not be satisfied;
   (c) whether the making of the order would be oppressive in that it would stifle a reasonably arguable appeal;
   (d) whether the appellant's impecuniosity arises out of the respondent's conduct; and
   (e) whether there are aspects of public interest which weigh against the making of the order.

8. Mr Lehrmann raises the issues below for consideration of the Court in exercising its broad and unfettered discretion to oppose a security of costs application.

The general rule as to impecuniosity of the Plaintiff

9. 'The general rule is that poverty is no bar to a litigant', which 'from time immemorial, has been the rule at common law, and also, I believe, in equity'[1]. So the bankruptcy or other impecuniosity of the plaintiff who has brought what appears to be a bona fide claim is not a sufficient reason by itself to order security for costs. In such a case, a

[1] Bowen LJ in Cowell v Taylor (1885) 31 Ch D at 38

defendant may be forced to accept the risk that, if successful, an order for costs will be fruitless.[2]

10. In examining impecuniosity in the context of an application for security of costs, there is a somewhat of a 'conundrum' for the law: [t]he poorer the plaintiff, the more exposed the defendant is as to costs and the greater the apparent justification for security', but 'the poorer the plaintiff, the less likely it is that security will be able to be provided and thus the greater the risk of a worthy claim being stifled'. As a matter of judicial (and public) policy, the latter prevails: access to justice, it said, 'trumps mere poverty', even if capable of frustrating the (successful) defendant's prospects of costs recovery. Were the court routinely to order security for costs, this policy would be frustrated for it would deny the poor (and even the not so poor) the opportunity to secure their legal rights. The law thus accords greater weight to a person's right to secure access to adjudication of his or her legal rights than to the financial interests of a defendant who has been dragged into court by an ultimately unmeritorious plaintiff. 'It is preferable,' it has been judicially said, 'that a successful defendant should suffer the injustice of irrecoverable costs than a plaintiff with a genuine claim should it be prevented from pursuing it.[3]

11. Arguably, the first respondent was made aware at onset of the defamation proceedings that the Appellant had no capacity to meet a costs order. The first respondent was made aware at the onset of proceedings in the Court below that the Appellant was receiving a Centrelink income[4], that he did not have the capacity to satisfy a costs order for 2 million dollars payable within 21 days of order and is most unlikely to be able to meet an order for security of costs for $200,000. It is known that personal injury appellants are afforded to run their appeals notwithstanding that they are impecunious and often represented on a conditional fee basis or pro bono. The first Respondent is a powerful media company and arguably the sum of $200,000 they seek in a security of costs order is subjectively not a considerable sum to lose in the event they are successful in the appeal, noting that they are likely to make far more in

[2] Law of Costs 5th Edition G E Dal Pont at 29.13 page 1078
[3] Law of Costs 5th Edition G E Dal Pont at 29.15 page 1079
[4] https://www.fedcourt.gov.au/__data/assets/pdf_file/0018/107730/Affidavit-of-Paul-Svilans-Ten-sworn-on-1-March-2023_Redacted.pdf -

advertising revenue in reporting the appeal proceedings on one of their programs or websites.

Cause of the Appellant's impecuniosity

12. The first Respondent's conduct complained of in the proceedings below (the Project program) and in subsequent media articles and broadcasts by the first Respondent, have caused, or in the alternative have substantially contributed to Mr Lehrmann's impecuniosity in respect of him being labelled a rapist, and a person who 'conned the court'.

13. Mr Lehrmann is arguably Australia's most hated and recognisable man who is continuously subject to ridicule, vilification, thus making him unemployable and impecunious.

14. In response to the first Respondent's submissions at D.3 'The cause of Mr Lehrmann's impecuniosity', in the proceedings below, Angus Llewellyn (producer for The Project) was cross-examined by Mr Richardson whereby he gave evidence that the promo for the Project story was attached to Ms Maiden's story (promoting the program in her article on news.com.au) and that the promo started running at 8am Monday morning on 15 February 2021.[5]

15. It is publicly known that Mr Lehrmann is charged with a sexual offence in the State of Queensland ("Toowoomba proceedings") and was granted an interim non-publication order of his name. The provisions in Part 3 of the *Criminal Law (Sexual Offences) Act 1978 (Qld*) were amended with effect from 3 October 2023 by the *Justice and Other Legislation Amendment Act 2023 (Qld)*. The first Respondent joined other parties to oppose Mr Lehrmann's application for a non-publication order to his name and thus was part of the machinery to seek publication of his name to the offence he was charged with.

[5] Transcript page 1653, lines 3-12

16. Mr Lehrmann's mental health issues have significantly suffered as a result and the first Respondent's have been afforded evidence of this in the proceedings below and at in submissions and evidence in the Toowoomba proceedings when they appeared to oppose a non-publication order of his name.

Arguable grounds of appeal

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

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

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

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

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

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

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

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

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

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

(i) the case pleaded at [34] involved "forceful sexual intercourse" but the case found involved no force.
(ii) case pleaded at [34] involves BL "audibly slapping against" BH but the judge makes no such finding.
(iii) the case pleaded at [34] involves BH being awoken by a sharp pain in the thigh, but the case found does not involve BH being asleep (or unconscious) or that BH causes a pain to her thigh. Indeed the finding of the bruising to the thigh was not accepted at [559].
(iv) the case pleaded at [35] involves BH being raped whilst asleep or unconscious, but the judge finds merely that she was prone to drowsiness at [523].
(v) the pleaded case at [34] involves BL's knee being crushed against BHs' thigh, but the judge makes no such finding.
(vi) the pleading at [34] refers to BHs' legs being held open by BL, but there is no such finding.

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

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

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

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

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

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

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

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

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

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

Additional considerations to flaws in the judgment

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

23. On 19 June 2024 the Second Respondent filed a Notice of Contention to the judgment of the Federal Court dated 15 April 2024, of 2 grounds relied on being justification and qualified privilege, totalling 8 pages[6].

24. On 21 June 2024, the First Respondent filed a Notice of Contention to the judgment of the Federal Court dated 15 April 2024[7], of 2 grounds relied on being that the primary judge ought to have found that the Appellant knew that Ms Higgins did not consent to having sex, contrary to the finding at [591] of the primary judgment and that the primary judge ought to have found that, if it had been necessary to assess damages in favour of the Appellant, the appropriate award was no or nominal damages, of 1 page.

Genuine Public Interest that the Appeal proceeds as a real risk the Appeal will be aborted if the first respondent succeeds in security of costs

(a) Applicant is on a Centrelink income and cannot meet a security of costs order

25. If a security of cost order is granted, the appeal will be nugatory on the basis that Mr Lehrmann cannot afford to meet a $200,000 security of costs order. Mr Lehrmann has been a recipient of Centrelink income since the commencement of the proceedings below. Affidavit of Zali Burrows affirmed 6 September 2024 ZB3 page 12 states he received Centrelink income since 1 January 2022. It was bought to the first

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

Respondent's attention in the Affidavit of Paul Victor Svilans sworn 1 March 2023, filed in the proceedings below and is on the public file court portal.[8] The affidavit states at paragraph [31]: *In late 2021, Mr Lehrmann applied for unemployment benefits and he has continued to be unable to work since that time*

(b) Power imbalance between Mr Lehrmann and Channel Ten a media juggernaut

26. In considering the competing rights between the parties, namely any prejudice to the first Respondent in not being granted a security of costs order, $200,000 is not a considerable sum of money to harm the first Respondent.

27. The first Respondent has commenced enforcement proceedings for the 2 million dollars costs order by way of a Bankruptcy Notice against Mr Lehrmann, notwithstanding the first Respondent is aware that Mr Lehrmann does not have the capacity to pay such an amount. An application for security of costs appears to be disingenuous in respect of a feigned concern for the accumulation of costs for its client (in the appeal proceedings) in circumstances the first Respondent actively and hastily engages in costs enforcement action prior to this Appeal being determined, noting it has 12 months to serve a bankruptcy notice.

28. The application for security of costs is considered a bullying hard-hitting tactic, a procedural play to smack down this appeal.

(c) The proceedings below were a *'de facto* rape trial' and Mr Lehrmann seeks to appeal that finding of being labelled a rapist

29. Mr Lehrmann is appealing from the finding of the criminality of being found a 'rapist'. The first Respondent has confirmed the view that the proceedings below have been a *de facto* rape trial. The First Respondent broadcast a story on its television channel 'The Project'. The program states *inter alia*:

[8] https://www.fedcourt.gov.au/__data/assets/pdf_file/0018/107730/Affidavit-of-Paul-Svilans-Ten-sworn-on-1-March-2023_Redacted.pdf

After the criminal case against Lehrmann collapsed due to jury misconduct this defamation case has effectively been a de facto rape trial, Justice Lee today finding on the balance of probabilities Mr Lehrmann is a rapist. The judge has called you a rapist today Mr Lehrmann what do you have to say to that?

30. On 15 April 2024, Mr Justin Quill ("Mr Quill"), solicitor for the first respondent conducted a press conference on the steps of the Law Court Building. I have viewed Mr Quill's affidavit of 29 April 2024 filed in the proceedings in the Court below which contains a transcript of his press conference of 15 April 2024 which was marked as "JQH-1". The transcript states *inter alia* at page 1:

> *"Ultimately as I said, it is an unmitigated disaster for Bruce Lehrmann. His Honour has found that Bruce Lehrmann is a rapist. Bruce Lehrmann is a rapist."*

31. Mr Quill also appeared on The Project; the title introduction of the program stated *inter alia*: Expert defamation lawyer Justin Quill explains how significant this decision was. Justin Quill is a solicitor for the first Defendant. The program states the following:

> "Judge Found Bruce Lehrmann Raped Brittany Higgins - Federal court judge Justice Michael Lee has found Bruce Lehrmann, on the balance of probabilities, raped Brittany Higgins in Parliament, meaning Lehrmann's defamation case against Network 10 has failed. Expert defamation lawyer Justin Quill explains how significant this decision was. The finding of rape is at the civil standard on the balance of probability'."
>
> **Justin Quill***: It was crazy stuff for him to bring this case ..I would have thought would be a bad decision for him to appeal, I would be confident that we would hang onto the judgment so I will be surprised if he appealed but I'm not going to guess what Bruce Lehrmann would do his judgment hasn't been the best or the most rationale so far …And hopefully it's a warning to other plaintiffs that want to come to court and con the court, there are rarely complete winners in legal cases but ten is as bigger winner as you can hope for.*

(d) Appealing from the finding of criminality and Mr Lehrmann should be entitled to clear his name and an entitlement to natural justice in accordance with Article 14 ICCPR

32. In accordance to Mr Lehrmann's interests, natural justice and Article 14 ICCPR, Mr Lehrmann seeks to appeal from the finding of criminality of being found to be a rapist and should be entitled to clear his name in whether is was a de facto criminal trial or a suit at law:

Article 14 (1) ICCPR:

> *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case* ***or in a suit at law*** [bold emphasis added] *shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

Article 14 (5) ICCPR:

> *Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

Mr Lehrmann should be entitled to clear his name and pursue his appeal without the bullying tactics of a security of costs against him to shut down his right to clear his name of being found to be a rapist, which is arguably one of the worst and the most damning of findings to be made against anyone.

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

33. In the view of the ethos of access to natural justice, Bowen LJ in *Cowell v Taylor*[9] said "The general rule is that poverty is not bar to a litigant" and thus respectfully seek the Court's consideration to the power imbalance between the Applicant and the First respondent in assessing the competing interests of the parties. There must be hundreds if not thousands of personal injury cases being appealed notwithstanding the plaintiff is impecunious and the Courts have granted stays of enforcement of costs in order for those plaintiffs to run their appeals.

(f) Significant public interest

34. It goes without saying that the appeal proceedings has significant public interest with examples annexed to the affidavit of Zali Burrows affirmed 6 September 2024 Annexures [ZB7] – [ZB13], being news articles, a wikipedia page on Mr Lehrmann, news reports on directions hearings in the appeal proceedings and that the Federal Court have recognised the public interest with live streaming on YouTube all court events in this matter and a public online file. It is in the great interest of the public that the appeal proceeds, and Mr Lehrmann has the opportunity to appeal from the finding of being a criminal, a rapist.

(g) Criticism for non-compliance to Court order for filing when the first Respondent was also in breach of Order 1 for not filing its evidence and did so later

35. The first Respondent submits in their submissions (at [9] to [11]) that at the case management hearing on 25 July 2024 that Mr Lehrmann did not comply timetable Orders 3 and 4 to file and amended appeal and to file evidence in relation to the security for costs application and any additional evidence upon which he proposes to rely in relation to the stay application.
36. The Respondent omits in it submissions that Channel 10 did not comply with Order 2 being: By 4.00pm on 15 August 2024, the respondents file and serve any evidence upon which they propose to rely in relation to the stay application and any additional

[9] (1885) 31 Ch D 34 at 38

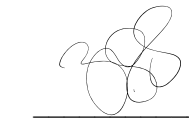
evidence upon which they propose to rely in relation to the respondents' interlocutory application filed on 21 June 2024 (**security for costs application**).

37. The first Respondent also omits that Mr Lehrmann's initial request for a case management listing was at first initiated by him on 29 August 2024 seeking consent to an email to the Associate and for mutual available dates. The first Respondent also omits that on 5 September 2024 Mr Lehrmann provided reasons why an extension to the orders was sought prior to the directions hearing.

38. The first Respondent filed evidence on 13 September 2024 in relation to the stay application which was initially ordered to be filed by 15 August 2024. Media unfairly reported Mr Leharmann was late in filing omitting that the first Respondent was too.

39. This give rise to the view that the first Respondent is concerned with tactical manoeuvres in this matter and that the security of costs application is merely a tactical manoeuvre to shut down the appeal, as opposed to the costs of $200,000 in the appeal is a genuine concern to first Respondent, notwithstanding this matter will be a reported story on its media channels/websites and likely to earn the first Respondent advertising revenue well above $200,000.

40. For reasons stated above, the Applicant respectfully seeks the Court makes the order that the application for security be dismissed with costs.



Zali Burrows
Lawyer
26 September 2024