

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 5/11/2018 6:14:46 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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| Document Lodged: | Outline of Submissions |
| File Number: | NSD2179/2017 |
| File Title: | GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR |
| Registry: | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA |



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 5/11/2018 6:14:51 PM AEDT

Registrar

Important Information

As required by the Court's Rules, 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



No. NSD2179 of 2017

Federal Court of Australia
District Registry: New South Wales
Division: General

Geoffrey Roy Rush

Applicant

Nationwide News Pty Limited and another

Respondents

Respondents' Outline of Submissions in relation to the admissibility of the expert reports of Fred Spektor and Fred Schepisi

1. The Applicant has served both an Outline of Evidence and a report which purports to be an expert report, from each of Fred Schepisi and Fred Spektor.
2. Mr Spektor is the Applicant's agent and has represented him for over 20 years. He has been referred to in evidence several times.
3. Mr Schepisi has known the Applicant for more than 12 years socially and professionally and is his friend. They have worked together and spend a lot of time together and have properties near each other.
4. The Respondents object to the expert reports of Fred Spektor and Fred Schepisi on the bases that:
 - (a) The witnesses are not independent and (as persons giving lay evidence on behalf of the Applicant) are necessarily incapable of being impartial;
 - (b) Each of Mr Schepisi and Mr Spektor have obtained information relevant to the formation of his respective opinion in the course of their relationship with the Applicant which is not part of the identified body of information to which the expert is authorised to have regard in preparing the report; and
 - (c) The evidence is unfairly prejudicial and ought be excluded pursuant to section 135 of the *Evidence Act 1995* (Cth).

Principles

5. Rule 23.11 of the *Federal Court Rules 2011* (Cth) provides that a party may call an expert to give expert evidence at trial *only if* the party has served an expert report that complies with rule 23.13.
6. Rule 23.13 of the *Federal Court Rules* provides that an expert report must comply with the Expert Evidence Practice Note (the **Practice Note**).
7. Clause 2.2 of the Practice Note provides that the purpose of the use of expert evidence in proceedings is for the Court to receive the benefit of the objective and *impartial* assessment of an issue from a witness with specialised knowledge (based on training, study or experience).
8. Clause 3.3(b) of the Practice Note provides that a witness retained as an expert should be provided with all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a *truly independent nature*.
9. Clause 4.1 of the Practice Note provides that the role of the expert witness is to provide relevant and *impartial* evidence in his or her area of expertise.
10. Clause 4.4 of the Practice Note provides that every witness must read and agree to be bound by the Harmonised Expert Witness Code of Conduct (the **Code of Conduct**).
11. Clause 2 of the Code of Conduct provides that an expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court *impartially* on matters relevant to the area of expertise of the witness.
12. The requirement for impartiality was considered by Mortimer J in *Guy v Crown Melbourne Limited* [2017] FCA 1104. The judgment considered the admissibility of evidence which was partly factual and partly opinion. The deponent of the affidavit, Dr Livingstone, had candidly disclosed his connection to the applicant's case and to having assisted the applicant and her legal representatives before he was asked to produce an affidavit in the proceeding ([23]). Her Honour considered the requirements of Part 23 of the *Federal Court Rules*, the Practice Note and the Code of Conduct at [36]-[49] before stating as follows at [50]:

In my opinion this means, at a minimum, that there must be substantial, at least purportedly substantial, compliance with Part 23, or a capacity

substantially to comply with Part 23, by both a party and that party's proposed witness, including a preparedness and capacity to acknowledge the necessity for an expert witness to be independent in the sense set out in the authorities, the Practice Note and the Harmonised Code.

13. Her Honour considered that Dr Livingstone's evidence was inadmissible as expert evidence as he had no capacity to comply with the requirements of Part 23 as he was an advocate for the cause of the applicant and had assisted her and her legal representatives ([51], [56]-[57]). Her Honour rejected the proposition that the evidence could be admitted but Dr Livingstone's position would go to weight ([53]-[56]) and concluded as follows ([58]):

In those circumstances, it would be inimical to the structure and purpose of Part 23 to waive the requirements of that Part entirely; or of r 23.11. This Court's Rules do not intend that there are two kinds of expert evidence admissible in proceedings in this Court – independent and non-independent; substantially compliant with Part 23 and wholly noncompliant. The purpose of Part 23 as a whole is to regulate the form and preconditions to admissibility of opinion evidence within the terms of s 79(1) of the Evidence Act. That is why substantial compliance (at least purported), or the capacity substantially to comply, with Part 23 must be, in this Court at least, a precondition to admissibility of evidence within s 79(1) of the Evidence Act.

14. The requirement for independence and impartiality was earlier considered by Austin J in *Australian Securities and Investments Commission v Rich* (2005) 190 FLR 242, in the context of the rules of court in the Supreme Court. Austin J considered the authorities relating to the admissibility of expert reports at [333]-[377]. At [346] his Honour found, in substance, that the fact that an expert has a family, personal or business connection with a party is not of itself a basis for excluding the evidence. His Honour went on to state that matters of this kind might influence the court to exercise its discretion under s135 of the *Evidence Act* 1995 to exclude the evidence.

15. At [348]-[349] his Honour stated:

One additional factor especially pertinent in the present case is that expert opinion evidence might be excluded if the expert, in the course of his or her prior relationship with the party who has retained him or her, has obtained information relevant to the formation of his or her expert opinion,

which is not part of the identified body of information to which the expert is authorised to have regard in preparing the report. Here the problem is not lack of independence per se, but the fact that, in the course of acting in relationship with a party to the litigation in a non-independent way, the expert may have obtained information which is not appropriate or permissible to be used as a factual basis for expert opinions.

....

Where, however, the expert has obtained extraneous information in the course of another relationship with the client prior to reaching his or her opinions, and the information is relevant to the opinions, a question would seem to arise as to whether the expert has failed to set out the factual basis that the opinions are based wholly or substantially on the expert knowledge.

16. The s135 discretion was considered by his Honour at [377] where his Honour stated as follows:

Nevertheless it is relevant to consider the degree of risk that the excluded materials will influence the formation of opinions, when one is considering the exercise of the statutory discretion to exclude evidence conferred by s 135. Under that section, the question is whether the probative value of the evidence is substantially outweighed by the danger that the evidence might be unfairly prejudicial, misleading or confusing, or cause or result in undue waste of time. The assessment of the degree of danger that evidence might be unfairly prejudicial, or misleading or confusing, seems to me to involve, in a case such as the present case, considering the degree of risk that the expert might have unwittingly relied on, been influenced by or taken into account material that has not been identified as part of the factual basis for the opinions he or she has expressed.

Admissibility of the evidence

17. There can be no dispute that both gentleman have deep and longstanding relationships with the Applicant. Mr Spektor is not only the Applicant's agent but he has been involved in giving him advice in relation to steps he should take in the lead up to and following the publication of the matters complained of.

18. Further, both gentleman are clearly advocates for the Applicant's case, in the sense that they are giving lay evidence on his behalf.
19. In addition, and perhaps most critically, it is evident that both gentleman have had regard to information obtained from their prior dealings in forming their opinions, which is not disclosed in their reports. In particular:
 - (a) Mr Spektor explicitly states, at [3] of his report, that his evidence is based upon his "personal knowledge of Mr Rush".
 - (b) Similarly, Mr Schepisi explicitly states, at [3] of his report, that his evidence is based upon his "personal knowledge of Mr Rush". In addition, at [10] of his report Mr Schepisi states "In addition, I rely upon my own personal knowledge of Mr. Rush."

Conclusion

20. Accordingly, the Respondents submit that the evidence of Mr Schepisi and Mr Spektor which purports to be expert evidence is inadmissible.
21. Alternatively, the Respondents seek an order that the evidence be excluded pursuant to section 135 of the *Evidence Act*.

Tom Blackburn SC **and** **Lyndelle Barnett**

Counsel for the Respondents

Dated: 26 October 2018