

Geoffrey Roy Rush ("Applicant") v. Nationwide News Pty Ltd ("Respondent")

Federal Court of Australia - Proceeding: NSD2179/2017

Expert Report by Richard Marks

July 26, 2018

1. I have been engaged by Ashurst, the solicitors for the Respondent per the Instructions attached hereto as Exhibit 1, have reviewed the documents listed therein as provided to me by Ashurst, and my Opinions are based on my experience as set forth herein.
2. I have been provided with, read, understood, and complied with the Expert Evidence Practice Notes (GPN-EXPT) together with Annexure A Harmonised Expert Witness Code of Conduct and Annexure B Concurrent Expert Evidence Guidelines. My opinions expressed in this Report are based on my own specialized knowledge arising from my training, study and experience.
3. I confirm that my fee for the preparation of the Report is not dependent upon the outcome of the Proceedings, and that I have had no prior relationship with the Applicant, the Respondents or any known related entities.
4. This Report is intended solely for the above expressed purpose and should not be copied or distributed to any other party other than in connection with this matter.
5. I reserve the right to amend my opinions and conclusions should further information be made available to me subsequent to the date of this Report which materially affects the expressions of opinion contained herein.
6. I have been told by Ashurst that Applicant has sought to claim damages from Respondent following the publication of defamatory new articles alleging "inappropriate behavior" of Applicant.
7. Description of the work that I perform in connection with the film and entertainment industry –

I am an attorney duly licensed to practice law in the State of California, and have practiced in various sectors of the entertainment industry since 1974. In addition to my years in private practice as a transactional lawyer in boutique entertainment law firms as well as a major international law firm, I have acted in senior legal and business affairs capacities for a boutique literary agency, major entertainment studios such as Paramount, Disney and Universal, and leading independent production companies such as The Kushner-Locke Company and Weintraub Entertainment Group. For the past twelve years, I have been of counsel to The Point Media, an entertainment law firm located in Beverly Hills, California, representing clients in connection with the development, production and exploitation of entertainment content for various media and platforms. During my career I have worked on hundreds of productions and negotiated/documented thousands of agreements as a lawyer/negotiator for dozens and dozens of clients/employers. The deals that I have worked on in this capacity range from the agreement for George Lucas for "Star Wars" with 20th Century Fox Studios and the multiple picture agreement between Eddie Murphy and Paramount Pictures pursuant to which he performed in the "Beverly Hills Cops" films at the beginning of my career, to currently being the day to day production attorney for the Amazon Prime Series "Bosch" (now in production of its fifth season) and the truTV Series "Adam Ruins Everything" (now in production of its third season). Although an attorney is not normally involved in the process of "who" to offer a role (normally an attorney is only involved in the negotiation and documentation of the agreement for the actor), at some studios and some independent production companies I have been involved in that pre-deal making identification process to some extent.

8. Description of my involvement in the industry including the negotiation of agreements and my involvement in production -

For an entertainment transactional attorney, I have a uniquely eclectic resume of experience in almost all aspects of the entertainment industry, attached as Exhibit 2 hereto. I have worked in house and at law firms negotiating all of the agreements required for the development, production and exploitation of live action and animated feature films as well as live action and animated productions for television, streaming, on-line, digital et al. In that capacity, I have been involved in all aspects of production, e.g., the agreements with respect to financing, casting, locations, clearances, releases, above and below the line personnel, materials, vendors, distribution, licensing, and exploitation.

Over the in excess of 40 years I have been involved in the film and television industries my role has heavily involved documenting contracts for all aspects of production covering directors, producers, acting talent et al. I have been involved in documenting in excess of 2000 contracts for actors for several hundred films and television projects. In that process I have been able to observe the kinds of roles available to actors, the kinds of actors offered and hired for roles and trends in both the number and type of roles available and who they are offered to. For example, in the early years of my career I observed that roles for characters of different ethnic backgrounds such as Hispanic or American Indian were usually offered to white Caucasian actors. With time this trend has now completely stopped and roles for characters of ethnic backgrounds are now generally offered to actors of that background. I have also noticed that the number of roles for women actors has increased over time. One trend that I have observed that has remained ingrained is with age. Based upon my observation of the thousands of roles I have documented there are generally fewer roles available to play aged characters, and when they are available they are generally offered to younger actors who are aged for the role.

9. Description of my training, study and experience by which I have acquired specialized knowledge in connection with the opinions set out in this Report -

I graduated from UCLA School of Law where I specialized in entertainment and media law and was mentored by Professor Melville B. Nimmer, an expert in Copyright Law and the author of the Treatises "Nimmer on Copyright" and "Nimmer on Freedom of Speech". In my over four decades of practice as an entertainment lawyer, I have negotiated and documented thousands of agreements for talent for various productions and at times been involved in the casting decision making process regarding same. As such, I have developed expertise in the laws and guild regulations surrounding the engagement of actors as well as the practical and budgetary concerns of producers, financiers and distributors surrounding such employment including, without limitation, physical examinations and insurance requirements, labor laws with respect to working conditions, and the physical and mental limitations of actors with respect to stunts, schedules and the demands and exigencies of various types of productions.

10. My Opinions -

(a) Based upon my specialized knowledge and experience, the following is my description of how contractual arrangements for actors in the entertainment industry generally arise in relation to work in films and television, and in particular how far in advance offers and arrangements are put in place compared to when the work is undertaken.

Based on my experience, the process of development and production of films and television programming normally starts with a producer (a studio, network, streaming service, major or independent producer, etc.) optioning material such as a book, article and/or life story rights and engaging a writer to write a script. That development

can also start with an original idea of the producer, writer and/or director, but regardless, in my experience, the first steps normally involve development of the script and engagement of the director for the project. With the script and director, the producer then normally engages a casting director to break down the roles in the script and provide a list of suggested actors for each role and a line producer to prepare a budget and shooting schedule for the locations required to produce the content. The next step would be prioritizing actors for each role by taking into consideration a myriad of factors with respect to their suitability for the role such as availability, cost, special circumstances and limitations with respect to age, mental and physical condition, the budget for the production, fitting into the ensemble of the other cast members, insurability, special abilities and talents, their career history, critical acclaim and/or financial success, ratings and/or box-office success for television and/or feature productions in which they've appeared and are perceived as being responsible for, awards, local and worldwide popularity, etc. Then the attorney would attempt to negotiate an agreement with the talent's representatives. There are generally two types of agreements that would be negotiated. One is a straight offer of the part. The other is a test/option agreement. A straight offer is just that, i.e., if a deal can be reached and a contract negotiated to signature, the actor is cast in the part. A test/option agreement also requires a deal to be reached and a contract negotiated to signature, but then the actor "tests" for the role, e.g., performing a scene(s) for the director and/or producers with or without other actors to determine if they are right for the role, if there's the desired "chemistry" between the actors, etc. In the test/option situation, a number of actors would normally "test" for the role, and one could be cast, i.e., the option would be exercised by the producer turning the test/option agreement into a binding contract, the same as a straight offer if accepted. The time period between the offer/test/contracting process until the actual performance work commences varies, but due to budgeting, production scheduling and exploitation dates and requirements, and the fact that the contract normally includes a start date for services and a guarantee of payment for same, generally in my experience, for television productions, the period can be as short as a few days to a few weeks, and usually no longer than a couple of months. For feature films, the period generally can be longer, e.g., a few weeks to up to three to six months depending on the particular circumstances of the film in question.

(b) Assuming that the publications complained of in these proceedings had not taken place, the following is my opinion as to whether Mr. Rush could reasonably expect to receive offers of work of a similar number and quality (in terms of role and remuneration) as he had in the past for approximately 10 years further, and if not, how the offers of work could be expected to differ from those received in the past and the factors that would influence the offers of work Mr. Rush may receive or not receive in the future.

As a general rule in my experience, actors' roles and remuneration over the course of their career are speculative, uncertain, and unpredictable especially because they are dependent on offers from third parties which ebb, flow and/or dry up based upon the producers' perceptions of the actor and the marketplace. This is a fickle business, and casting decisions are made based on hard to quantify criteria. The process is not scientific making actors' roles and remuneration subject to such vagaries and ambiguous measurements.

Generally, in my experience, and based on my observation of trends from the thousands of roles I have documented, the number of roles offered working actors decreases when they are perceived as "old". In Hollywood terms old could be 60 for men and much younger for women. There is a perception in Hollywood that audiences generally want to see young beautiful people. Therefore there are fewer roles written for older actors than there are for younger actors, and the roles for older actors are generally supporting roles, not leading roles, and as a result are budgeted for less remuneration than the leading roles.

The age of the actor is a factor in casting. For example, producers prefer to hire actors who are not minors to play minors so that they are not subject to child labor law restrictions on hours and are not required to budget for the

extra expenses required, e.g., teachers, shorter hours, etc. And when there are roles for older characters, they are generally played by younger actors aged with make-up and prosthetics because the general perception is that they will have more stamina, have the ability to work longer days, be insurable without exclusions, increased premiums and/or deductibles, etc.

One aspect of television and feature film production that I have been involved with is cast insurance. This is insurance that covers any loss or damage caused to the production cost or schedule based upon illness, injury, death, etc. of an actor. In my experience and to my observation all actors must qualify for insurance and must undergo medical examination for this purpose, and producers are loathe to cast an actor for whom the insurance premium and/or deductible is increased due the underwriter's concern about their health and how it might affect the production remaining on schedule and on budget; some carriers may also refuse to insure an actor or exclude claims based on certain of the actor's infirmities. Therefore if an actor has any illness or is at risk of illness, or has reached an age that the cost or conditions of insurance are no longer financially viable for the production, the producer is more likely to hire a younger actor without those issues.

Since in my experience as stated above the number and quality of roles in terms of remuneration generally decrease with age, in general the number and quality of roles and remuneration would be less for an actor between the ages 67 and 77 than for an actor between the ages of 57 and 67 and further decreasing for an actor between the ages of 77 and 87, etc. The older the actor the greater the decline. In my experience there's no reason to believe that these industry norms would not apply to the offers of work to Mr. Rush for his acting services as his appearance and physical and mental abilities would generally be expected to deteriorate in the same way aging affects most other people. All things being equal, a producer would rather produce a story about young beautiful people than about older folks. This may be demonstrated by an anecdote from the 1970's about a creative executive at a production company interested in optioning the rights to a book about the senior citizen community in Venice, California to produce a film based thereon. The executive went on and on about how much he loved the book and believed that it would make an excellent film, but then asked the author, "Do the characters need to be old?"

(c) Assuming that Mr. Rush obtains vindication from these proceedings through a judgment in his favor which includes a finding that what was published is false, and an award of damages, the following is my opinion as to whether the publication of the matters complained of are likely to have any significant ongoing effect on Mr. Rush's ability to receive offers for work of the kind that he could reasonably have expected as discussed in my opinion (b) above.

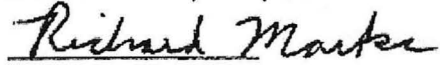
Assuming a judgment in Mr. Rush's favor, a vindication and finding that what was published is false, generally in my experience the Hollywood entities and individuals that engage actors would be inclined to show support for and offer the roles to Mr. Rush that he could reasonably have expected as discussed in my answer to (b), roles that would not have been offered to him during the pendency of the proceedings. The Hollywood community is known for rushing to the aid of the underdog, those in need, and those discriminated against.

In fact, Mr. Rush might expect more of such offers as Hollywood entities and individuals that engage actors would want to be perceived as supporting Mr. Rush who had been damaged by such false publications prior to vindication, and some might also want to take advantage of the additional publicity received by Mr. Rush (since many believe that any publicity is good publicity if it ends well). In fact, in some cases even where there's been no such vindication, Hollywood entities and individuals have been forgiving and embracing, e.g., with respect to Robert Downey Jr. (his career in terms of roles and remuneration suffered in the late '90s and early 2000's due to

drug and alcohol problems, but when he conquered those issues, he made an amazing comeback to become one of the highest paid actors in Hollywood).

Therefore it is likely that the publications will have no ongoing effect on Mr. Rush's ability to obtain acting roles. For someone of Mr. Rush's stature the publications are likely to be a non-issue after a judgment.

Dated this 26th day of July 2018

A handwritten signature in cursive script that reads "Richard Marks". The signature is written in dark ink and is positioned above the printed name.

Richard Marks

17 July 2018

**MEMORANDUM
CONFIDENTIAL & PRIVILEGED
Geoffrey Roy Rush v Nationwide news Pty Limited & Anor
INSTRUCTIONS FOR RICHARD MARKS**

1. DOCUMENTS

You have been provided with the following documents:

- (a) Outline of Evidence of Geoffrey Rush dated 15 June 2018;
- (b) Outline of Evidence of Fred Specktor dated 15 June 2018;
- (c) letter from HWL Ebsworth to Ashurst dated 22 May 2018;
- (d) email from Tony Wright to Ann Churchill-Brown dated 20 April 2018 with the subject line "Great Barrier Reef"; and
- (e) the Report of Michael Potter dated 28 June 2018.

2. ASSUMPTIONS

In preparing your report, unless a specific question asks you to assume to the contrary, we ask you to take account of the following assumptions:

- (a) Mr Rush was born on 6 July 1951 and is presently aged 67.
- (b) Mr Rush has the experience in film and television set out in paragraphs 10 to 25 of his Outline of Evidence.
- (c) Mr Rush has won the awards set out in paragraphs 26 to 42 of his Outline of Evidence.

3. QUESTIONS

We would be grateful if you could address the topics set out below in your independent expert report in these proceedings.

3.1 Code of Conduct

- (a) Please confirm that you have received and read the Code of Conduct, and agree to be bound by it in preparing your report and providing your opinion in these proceedings.

3.2 Training, Study or Experience

Please describe in detail:

- a) The work that you perform in connection with the film and entertainment industry;
- b) A history of your involvement in the industry including the negotiation of agreements and your involvement in production;
- c) To the extent not already addressed, your training, study and experience by which you have acquired specialised knowledge in connections with the opinions set out in your report.

3.3 Your Opinion

- (a) Based upon your specialist knowledge and experience, please describe how contractual arrangements for actors in the entertainment industry generally arise in relation to work in films and television, and in particular how far in advance offers and arrangements are put in place compared to when the work is undertaken.
- (b) Assuming that the publications complained of in these proceedings had not taken place, please provide your opinion as to whether Mr Rush could reasonably expect to receive offers of work of a similar number and quality (in terms of role and remuneration) as he had in the past for approximately 10 years further. If not, please describe how the offers of work could be expected to differ from those received in the past and discuss factors that would influence the offers of work Mr Rush may receive or not receive in the future.
- (c) Assuming that Mr Rush obtains vindication from these proceedings through a judgment in his favour which includes a finding that what was published is false, and an award of damages, please provide your opinion as to whether the publication of the matters complained of are likely to have any significant ongoing effect on Mr Rush's ability to receive offers for work of the kind that he could reasonably have expected as discussed in your answer to (b).

**Ashurst
17 July 2018**

Australia

Exhibit 2
Richard Marks Resume

Career History

The Point Media (2006 – Present)
Beverly Hills, California
An Entertainment Law Firm

Of Counsel in all aspects of small boutique entertainment law transactional practice, e.g., business affairs and legal work for development, production and exploitation of content in all media including new and traditional platforms for clients such as: Imperative, IMG, ITV, DirectTV, Electus, Fabrik, FOD, Machinima, Mandalay, Ovation, Starz, WME, Beachside, 3 Feet Under, Lionsgate Digital Studios, UnbeliEVAble. Engaged as forensic expert witness by clients such as Warner Bros., ICM, HMRC and Celador.

Greenberg Traurig, LLP (2004 – 2006)
Santa Monica, California
International Law Firm with over 1500 lawyers in 29 locations

Of Counsel in all aspects of large worldwide entertainment law transactional department, e.g., business affairs and legal work for programming development, production and exploitation in all media including network, syndication, foreign, home entertainment and new media for clients such as: Smith & Wesson, The Gurin Company, Smith & Weed Productions, Linda Ellman Productions, Summit Entertainment, and J. Walter Thompson; "Live 8" carriage agreements with AOL, MTV and domestic and foreign radio and television broadcasters as well as sponsorship agreements; Berry Gordy Jr. for development, production and exploitation of video, television and live theater projects; Downey Studios for leases to producer tenants; Direct TV for development and production of original programming; George Foreman for merchandising agreements; Robert Sillerman for acquisition of "American Idol"; Nat King Cole Estate for development, production and exploitation of television/video tribute project; and Lin TV for talent agreements.

Nickelodeon Movies (2003 – 2004)
Los Angeles, California
Business Affairs Consultant (*until outsourcing of legal and business servicing for division*).

Consultant in connection with development, production and distribution in all media of feature films for Paramount Pictures such "Barnyard", "Sponge Bob", and "Nacho Libre".

Universal Network Television (2002 – 2004)
Universal City, California
Vice President of Business & Legal Affairs (until NBC purchase)

Universal Network Television is a supplier of prime time live action television programming for the major networks. Supervised legal and business affairs work on network series such as "Mr. Sterling" and "Just Shoot Me" as well as for USA Network development of projects such as "Kojak".

Nelvana Communications (2001 – 2002)

Los Angeles, California

Vice President/LA General Counsel in charge of Business and Legal Affairs (until such operations re-located to Canada)

Nelvana is a leading independent producer/distributor of animated programming for theatrical, video, and television worldwide exploitation as well as subsidiary and ancillary publishing and merchandising licensing.

- In charge of all business and legal affairs for development, domestic sales and licensing in all media for shows and properties such as "Babar", "Care Bears", "Berenstain Bears", "Little Bear", "Franklin" and "Rolie Polie Olie" to networks such as Nickelodeon, Disney Channel and PBS, toy manufacturers and publishers.
- Supervised in house staff and outside counsel.
- Managed transition of such services to Canadian counsel commencing as of 12/02.

Kushner-Locke Company (1993 - 2001)

Los Angeles, California

Executive Vice President and General Counsel (until ceased operations)

Kushner-Locke was an independent producer/distributor of feature and direct-to-video films, television series, made-for-television movies, mini-series and animated programming for theatrical, network and cable television worldwide exploitation such as "Pinocchio" starring Martin Landau and Jonathan Taylor Thomas, "Harts of The West", "Gun", "Cracker", "1st & Ten" (first HBO original series). It ceased operations in 2001.

- Managed all legal and business affairs for all divisions of publicly traded company (KLOC) including development, financing, production, post-production, marketing, advertising and distribution of all production and programming in all media.
- In charge of all personnel and labor issues and disputes and litigation.
- Supervised in house staff and worked with outside counsel on corporate matters including public filings and IPO for US Search.com (SRCH).

Law Offices of Richard Marks (1992 - 1993)

Los Angeles, California

Represented clients in all areas of entertainment law.

Media Home Entertainment (1990 - 1992)

Los Angeles, California

Senior Vice President and General Counsel (until sale to Fox)

Media Home Entertainment was one of the first and leading independent distributors of home video entertainment product. In 1992, MHE's assets were acquired by Twentieth Century Fox Home Video, and it ceased operations.

- Member of Board of Directors involved in all strategic planning including Fox Acquisition Agreement.
- Negotiated the terms and documentation of all development, production, distribution and acquisition agreements for product such as the "Nightmare on Elm Street" series, "Blue Velvet", Kathy Smith and Jane Fonda exercise videos, NFL Films, and original children's videos such as "Baby Songs".
- In charge of all legal enforcement and administration of copyrights and trademarks. Supervised in house staff and outside counsel in all areas of business and legal affairs.

Walt Disney Pictures, Touchstone and Animation (1990)

Burbank, California

Of Counsel (during Sr. V.P. Legal's leave of absence)

Responsible for all development and production legal work and involved in all such business affairs for feature films such as "Beauty & The Beast" and "Rocketeer".

Weintraub Entertainment Group, Motion Picture Division (1987 - 1990)

Los Angeles, California

Vice President in Charge of Business and Legal Affairs (until ceased operations)

Weintraub Entertainment Group was founded by former manager, motion picture producer and President of United Artists, Jerry Weintraub to compete with the major motion picture studios in the production and distribution of theatrical motion pictures and television series and movies. WEG ceased operations in 1990.

- Created and administrated all business and legal forms and practices for the Motion Picture Division that produced such films as "Troop Beverly Hills" and "My Stepmother Is An Alien".
- Hired and supervised in house staff and outside counsel in all areas of business and legal affairs for the division.

Paramount Pictures Corporation, Motion Picture and Network Television Divisions (1984 - 1987)

Los Angeles, California

Senior Counsel

- Responsible for all legal work and involved in all business affairs from development, production, post-production, marketing and advertising for such feature films as "Beverly Hills Cop II", "Tucker" and "The Golden Child", and such television series as "Cheers" and "Family Ties".

Law Offices of Richard Marks (1983 – 1984)

Los Angeles, California

Represented clients in all areas of Entertainment Law

Ziegler Agency (1978 - 1983)

Los Angeles, California

Vice President and General Counsel (until closure)

- The Ziegler Agency was founded and run by Evarts Ziegler until it was acquired in 1983 by International Creative Management and ceased operations. It was one of the premiere boutique literary and talent agencies representing such clients as William Goldman, Sidney Pollack, Pat Conroy and the Estates of Raymond Chandler and John Steinbeck for employment and acquisition agreements. Packaged literary material from authors such as Irving Wallace and Ray Bradbury with producers such as Dick Berg and David Manson for television development and production.
- In charge of all business and legal affairs for agency including lease and personnel issues, supervising litigation and working with all senior agents and their clients including their outside counsel, managers, publicists, studio and independent employers, and guilds.

Law Offices of Richard Marks (1977 – 1978)

Los Angeles, California

Represented clients in all areas of Entertainment Law

Pollock, Rigrod & Bloom (1974 – 1977)

Los Angeles, California

Associate Attorney in all aspects of Entertainment Law

Education

UCLA School of Law

Juris Doctor 1973

- Chief Justice in Charge of Moot Court Program
- Represented clients at Venice Legal Aid office

UCLA

Bachelor of Arts, Magna Cum Laude 1970

- Phi Beta Kappa
- Valedictory Speaker
- Swim Team
- Yell Leader
- Congressional Intern