

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 3/04/2018 4:37:00 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Application for Leave to Appeal - Form 117 - Rule 35.12(1)
File Number:	NSD493/2018
File Title:	NATIONWIDE NEWS PTY LIMITED & ANOR v GEOFFREY ROY RUSH
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 3/04/2018 4:46:17 PM AEST

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 Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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.



Application for leave to appeal

No. NSD2179 of 2017

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

Nationwide News Pty Limited and another named in the schedule

Applicants

Geoffrey Roy Rush

Respondent

To the Respondent

The Applicants apply for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

The Court ordered that the time for serving this application be abridged to.

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Nationwide News Pty Limited and Jonathon Moran, Applicants

Prepared by (name of person/lawyer) Robert Todd / Nicholas Perkins

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The Applicants apply for leave to appeal from that part of the judgment of the Federal Court given on 20 March 2018 in which:

- a) paragraphs 36.9A to 36.9C of the Amended Defence (relating to the defence of statutory qualified privilege) were struck out;
- b) the words "specifically the matters set out in paragraphs 36.9A and 36.9C below" in paragraph 36.9 of the Amended Defence were struck out; and
- c) the subpoena issued to the Sydney Theatre Company on the application of the Applicants was set aside.

Leave to appeal is required by s.24(1A) of the *Federal Court of Australia Act 1976* (Cth).

Grounds of application

1. The application raises a question of principle, namely whether or not the objective truth of material published in the publication complained of is capable of being relevant to the question of reasonableness of the publisher's conduct for the purpose of the defence of qualified privilege under section 30 of the *Defamation Act 2005* (NSW) (the **Act**).
2. The negative answer to that proposition is not supported by the wording of s. 30(1)(c) of the Act. That sub-section does *not* require that in assessing the reasonableness of the respondent's conduct, "all the circumstances" are confined to what the respondent ascertained or believed. Statements in the authorities to the contrary are based on concepts imported from the common-law defence of qualified privilege, which is a quite different defence, and does not turn (in any way) on the reasonableness of the respondent's conduct. Further, the question is more than merely arguable. It is easy to conceive of a situation where the care taken by a respondent to ascertain the truth of the matters published has the direct consequence that the publication is objectively without error.
3. The application involves a conflict in the authorities between the decision of Hunt J in *Makim v John Fairfax & Sons Ltd* (unreported, Supreme Court of New South Wales, Hunt J, 15 June 1990) and the decision of White J in *Hockey v Fairfax Media Publications Pty Limited* (2015) 237 FCR 33. In *Makim*, Hunt J stated (as his Honour noted at [137]) that the objective truth or falsity of what was said is irrelevant to the defence of qualified privilege and that proof of the objective truth does not assist the publisher to establish the reasonableness of the steps which were taken to ensure that what was published was true. As his Honour also noted at [133], that was precisely the issue in this application. His Honour went on at [140] and [148] to doubt the correctness of White J's reasoning in *Hockey*. With respect, his Honour's statement at [133] that the issue was not to be resolved by determining which of the two cases should be "followed" is correct only in the sense that *Hockey* and *Makim* dealt with different fact situations –



respectively, the relevance of questions put in cross-examination and of interrogatories.

The application squarely raises the question which of the two plainly contradictory principles of law enunciated in those two authorities should be *applied*. The issue is likely to arise again, and this case is a good vehicle for its resolution.

4. In striking out the particulars, his Honour put an end, at an interlocutory stage, to the Applicants' case on the issue, and prevented a significant component of its defence from being considered at trial. At the hearing on 27 March 2018 the Respondent's counsel repeatedly referred to "a decision on practice and procedure" as a reason for the hopelessness of this application. That broad-brush submission pays no attention to the consideration adverted to in *Will of Gilbert* (1946) 46 SR (NSW) 318 (and many other cases), approved by the High Court in *Adam P. Brown Male Fashions Pty Limited v Phillip Morris Inc* (1981) 148 CLR 170 at 177.
5. His Honour's decision (at [159]) to strike out the particulars on the alternative ground that, in form, they were ambiguous or embarrassing is, with respect, wrong, but in any event is not a basis for refusing leave to appeal. As matters stand, there is no basis on which to apply to replead these particulars, because of the principal ground on which they were struck out: however reformulated, they are irrelevant. But in addition, this alternative ground gives rise to an injustice. The *form* of the qualified privilege particulars was not a basis on which the Respondent sought to strike them out, and indeed in argument the Respondent disavowed reliance on the form of the particulars as a basis for striking them out (T105/45 – T106/1-5). The Respondent's only basis was that the truth of the matter published was irrelevant to the defence of qualified privilege. The Applicants were not on notice that his Honour was contemplating striking out the particulars for the reasons summarised at [159] and would have responded appropriately if they had been.
6. If leave is given and the appeal succeeds, the order setting aside the subpoena must also be set aside. Accordingly, leave is also sought as regards the order setting aside the subpoena.

Other applications

1. Not applicable.

Accompanying documents

This application must be accompanied by the following:

1. the judgment or order from which leave to appeal is brought;
2. the reasons, if published, for the judgment or order;



3. an affidavit stating the facts that support the application;
4. a draft notice of appeal that complies with rules 36.01(1) and (2).

Applicants' address

The Applicants' address for service is:

Place: Ashurst, Level 11, 5 Martin Place, Sydney NSW 2000

Email: robert.todd@ashurst.com / nicholas.perkins@ashurst.com

The Applicants' address is care of Ashurst, Level 11, 5 Martin Place, Sydney NSW 2000.

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 3rd April 2018

A handwritten signature in black ink, appearing to read 'Robert James Todd', written over a horizontal line.

Signed by Robert James Todd
Lawyer for the Applicants



Schedule

No. NSD2179 of 2017

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

Applicants

Second Applicant: Jonathon Moran

Date:

Annexure A



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

No: NSD2179/2017

GEOFFREY ROY RUSH
Applicant

NATIONWIDE NEWS PTY LIMITED and another named in the schedule
Respondent

ORDER

JUDGE: JUSTICE WIGNEY
DATE OF ORDER: 20 March 2018
WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. Pursuant to r. 16.21(1) of the Federal Court Rules 2011 (Cth), paragraphs 13(a), 14 to 28 and 36.9A to 36.9C of the respondent's amended defence filed on 15 February 2018 be struck out.
2. Pursuant to r 24.15 of the *Federal Court Rules 2011* (Cth), the respondent's subpoena issued on 14 February 2018 and served upon the Sydney Theatre Company Limited be set aside.
3. The respondents to pay the applicant's costs thrown away by reason of amendments to the defence and arising from the filing of the amended defence.
4. The respondents to pay the applicant's costs of and associated with the interlocutory application filed on 2 February 2018 and the amended interlocutory application filed on 20 February 2018.
5. The matter is listed for a case management hearing at 9:30am on 27 March 2018.

Date that entry is stamped: 20 March 2018


Registrar



Schedule

No: NSD2179/2017

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

Second Respondent JONATHON MORAN