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Details of Filing

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File Title:	NATIONWIDE NEWS PTY LIMITED & ANOR v GEOFFREY ROY RUSH
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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Important Information

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No. NSD 679 of 2019

Federal Court of Australia

District Registry: New South Wales

Division: General

On appeal from the Federal Court

Nationwide News Pty Limited and another

Appellants

Geoffrey Roy Rush

Respondent

APPELLANTS' SUBMISSIONS

Introduction

1. The Respondent brought proceedings for defamation in relation to the publication of three matters: a billboard poster published on 30 November 2017 (the **first matter complained of**); an article published in *The Daily Telegraph* newspaper on 30 November 2017 (the **second matter complained of**); and an article published in *The Daily Telegraph* newspaper on 1 December 2017 (the **third matter complained of**).

2. The Respondent sought general and aggravated compensatory damages, special damages and permanent injunctions.

3. The Appellants contended that certain meanings were not conveyed, and relied upon a defence of justification pursuant to s. 25 of the *Defamation Act* 2005 (NSW) (the **Act**).

4. Throughout the course of the proceedings there were a number of interlocutory decisions given which are relevant to this appeal, as follows:

   (a) Judgment given on 10 October 2018 (*Rush v Nationwide News Pty Limited (No 4)* [2018] FCA 1558) (**Judgment No 4**; **J4**) (Appeal Book (**AB**) Part A, Tab 10);

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(b) Judgment given on 29 October 2018 (*Rush v Nationwide News Pty Limited (No 5)* [2018] FCA 1622) (**Judgment No 5; J5**) (AB Part A, Tab 12);

(c) Judgment given on 6 November 2018 (*Rush v Nationwide News Pty Limited (No 6)* [2018] FCA 1851) (**Judgment No 6; J6**) (AB Part A, Tab 15).

5. By judgment dated 11 April 2019 (**Primary Judgment**; **J**) (AB Part A, Tab 17) Wigney J made findings in relation to the imputations, found that the defence of justification was not established and awarded general and aggravated damages in the amount of $850,000. His Honour also made findings in relation to the Respondent's claim for special damages, with the result that on 23 May 2019 the Appellants were ordered to pay the Respondent special damages assessed at $1,060,773 for past economic loss and $919,678 for future economic loss (a total of $1,980,451). This assessment reflected an agreed calculation based upon application of his Honour's findings.

6. On 28 August 2019 the Respondent's application for permanent injunctions was dismissed (*Rush v Nationwide News Pty Limited (No 9)* [2019] FCA 1383; **Judgment No 9**).

7. The grounds of appeal relied upon by the Appellants are set out in the Further Amended Notice of Appeal at AB Part A, Tab 23. There is a typographical error in respect of ground 6 of the Further Amended Notice of Appeal, it should in fact be sub-paragraph (g) to ground 5. Further, in light of the judgment and orders made by the primary judge on 28 August 2019 in Judgment No 9 ground 20 is not pressed.

Ground 8: Imputations 7(a) and 10(e): the Applicant is a pervert

8. At J[135] and J[195] the primary judge found that the imputation "the applicant is a pervert" was conveyed by the second and third matters.

9. In so finding the primary judge rejected the Appellants' submission as to the meaning to be given to the word "pervert" (see J[136] to [140] and [197]). The Appellants submit that the primary judge erred in this regard.

10. A pervert is a person who, by contemporary standards, is a sexual deviant. As an example, a peeping tom, or someone who engages in sexual behaviour that would be regarded as not just offensive, but disgusting as well as bizarre. This is consistent with the dictionary definitions set out by the primary judge at J[138]. Sexual harassment, in the ordinary

sense of that term, is rightly regarded with disapprobation but it would strain the ordinary everyday use of language to describe it as "perverted".

11. At J[140] the primary judge appears to have equated the noun "pervert" with the slang verb "to perve". In ordinary language the two concepts are quite distinct. The pejorative sense of the verb ranges from merely facetious to reprehensible, but it is not something that ordinary members of society would regard as sexual deviance. On the contrary, a "pervert" or a person who is "perverted" is rarely, if ever, considered in a positive light.

12. The dictionary definitions referred to by the primary judge do not support his conclusion. "Perve" as a noun is said to be synonymous with "pervert", but as a verb the word is defined quite differently: "to look at something, and with or as if with lustful appreciation" or "to look lustfully". To look lustfully may in some circumstances be regarded as reprehensible, but not as the conduct of a sexual deviant. The word is a slang term, and it would be wrong to conclude, as his Honour has done, that because the noun "perve" may be synonymous with "pervert", the verb "perve" must therefore connote behaviour that is sexually deviant or perverted. It is a matter of actual usage.

13. The primary judge's finding that the articles conveyed that the Respondent engaged in inappropriate or bad behaviour involving "leering, or slyly looking at the complainant in a lecherous, lewd or licentious manner" must be considered in the context of the matters referred to in the preceding paragraphs.

14. Taking the second and third matters complained of as a whole and even allowing for loose thinking, there is not the faintest suggestion that the Respondent had engaged in any perversion of the kind that would make him a "pervert" by contemporary standards.

Grounds 9 to 12: the justification defence and credit findings

Ground 10

15. The primary judge was not satisfied that Eryn Jean Norvill was a reliable witness of credit (J[339]), and found that she was prone to exaggeration and embellishment (J[330]). The basis for those findings is summarised at J[331]-[338].

16. A finding of fact based to any substantial degree on the credibility of the witness must stand unless it can be shown that the trial judge has failed to use or has palpably misused his advantage or has acted on evidence which was inconsistent with facts incontrovertibly

established by the evidence or which was glaringly improbable: *Fox v Percy* [2003] HCA 220; 214 CLR 118; *Devries v Australian National Railways Commission* [1993] HCA 78; 177 CLR 472; *Shimokawa v Lewis* [2009] NSWCA 266; *Baira v RHG Mortgage Corp Ltd* (2012) 297 ALR 416; [2012] NSWCA 387.

17. In *Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited* [2019] HCA 28 Bell, Gageler, Nettle and Edelman JJ, Kiefel CJ agreeing at [1], described the task of an appellate court as follows at [55]–[56] (citations omitted):

> *A court of appeal is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's findings unless they are "glaringly improbable" or "contrary to compelling inferences" is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter, "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge".*
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> *It was the duty of the Court of Appeal to persist in its task of "weighing [the] conflicting evidence and drawing its own inferences and conclusions", and ultimately to decide for itself which of the two hypotheses was the more probable.*

18. The primary judge expressly disavowed reliance on witness demeanour as providing the basis for his findings in relation to Ms Norvill's reliability and credibility as a witness (J[310] and [330]). In these circumstances, this Court is in as good a position as the primary judge to decide on the proper inferences to be drawn from facts. Its duty is to weigh the conflicting evidence afresh and draw its own inferences and conclusions.

19. There were five primary bases for the primary judge's credibility finding.

20. First, that Ms Norvill's evidence concerning the Respondent's conduct was inconsistent with contemporaneous statements that Ms Norvill had made in press events about working alongside the Respondent (J[332]; [464]-[465]; [494]-[501]). While it is not necessary for the appellants to show that the primary judge's conclusions on this point were glaringly improbable, it is submitted that that is the case. Ms Norvill's evidence to the effect that in giving promotional interviews it was her job to be positive and respectful and help bring people to the show, and that she would not have in those circumstances

disrespected the Respondent, was not only compelling but glaringly obvious. The primary judge accepted that Ms Norvill could not have been expected to disclose the Respondent's conduct to a journalist in a promotional interview (J[497]), but did not accept that there was any reason why Ms Norvill went on to make positive statements about the Respondent. That finding does not, with respect, acknowledge the realities of the situation. Ms Norvill was part of an organised press interview whose purpose was to attract attention to the STC production of "King Lear" and no doubt to promote the excellence of the ensemble cast, with a view to getting public support for a significant piece of live theatre. As she stated, it was her job to do so (T578.20-25 at AB Part B, Tab 120; see also T571.18-33 at AB Part B, Tab 119). It was her job to promote the show, and that necessarily meant giving positive statements about it and its lead star. The primary judge accepted this was the "obvious purpose" of the interview at J[272]. It is fanciful and glaringly improbable that Ms Norvill could be expected to sit silently or give a neutral or guarded answer to a question by a journalist about working with the Respondent, and that the answers she gave to the question in those circumstances was a reason to reject her evidence affirmed at the trial.

21. Secondly, the primary judge considered Ms Norvill's evidence was inconsistent with an account given to Annelies Crowe on 5 April 2016. In so finding the primary judge relied upon Ms Crowe's email at AB Part B, Tab 97. The primary judge's findings in this regard are discussed below in relation to appeal ground 11.

22. Thirdly, the primary judge considered that Ms Norvill's evidence went beyond the statement of her evidence that had been served in advance of the trial, and that there were apparent inconsistencies (J[334]-[336]). The challenges in giving evidence faced by victims of sexual assault or harassment were set out by the primary judge at J[328] and said to have been taken into account. However, it is not apparent that he did so when making the findings at J[334]-[336]. The findings also fail to take account of the fact that Ms Norvill's statement was intended to be an outline of her evidence, as that is all the parties were directed to serve in advance of the hearing. It was not an affidavit or a statement of evidence for use at trial. It was not prepared with any involvement of the Appellants' solicitors or counsel, who had not met or had any communication with Ms Norvill at the time of the application to amend. Whilst the statement was deployed

by the Appellants in support of their application for leave to amend their defence, that circumstance did not give the statement any greater significance than any other outline of evidence served in the case (see, by way of contrast the exchange in relation to the outline of Frederick Specktor at T731.10-38 (AB Part B, Tab 121)).

23. Fourthly, the primary judge considered it difficult to reconcile Ms Norvill's evidence with the fact that she had various other interactions with the Respondent outside of the theatre (J[337]) and the terms of an email she sent the Respondent on 7 January 2016 (AB Part B, Tab 51). Ms Norvill's explanations for these, particularly in relation to the email, were surely compelling. Ms Norvill wanted the Respondent to think that everything was normal (T566.34-35 at AB Part B, Tab 119) and to avoid tension because she felt tension would have disrupted the performance (T567.6-13 at AB Part B, Tab 119). Ms Norvill stated (T543.2-6 at AB Part B, Tab 119):

> *I guess I was in survival mode. I wanted to get to the end of the show. We were nearly there. I had two shows to go. I was very frightened. I didn't want to risk the performance. I guess I chose to put Geoffrey's comfortability above my own. Yes. I – I just thought I –I could keep going, I have come this far, and I felt trapped by my own silence, I guess.*

24. That Ms Norvill would act in a way that made the Respondent think everything was normal to 'keep the show on the road' is not surprising, let alone improbable. The primary judge's findings in this regard and the findings discussed in paragraph 20 above reveal a failure to appreciate the delicate and difficult situation Ms Norvill found herself in.

25. Fifthly, the primary judge considered the "most telling circumstance against the acceptance of much of Ms Norvill's evidence" was that it was not corroborated or supported by the balance of the evidence (J[339]). In this regard the Appellants challenge the primary judge's findings that Mark Winter's evidence did not corroborate Ms Norvill's evidence (J[346]).

26. Mr Winter's evidence was corroborative of Ms Norvill's evidence in two key respects. First in relation to allegation one (that during the rehearsal period the Respondent had made a "joke" over Ms Norvill's body which involved him simulating stroking her body and groping her breasts) and secondly, in relation to allegation five (that the Respondent stoked the side of Ms Norvill's breast).

27. In relation to allegation one, both Ms Norvill and Mr Winter's evidence describe a series of movements which culminated in a simulated groping or squeezing of Ms Norvill's breasts (T516.18-28 at AB Part B, Tab 119; T671.46-672.19 at AB Part B, Tab 121). Mr Winter described it as like a "Three Stooges-y type bit". This is consistent with Ms Norvill's evidence of seeing the Respondent "raising his eyebrows and bulging his eyes and smiling and licking his lips" whilst he was doing this. Mr Winter's evidence of this being a comical skit is consistent with Ms Norvill's evidence that she heard titters of laughter. That it may have been intended by the Respondent as a "joke" and received by the other persons present as one, including Mr Winter, is beside the point. It made Ms Norvill feel uncomfortable to have her body the subject of a sexualised joke (T516.39-42 at AB Part B, Tab 119). That Ms Norvill and Mr Winter's descriptions ascribed varying degrees of seriousness to the event is explicable in these circumstances. As Mr Winter stated, the conduct did not happen to him, he was simply a bystander.

28. As to allegation five, Mr Winter saw the Respondent touch Ms Norvill's breast (T672.45-47; T673.22-25 at AB Part B, Tab 121). Whilst his memory was that it was the left breast, he indicated that this was his memory only, but was adamant that he had seen the Respondent touch Ms Norvill's breast. The fact that Mr Winter's recollection as to which breast was touched is different to Ms Norvill's is explicable by the fact that he was not the one who had the touch visited upon himself, and he was on stage focusing on his performance at the time. It is also indicative that he has not colluded with Ms Norvill as the cross-examination appeared to suggest.

29. Mr Winter's evidence at T681.42-44 (AB Part B, Tab 121), in relation to his evidence concerning allegation five, is also pertinent. He indicated (in the context of giving evidence about what he had earlier told the Respondent's solicitor) that "this was pre-Me Too and that there was a strange thing that occurred that we just went 'that happened' and then we moved on". This evidence is consistent with Ms Norvill's evidence at T520.13-14 (AB Part B, Tab 119): "Everyone else didn't seem to have a problem about it, you know, so I was looking at a room that was complicit." At T580.9-12 (AB Part B, Tab 120), Ms Norvill explained what she meant by people being "complicit" or "enabling" the Respondent's behaviour as follows:

> *There was a culture of bullying and harassment in that room, and in my industry. And it is accepted and normalised. And that word, "complicit", that – I guess, that's what I mean.*

30. Ms Nevin and Ms Buday's evidence that they did not recall certain events needs to be considered in this context. The same applies to Mr Armfield's evidence that he does not believe that he said, and has no memory of saying, "Geoffrey, stop that" (T311.13-22 at AB Part B, Tab 116; see T516.33-37 as to Ms Norvill's evidence about Mr Armfield's comment made in a reprimanding tone at AB Part B, Tab 119).

31. Further, as the primary judge accepted at J[328] absence of corroboration is a common feature of cases involving sexual harassment. This is particularly pertinent to the sixth and seventh allegations (J[237] and [238]).

32. Although not relied upon as a basis for the primary judge's credibility finding, the primary judge also held that Ms Norvill's evidence concerning her conversations with Robyn Nevin (J[432]-[449]) were unreliable. As to the second conversation which Ms Norvill stated occurred when Ms Norvill and Ms Nevin were acting together in *All My Sons*, incontrovertible evidence in the case warranted a finding that Ms Nevin's evidence about this conversation was unreliable, not Ms Norvill's. That evidence was the fact that Ms Nevin was aware on the day of publication that Ms Norvill was the complainant who making serious allegations against the Respondent (although she could not say how she was so aware) and sent her a highly sympathetic text (AB Part B, Tab 20). The fact that Ms Norvill did not refer to her conversations with Ms Nevin in her statement served in advance of the hearing is neither here nor there (J[433]). At the time Ms Norvill's statement was prepared and served it was not known that Ms Nevin would be a witness. Evidence as to the conversations at the time of preparation of the statement amounted to no more than an inadmissible account of a prior consistent statement; why would it be referred to in her statement?

33. Further, there is no inconsistency between Ms Norvill's evidence that in the first conversation (where the Respondent was not named) Ms Nevin stated that she could not help her, and her evidence that Ms Nevin was always kind to her (J[435]). Self-evidently, the fact that Ms Nevin said she could not assist Ms Norvill did not mean that she was being unkind. It was open to Ms Norvill to understand this as Ms Nevin saying she was powerless to assist, not that she didn't want to. Ms Norvill's evidence in this regard, and

also her belief that Ms Nevin was complicit in the Respondent's conduct (J[446]) needs to be considered in the context of Ms Norvill's evidence at T550.5-7 (AB Part B, Tab 119), 580.9-21 and 578.41-45 (AB Part B, Tab 120) (referred to in paragraph 29 above). Ms Norvill's evidence was that there was a cultural problem within the industry where bullying and harassment was normalised and accepted, and people did not speak out against it. Ms Norvill's evidence was not implausible.

Ground 11

34. The primary judge considered Ms Norvill's meeting with Ms Crowe, and Ms Crowe's email at J[347]-[378]. As is apparent from J[333], [368] and [377], the primary judge's findings that Ms Norvill's evidence was inconsistent with this email was a matter of significance in the primary judge's finding that Ms Norvill was not a reliable or credible witness.

35. In considering this evidence the primary judge was faced with a competition between Ms Norvill's evidence in the witness box as to what she did and did not say at the meeting with Ms Crowe, and Ms Crowe's email. The Appellants' position was, and is, that caution should be exercised in relying upon the email as a basis to find that Ms Norvill had in fact made a prior inconsistent statement in circumstances where Ms Norvill and Ms Crowe met at a pub at Annandale and had dinner and drank a lot (T631.1-3; 14 at AB Part B, Tab 120), the meeting went for several hours (T631.5-6 at AB Part B, Tab 120), Ms Crowe did not take any notes (T631.16 at AB Part B, Tab 120), Ms Crowe's email was short and sent the following afternoon and the email is not, and does not purport to be, a transcript of the conversation (this was accepted at J[363]). On its face the email is simply Ms Crowe's short "outline" or summation of what was said to her over the course of several hours. It also appears that Ms Crowe's own commentary is intermingled (for example, her account of her observations of Ms Norvill at the closing night party and her prior knowledge of "Geoffrey's reputation"). The Appellants submit that the email does not reliably establish any statement actually made by Ms Norvill on that occasion.

36. The Respondent relied upon the email as evidence of what Ms Norvill had said to Ms Crowe at the meeting, although they did not call Ms Crowe as a witness to attest to what Ms Norvill had in fact said. Ms Crowe was subject to a subpoena to attend to give evidence (AB Part B, Tab 98). Although issued at the request of the Appellants, the Respondent was at liberty to call upon that subpoena. In circumstances where it was the

Respondent who ultimately sought to rely upon representations by Ms Crowe (that is, those set out in her email) it was plainly open for him to call her as a witness. His failure to call Ms Crowe to give evidence in circumstances where she was available and compellable meant that the primary judge ought to have inferred that Ms Crowe's evidence would not have assisted the Respondent, or that the position was at best neutral.

37. In these circumstances, the primary judge erred in finding that the email provided a basis for finding that Ms Norvill had made prior inconsistent statements which reflected adversely on her credit.

Ground 12

38. At J[389] the primary judge recorded a basis for disbelieving, or at the least doubting, Mr Winter's evidence about allegation one that Mr Winter's evidence appeared to be a very belated recollection. After noting that Ms Norvill's lawyers were present at the conference with Mr Winter, the primary judge stated that "it appears that Mr Winter's recollection of the event was prompted by someone else who was present at the conference". To the extent this is suggesting that Ms Winter's recollection was arrived at by him being coached in the conference, that is a very serious allegation that was not put to Mr Winter or the Appellants in order for them to respond. This should have been done as a matter of elementary fairness. If that is not the suggestion, it is unclear why there is a reference in the judgment to Ms Norvill's lawyers being present at the conference.

39. In any event, the full context of Mr Winter's evidence in this regard (T685.1-40 at AB Part B, Tab 121) does not support that Mr Winter's evidence was a belated recollection. He was asked only about when he first told anyone about what he observed, not when he first recalled it. He also disagreed that the conference was the first time he told anyone about the incident. In circumstances where Mr Winter did not really think anything of the incident at the time, because he considered it "clowning" and "it didn't happen to [him]", it is hardly surprising that it was not included in his outline of evidence.

Ground 9

40. The Appellants accept that in order to succeed on this ground it will be necessary to overturn the primary judge's findings in relation to Ms Norvill's credibility and reliability as a witness, as discussed in relation to appeal grounds 10 to 12 above.

41. In the event that the primary judge's findings in relation to Ms Norvill's credibility and reliability are overturned it will be necessary for the primary judge's findings in relation to the justification defence as a whole to be revisited given that those findings are seriously contaminated by the credibility findings.

42. Ms Norvill's evidence, corroborated by Mr Winter (as discussed in paragraphs 25 to 28 above), establish that each of allegations one, two, three, five, six and seven occurred. The primary judge erred in finding that they did not.

43. In relation to allegation eight, the primary judge did not consider that the text message sent to Ms Norvill on 10 June 2016 (AB Part B, Tab 11) was inappropriate (J[654]). The Appellants challenge that finding. A suggestive message from the Respondent, an older, married, male actor towards a younger female actor that he thinks of her "more than is socially appropriate" is inappropriate. By its very terms, the text message acknowledges that the Respondent thinks of Ms Norvill more than is appropriate, and telling her that is inappropriate. It is not difficult to see how that would make a woman in Ms Norvill's position uncomfortable. This text message is quite different to those which had passed between Ms Norvill and the Respondent previously, and there was no indication at the time that such a comment would be welcomed by Ms Norvill. The Respondent's explanation as to what he meant by this text does not sit comfortably with the unambiguous meaning of the words. It may be inferred from his attempt to alter their plain meaning that even he accepts it was not an appropriate text to send.

Ground 7: Judgment No 6

44. On 30 October 2018 the Appellants applied to the Court for orders that they be granted leave to file a Third Further Amended Defence and to rely upon the evidence of Yael Stone.[1] An outline of Ms Stone's evidence was included as annexure MRS-5 to the affidavit of Marlia Ruth Saunders dated 28 October 2018 (AB Part B, Tabs 3 and 3.5). The

[1] On 9 May 2019 a suppression order relating to the identity of Yael Stone as 'Witness X' was revoked.

Interlocutory Application (AB Part A, Tab 14) also sought an order (order 3) that Ms Stone's evidence be given via video-link from New York. On 6 November 2018 the Appellants' application was dismissed and reasons given (Judgment No 6).

45. The principles in *House v The King* (1936) 55 CLR 499 apply to the disposition of the appeal.

46. The primary judge accepted the following in relation to the proposed amendments, as matters favouring the grant of leave:

(a) The amendments were of considerable importance to the Appellants' case (J6[93]; [128]);

(b) If accepted, the new particulars of truth and the expected evidence of Ms Stone were capable of providing the substantial truth of three of the general imputations pleaded by the Respondent (J6[95]; [128]);

(c) If the three general imputations were found to be substantially true, the substantial truth of those imputations would be likely to mitigate the Respondent's damages, potentially significantly (J6[97]; [128]); and

(d) That the Appellants' had explained the lateness of the application, and that there was no delay in making the application once Ms Stone had advised of her willingness to give evidence (J6[105]; [128]).

47. The matters against granting the application, which the primary judge considered outweighed the factors in the preceding paragraph, were:

(a) The history of the litigation and the lateness of the application (J6[129]);

(b) The prejudice to the Respondent by the trial "almost inevitab[ly]" (see J6[106]) having to be bifurcated and delayed for sixth months until April 2019 (J6[107]; [129]); and

(c) The prejudice to the Respondent by having to be recalled to give evidence and having to endure further cross-examination, and potentially having to recall other witnesses (J6[108]).

48. It is apparent from J6[110]-[117] that the factor in (b) in the preceding paragraph was considered most significant to the primary judge.

49. At J6[119]-[122] the primary judge considered the Appellants' application for Ms Stone to give evidence by video-link but did not reach a concluded view (J6[122]). At J6[121] the primary judge stated that he was "far from satisfied that Nationwide and Mr Moran have made out a compelling or persuasive case for why witness X's evidence should be given via video-link". His Honour does not refer the reasons provided as to why Ms Stone could not travel to Australia at the time of the trial (as set out in [14](c) and (d) of Ms Saunders' affidavit at AB Part B, Tab 3 and [32] of MRS-5 at AB Part B, Tab 3.5), or consider whether they were adequate, but rather focuses on the prejudice to the Respondent of Ms Stone giving evidence via video-link.

50. The uncontested evidence on the amendment application (see [32] of MRS-5 at AB Part B, Tab 3.5) was that Ms Stone would make herself "readily available" to give evidence via video-link. In these circumstances, had the application for evidence by video-link been granted, the trial would not have been required to be adjourned until April 2019. Whilst a short adjournment would likely have been necessary to enable the Respondent's legal team time to prepare to meet the new particulars and evidence, there would have been no necessity for a six month adjournment. The prejudice to the Respondent from such a course would not have been as significant as the prejudice referred to in 47(b) above, and may well not have been as significant in the exercise of his Honour's discretion.

51. Accordingly, the primary judge ought to have considered whether the factors referred to in paragraph 46 above outweighed the prejudice to the Respondent occasioned by a shorter adjournment, and Ms Stone giving evidence by video-link, in addition to the matters in 47(a) and (c) above. His Honour failed to consider the exercise of discretion on this scenario. Had his Honour undertaken this task the result of the application, and the proceedings, may well have been very different.

Ground 13: excessive general damages

52. The primary judge assessed compensatory damages, including aggravated damages, in the amount of $850,000 (J[792]). The Appellants submit that this award was excessive.

53. In the event that ground 14 (discussed below) is upheld the Court may not need to determine the Appellants' appeal with respect to ground 13 given that it will be necessary for damages to be re-assessed in any event.

54. An assessment of damages is an evaluative judgment having regard to all of the relevant factors in the case, guided by the provisions of the *Defamation Act*, and most notably ss. 34 and 35. Subject to the Court's findings with respect to ground 16, the consequence of the primary judge's finding that the conduct of the Appellants warranted an award of aggravated damages is that s. 35 is of no application in this case.

55. An award of damages for defamation is recognised to serve three purposes: consolation for personal distress and hurt; reparation for damage to the applicant's reputation; and vindication of reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60. The sum awarded must be at least the minimum necessary to signal to the public the vindication of the applicant's reputation: *Carson* at 61. The principles relating to an award of compensatory damages were helpfully summarised by White J in *Hockey v Fairfax Media Publications Pty Limited* (2015) 237 FCR 33 at [446].

56. Whilst damages in each case must be assessed based upon the factors in that case, and in particular the evidence of the applicant's subjective hurt, comparable cases can provide the Court with a guide in relation to the assessment of damages (see *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89 at [54]-[55], per Applegarth J (with whom McMurdo P and Gotterson JA agreed)).

57. In this case, the award of compensatory damages is so inconsistent with comparable awards that it may be inferred that there is no appropriate and rational relationship between the harm sustained by the Respondent and the award of damages, and that the award is manifestly excessive.

58. The most comparable case to this case is the case brought by the international cricketer Chris Gayle (*Gayle v Fairfax Media Publications Pty Ltd* (*No 2); Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2)* [2018] NSWSC 1838, upheld on appeal in *Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle* [2019] NSWCA 172). Mr Gayle is a famous cricketer who played internationally for the West Indies. He brought proceedings in relation to the publication of 28 articles which conveyed imputations to the effect that he indecently exposed himself to a woman during the 2015 Cricket World Cup. The primary judge described Mr Gayle's evidence on hurt feelings (extracted in the

judgment) as compelling (see [29]) and considered the imputations serious, although not at the most serious end of the spectrum, before stating (at [30]):

> *As submitted on behalf of Mr Gayle, it is significant that the imputations relate to his behaviour in the workplace with a work colleague. The articles attributed him with intentionally acting indecently towards her. I accept that the imputations had particular resonance in cricketing circles, among fans, coaches, officials and players. The defamation went to the heart of Mr Gayle's professional life as a respected batsman.*

59. McCallum J had regard to the evidence of Mr Gayle's good reputation and that the articles were read widely ([32]-[33]). Mr Gayle was awarded $300,000 in general damages ([45]).

60. There are several significant similarities between *Gayle* and this case: both claimants are well known internationally in their respective fields, the evidence in both cases was of a good reputation and extensive hurt to feelings and, critically, the imputations all relate to the same kind of imputations, namely sexual impropriety towards a woman in the workplace. The key differences are that in the *Gayle* case there were more publications (28 versus three) and in the *Gayle* case there was no award for aggravated damages.

61. The *Gayle* decision post-dated the decision of *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154. Accordingly, even though aggravated damages were not awarded, it is apparent from the fact that Mr Gayle was not awarded the "cap" (as he would have been if his damages were assessed above the cap and s. 35 operated) that McCallum J's assessment of Mr Gayle's damages at large was $300,000. It is difficult to see how the matters of aggravation found by the primary judge in this case resulted in a damages award $550,000 higher than Mr Gayle's award given the similarities in the cases. A cross-appeal based upon an alleged manifest inadequacy of damages was dismissed in *Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle* [2019] NSWCA 172.

62. The awards of compensatory damages in two other recent decisions are also indicative of the damages awarded in this case being manifestly excessive.

63. The Respondent's award in this case of $850,000 was equal to the amount awarded to each of the plaintiffs in *Wagner v Harbour Radio Pty Limited* [2018] QSC 201, where the plaintiffs were accused of heinous criminal conduct in 29 separate high-rating and extensively published radio broadcasts. The imputations were of the most serious kind,

including that they were responsible for the deaths of 12 people, including two children, and knowing of their culpability, covered it up, and conspired to do so with Police and politicians, including the Deputy Prime Minister. There were numerous other serious allegations including intimidation of powerless witnesses and extensive corruption. A number of significant matters – including a broadcast statement that the plaintiffs had, by their actions, committed murder - were found to have aggravated the plaintiffs' damages.

64. In *Rayney v Western Australia (No 9)* [2017] WASC 367 Chaney J considered the defamatory imputation that Mr Rayney was guilty of murdering his wife as being "at the high end of the range of seriousness of defamatory imputations". Chaney J described the effect of the publication on Mr Rayney's life as devastating and found that an award of aggravated damages was warranted. Mr Rayney was awarded $600,000; $250,000 less than the Respondent in this case.

65. In these circumstances, the award of compensatory damages in the amount of $850,000 ought be set aside as manifestly excessive.

Ground 14 and 16: aggravated damages

Ground 14

66. Aggravated damages may be awarded where the conduct of a respondent has increased the subjective hurt suffered by an applicant. In order to obtain an award of aggravated damages the applicant must additionally establish that the respondent's conduct was lacking in bona fides, improper or unjustifiable: *Triggell v Pheeny* (1951) 82 CLR 497.

67. Two of the bases on which the primary judge awarded aggravated damages were the Appellants' conduct in pleading its initial truth defence (in the Defence and Amended Defence) and the Appellants' conduct in publishing the article of 20 February 2018 (J[773]; [776]; [777]).

68. As to the pleading of the defence, the primary judge inferred that the initial truth defence was based upon the contents of Ms Crowe's email of 6 April 2016, or a hearsay account of the contents of that email, or the general nature of Ms Norvill's complaint provided by someone else (J[771]). The primary judge was critical of the Appellants for relying upon Ms Crowe's email or a hearsay account of it in circumstances where, at trial, the

Appellants submitted that the email was unreliable (J[771]). However, when considering the Appellants' conduct the focus must be on the Appellants' state of knowledge at the time of filing the defence. As his Honour stated at J[771] it was fairly clear from the events that transpired that the Appellants had not spoken to Ms Norvill at the time that the initial defence was filed. The fact that the Appellants later came to speak to Ms Norvill and to learn information which supported a submission that Ms Crowe's email was unreliable is irrelevant to the question of the Appellants' conduct at the time of filing the defence.

69. Assuming the primary judge's inference that the initial defence was based upon the contents of Ms Crowe's email of 6 April 2016 or a hearsay account of the contents of that email or the general nature of Ms Norvill's complaint, there is nothing lacking in bona fides, improper or unjustifiable about the Appellants' conduct. On its face that email was a serious email from the company manager of the Sydney Theatre Company to a director of the Sydney Theatre Company discussing serious allegations that Ms Crowe received first-hand the day before. There was no reason on its face to doubt its reliability. In fact, the primary judge himself considered it a reliable document for these reasons, see J[350]-[354]; [363]; [365]-[366]. On its face the email provided a basis for the pleading of the allegations in the initial defence and it was entirely permissible for the Appellants to rely upon it.

70. The primary judge's criticism of the Appellants for relying upon a hearsay or second-hand account of Ms Norvill's complaint for the allegations made in the initial defence places too high a burden on the obligation of a party in pleading an allegation. Ms Crowe's email, reliable on its face in the absence of contrary information (which came to the Appellants' attention long after the defence was filed) provided a basis for the allegations. At the time of filing the initial defence there was no reason for the Appellants to believe that if they issued a subpoena to Ms Norvill to give evidence at the hearing she would give evidence otherwise than consistently with the account set out in Ms Crowe's email. In these circumstances, there was nothing lacking in bona fides, improper or unjustifiable about the Appellants' conduct.

71. As to the article published on 20 February 2018, that article related to the contents of the Amended Defence and was published after a temporary suppression order had been revoked (*Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [8] (***Judgment No 1***) (AB Part

B, Tab 145)). Accordingly, the Amended Defence was a defence that the public was entitled to inspect pursuant to rule 2.32 of the *Federal Court Rules* 2011 (Cth). As recognised by his Honour in Judgment No 1 at [189] (AB Part B, Tab 145), public access to pleadings forms an important part in the system of open justice. The media are the conduit by which the public are informed of what is transpiring in proceedings in court,[2] and it was in this context that the 20 February article was published. Whilst the Amended Defence was subsequently struck out on 20 March 2018, as at the time of publication it was the extant defence in the proceedings.

72. Further, the primary judge accepted at J[770] that the article was likely to be considered a fair report of proceedings of public concern pursuant to s. 29 of the *Defamation Act.* It would likely also be protected as a fair report of a public document pursuant to s. 28 of the *Defamation Act* (see *Cummings & Anor v Fairfax Digital Australia & New Zealand Pty Ltd & Anor* (2018) 366 ALR 727). It is difficult to see how it could be found to be lacking in bona fides, improper or unjustifiable to do something that would be defensible pursuant to the law.

73. In the circumstances, his Honour erred by awarding aggravated damages on this basis, and this finding ought be set aside. As set out in paragraph 53 above if this ground is successful compensatory damages will need to be re-assessed.

Ground 16

74. The Appellants rely upon their submissions dated 7 June 2019 in relation to this ground.

75. The starting point of the analysis of the Victorian Court of Appeal in *Wilson* is whether s. 35 of the Defamation Act provides for a cut off for damages or provides for a scale/range in which verdicts are to be placed. In deciding that s. 35 provided for a cut off as opposed to a scale/range the Court preferred the reasoning of Kyrou J in *Cripps v Vakras* [2014] VSC 279 over the reasoning of Bell J in *Attrill v Christie* [2007] NSWSC 1386.

76. Bell J's reasoning in *Attrill* relied upon the judgment of Hayne J in *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, by reference to the relationship between s. 46A(1) and s. 46A(2) of the *Defamation Act* 1974 (NSW), whereas Kyrou J's reasoning in *Cripps* relied upon the statutory caps under s. 28G of the *Wrongs Act* 1958 (Vic) and s. 134AB(22) of

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[2] *Raybos Australia Pty Limited v. Jones* (1985) 2 NSWLR 47 at 55.

the *Accident Compensation Act* 1985 (Vic), which he noted had never been interpreted as creating a range or scale. The Appellants submit that construing s. 35 by reference to differently worded legislation, or legislation directed at a different type of injury, is apt to mislead. The preferable course is to construe the legislation considering the text of the legislation in light of its context and purpose, as discussed in the Appellants' submissions dated 7 June 2019.

Grounds 15, 17, 18 and 19: Judgment No 5 and special damages

Ground 15

77. At trial the Appellants' objected to the admission of the expert opinion evidence of the Respondent's long-time agent and friend Mr Specktor and his long-time friend Frederic Schepisi.

78. It was evident from the reports of Mr Specktor and Mr Schepisi that they each had regard to information obtained from their prior dealings with the Respondent in forming their opinions, which was not disclosed in their reports, and which was unknown to the Appellants (see [3] of Mr Specktor's report (AB Part B, Tab 101) and [3] and [10] of Mr Schepisi's report (AB Part B, Tab 80). In objecting to the reports on this basis (amongst other bases) the Appellants relied upon the decision of Austin J in *Australian Securities and Investments Commission v Rich* (2005) 190 FLR 242 at [348]-[349]. At J5[50]-[51] the primary judge distinguished *ASIC v Rich* and noted that caution should be exercised in relying upon statements of principle in that decision. Whilst that might be correct, there can be no serious dispute that an expert report is required to explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded.[3] In relying upon unstated matters of "personal knowledge" it was not clear that Mr Specktor and Mr Schepisi's opinions were 'wholly or substantially based' on their 'specialised knowledge'. The evidence ought to have been excluded.

[3] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37].

Ground 17

79. In his Statement of Claim the Respondent provided particulars of special damages including that his "reputation as an actor has been irreparably harmed such that he is likely to be shunned by employers in future" (m), that he was asked to stand aside as President of the Australian Academy of Cinema and Television Arts (n) and that further particulars would be provided (AB Part A, Tab 2).

80. On 22 May 2018 the Respondent provided further particulars of his claim for special damages (AB Part A, Tab 7). That letter provided general particulars of the Respondent's loss and in that context referred to an affidavit of the Respondent's solicitor dated 9 April 2018 (AB Part B, Tab 5) (paragraph 5), particulars of the loss of a specific contract, namely a voiceover for a documentary about The Great Barrier Reef (paragraph 8) and indicated that an expert report would be served in support of his claim for special damages. The affidavit of the Respondent's solicitor had previously been relied upon in opposition to the Appellants' application for leave to amend their defence. That affidavit referred to the Respondent's "ongoing hurt" (see heading above paragraph 3) and provided details of further publications about the Respondent. It did not anywhere refer specifically to the Respondent's claim for economic loss. In particular, it *did not* refer to the loss of the voiceover contract, contrary to the primary judge's finding at J[795] that it did. The letter did not provide any specificity as to which aspects of the affidavit were relied upon as particulars of the Respondent's economic loss claim. In these circumstances, the relevance of the affidavit to the Respondent's claim for special damages was illusory.

81. Shortly after the Respondent served an expert report prepared by Michael Potter. The assumptions provided to Mr Potter (AB Part B, Tab 104, appendix 1) included:

> *(e) The matters complained of have damaged our client's reputation such that he has not received, and is unlikely in the foreseeable future to receive, the same number of offers of work as an actor.*

82. Whilst both the letter of 22 May 2018 and the assumptions provided to Mr Potter referred in a very general way to the Respondent not having done any work or being unable to work, the only specificity provided at any time as to the reason for that focussed on the effect of the publications on the Respondent's reputation and his ability to receive offers (see particulars (m) and (n) of the Statement of Claim, paragraph 8 of the letter of 22 May

2018 and assumption (e) in the letter of instruction to Mr Potter). Before trial it was *never* specifically stated that in support of the claim for economic loss it would be asserted that a reason for the Respondent not working was due to "the debilitating effect of his ability to act" (J[796]), and certainly *never* articulated in the way the primary judge characterised the claim at J[796]. Put simply, if this was the case the Respondent sought to advance he failed dismally to put the Appellants' on notice that this was the case they were called upon to meet.

83. Even at trial the Respondent did not give evidence that he was unable or unwilling to work in the future due to the emotional toll the matters complained of took on him. The only evidence from the Respondent in that regard, which contradicts the case advanced at trial, was his evidence about why he had withdrawn from *Twelfth Night* (J[830]), and the email at AB Part B, Tab 18 where the Respondent leaves open the possibility of performing in *Twelfth Night* and stated "If (and it's a big if) we came to a suitable settlement at Mediation on July 4th – it may affect my TN decision more favourably". That evidence is explicitly confined to why the Respondent withdrew from *Twelfth Night.* That he gave no evidence that he was unable to work in the future due to the emotional toll the matters complained of had taken on him was, to put it mildly, a glaring omission, given that it was the foundation on which his claim for special damages was based.

84. The only evidence arguably relevant to the primary judge's findings about the Respondent's inability to work due to his emotional state was given by the Respondent's agent Mr Specktor (T727.39-42 at AB Part B, Tab 121) and his wife Jane Menelaus (T264.33-34 at AB Part B, Tab 115). At J[818] and [819] the primary judge also referred to the evidence of Simon Phillips who was directing *Twelfth Night*, however when that evidence was objected to the Respondent's counsel stated on two occasions that it was "just hurt feelings evidence" (T339.11-12; 340.1-4 at AB Part B, Tab 116). That evidence was also limited to the Respondent's ability to act in that particular play, which was a comedy, at the time. Similarly, the evidence referred to by the primary judge at J[820]-[822] was never put as anything other than evidence going to hurt to feelings.

85. Further, no expert evidence was adduced in relation to effect of the Respondent's emotional state on his ability to work. All of the expert evidence adduced by both parties

was directed to the effect of the publications on the Respondent's reputation and his ability to receive offers for work.

86. The case that had been advanced in the particulars, that the Respondent had not received any offers of work, was wholly unsupported on the evidence. There was no evidence that the Respondent had not received offers. The effect of Mr Specktor's evidence was that the Respondent was not open for business (T728.28-29; 729.46-730.15 at AB Part B, Tab 121; see also Richard Marks' evidence at T816.39-817.7 at AB Part B, Tab 122). Further, the evidence established that the offer in relation to the voiceover work for The Great Barrier Reef was made to the Respondent after the publications (T136.29-33 at AB Part B, Tab 114).

87. Against this background, the Respondent's case for economic loss ought to have failed, especially his claim for future loss, for the following reasons.

88. First, the basis for the claim ultimately pressed, that the Respondent was so debilitated by the effect of the publications that he could not act, was not part of the pleaded case. On the basis of the matters set out above, the Appellants challenge the primary judge's findings at J[809] and [810] finding to the contrary.

89. Secondly, the evidence in support of this alternate and unpleaded case was so unpersuasive that the claim ought to have been rejected. The Respondent's failure to give direct evidence in support of this case ought to have led the primary judge to infer that his evidence would not have assisted his case. The Appellants invited the primary judge to draw such an inference at T1288.23-1289.1 (AB Part B, Tab 127). The primary judge referred to this at J[828], [829] and [832], but did not ultimately draw the inference or expressly decline to draw it. No reasons were given for impliedly rejecting the Appellants' submission. Contrary to the principles in *Jones v Dunkel*, the primary judge appears to filled the evidentiary lacuna in the Respondent's favour by inferring from Mr Specktor's evidence that the Respondent himself believed he was unable to work (J[842]). This was despite the fact that even Mr Specktor did not say that was, to his knowledge, the Respondent's view; he merely speculated that the Respondent's ability to work "probably" concerns him (T727.42 at AB Part B, Tab 121). Had the primary judge drawn the correct inference that the Respondent's evidence would not have assisted him, the

evidence of Mr Specktor and Ms Menelaus alone would not have been enough to discharge the Respondent's onus of proof.

90. Further, at J[844] the primary judge appears to reverse the onus by stating that "Nationwide and Mr Moran did not posit any other rational or reasonable hypothesis" which could explain why the Respondent stopped acting. The failure to adduce the evidence could only have been deliberate. It was not for the Appellants to advance alternative hypotheses in the absence of any persuasive evidence.

91. Thirdly, there was no evidence at all to support the pleaded case that the Respondent had in fact received no offers of work. Whilst the primary judge appears to have accepted this (J[840]-[842]) and it was not the basis on which damages were awarded (J[843]; [848]), the primary judge did not address the Appellants' submission in relation to a *Jones v Dunkel* inference in this regard. Again, the primary judge appears to have filled the evidentiary lacuna by an inference drawn in the Respondent's favour (J[847]).

92. Further, the Respondent's case for future economic loss on the basis of an inability to work due to the debilitating effect of the matters complained of on his ability to act was unsupported by evidence other than very limited evidence which warranted little weight, as acknowledged by the primary judge at J[874] and [876]. The primary judge's reasoning at J[876]-[877] as to how long it will take the Respondent to recover from the debilitating state he was found to be in is based on little more than speculation. The primary judge's findings as to how long it will take for the Respondent to receive offers and the "rate" of offers (J[892]-[893]) assumes a starting point of *no* offers. For the reasons set out in paragraph 91 above there was no foundation for this in the evidence.

Ground 18

93. At J[877] the primary judge found that the Respondent's emotional recovery would likely occur within 12 months of judgment. It follows that if offers were made to the Respondent at about the 12 month mark on the primary judge's finding the Respondent would be in a position to start working from 12 months after judgment.

94. The evidence of Mr Specktor, which the primary judge considered to be the most persuasive and realistic (J[885]) was that offers for movies could be at the "same rate" as before the publication in about 12 months (or more) (AB Part B, Tab 101, paragraph 25).

There was no evidence as to what that "rate" was, as there was no evidence of the number of offers the Respondent received prior to the publications. However, the Respondent's film history demonstrated that he worked on approximately one main film per year (T934.29-39 at AB Part B, Tab 123). Accordingly, it may be assumed that he only needs one offer to be back where he was before. In these circumstances, the primary judge's allowance of damages for a period up to two years after judgment on a sliding scale was beyond that supported by the evidence.

95. Further, the primary judge's findings at J[893] and [895] based upon a "rate" are purely speculative in circumstances where there was no evidence of what the pre-publication "rate" was.

Ground 19

96. On the basis of the matters set out in paragraphs 79 to 95 above, the primary judge erred in making orders 2(a) and 2(b) on 23 May 2019.

Grounds 1 to 4: apprehension of bias

97. The test for apprehended bias was stated by the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6], per Gleeson CJ, McHugh, Gummow and Hayne JJ, as follows:[4]

> *"…a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."*

98. The hypothetical fair minded observer is to be assumed to be aware of the actual circumstances of the case: *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; 210 CLR 438 at [68] and [76].

99. In this case the Appellants' rely upon the matters set out in ground 1 of the Further Amended Notice of Appeal as giving rise to a reasonable apprehension of bias. The Appellants do not submit that any matter individually would be sufficient to establish the test. However, the Appellants submit that taken together and cumulatively, the matters relied upon give rise to a reasonable apprehension of bias in that a fair-minded lay observer might reasonably apprehend that the primary judge might not have brought an

[4] See also *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427 at [31].

impartial mind to bear in the resolution of the issues in the case in that he was partial to the Respondent's interests.

100. The primary judge's treatment of Ms Crowe's email as between the Appellants and the Respondents is one of the clearest demonstrations of this point. As discussed in paragraphs 66 to 73 above the primary judge found that the Appellants' reliance upon Ms Crowe's email to plead their initial defence was lacking in bona fides, improper or unjustifiable, and awarded aggravated damages on that basis. Yet earlier in the judgment the primary judge had considered the email to be reliable (see J[350]-[354]; [363]; [365]-[366]) and relied upon it as a significant matter affecting Ms Norvill's credit, even though the Respondent did not call Ms Crowe as a witness, as discussed in paragraphs 34 to 37 above. The fair-minded lay observer considering the judgment as a whole might wonder why the primary judge considered the email to be reliable when the contents of the email suited the Respondent's interests in the case, but not when it suited the Appellants' interests in the case. On its own in isolation the fair-minded lay observer might consider this to be an error, however taken with the balance of the matters relied upon the fair-minded lay observer might consider these inconsistent findings to be indicative of an apprehension of bias.

101. Other instances of where it might have appeared to the fair-minded lay observer that the primary judge might have been partial to the interests of the Respondent over the Appellants are:

(a) The approach to the assessment of the credibility of witnesses. Specifically:

(i) At J[325] it was held that Ms Nevin's frankness and candour about the poor state of her recollection about how she became aware that Ms Norvill was the complainant was "to her credit". Whereas at J[387] Mr Winter's candour about the fact that his evidence as to allegation one was "the vaguest of his recollections" was a matter taken into account against his credit, even though he was clear that he did recall it (T685.8-9 at AB Part B, Tab 121).

(ii) At J[346], [393] and [476] it was held that Mr Winter's evidence about what he observed and the "inconsistency" between that and his otherwise positive views of the Respondent cast considerable doubt on the reliability

of Mr Winter's evidence generally. Whereas it was not considered that there was any corresponding inconsistency between Ms Nevin's evidence that as at 1 December 2017 she was not angry at Ms Norvill for making allegations against her good friend, and her primary concern at the time was Ms Norvill's welfare (J[449]).

(b) The primary judge's finding at J[389] discussed in paragraph 38 above, especially in circumstances where this serious allegation was not put to the Respondent or Mr Winter as a matter of fairness.

(c) The finding at J[416] that Ms Nevin and Ms Buday were of "impeccable character and integrity", when these matters are irrelevant to the issue of credit and there was no evidence before the Court to support this finding.

(d) The primary judge's statement at J[447] that there was no evidence to suggest that the Respondent had in fact sexually harassed anyone in the past, and that the proposition was not put to the Respondent in cross-examination. This was not a matter in issue on the pleadings, and any cross-examination in this regard would have in all likelihood been objected to and probably been improper. The primary judge's statement in this regard was unnecessarily critical of the Appellants and their counsel.

(e) The primary judge's finding that the Respondent's evidence in relation to his withdrawal from *Twelfth Night* could be admitted into evidence in relation to his special damages claim, even though it had not been specifically pleaded. The same applies to the primary judge's finding about the way in which the Respondent's special damages case was pleaded and how it was advanced at trial, and how the primary judge dealt with the lacunas in the evidence, as referred to in paragraphs 79 to 92 above. The latitude the Respondent was allowed in his pleading and proving his case, even though this was a significant aspect of the case in terms of the quantum at stake, was very different to the standard applied to the Appellants, as demonstrated in Judgment No 1, Judgment No 4 and Judgment No 6.

(f) The awarding of special damages for a period beyond that which was supported by the evidence, as discussed in paragraphs 93 to 95 above.

(g) The primary judge's decision in Judgment No 4 to disallow the evidence of Colin Moody, even though the evidence related to a discrete topic, namely whether Mr Armfield gave a particular "note" to the Respondent after a preview performance, and notice of the intention to rely upon the evidence was served several weeks before the hearing. An outline of Mr Moody's anticipated evidence is an annexure to the affidavit of Nicholas James Perkins dated 8 October 2018 (AB Part B, Tabs 2 and 2.1). Mr Moody's anticipated evidence related to a topic that each of Ms Nevin, Ms Buday and Mr Armfield ultimately addressed, but the Appellants were deprived of the opportunity to call evidence that might have corroborated Ms Norvill in this respect.

(h) The primary judge's decision in Judgment No 5 to allow two of the Respondent's close associates to give expert opinion evidence as discussed in paragraphs 77 to 78 above.

(i) The primary judge's decision in Judgment No 6 to refuse the Appellants' leave to amend the defence and rely upon the evidence of Ms Stone, as discussed in paragraphs 44 to 51 above. It is clear from J6[111], [116] and [129] that the prejudice to the Respondent from delay in the proceedings was a significant matter in the exercise of the discretion. The primary judge referred at J6[111] and [116] to the fact that the Respondent was seeking an early hearing date to obtain "vindication". Such vindication of course assumes that the Respondent would be successful in the litigation. Taken cumulatively with all of the other matters relied upon in these submissions, the fact that the primary judge considered that the Respondent's desire for early vindication outweighed the Appellants' desire to bring forward significant evidence which could affect the outcome of the proceedings, even though the lateness of the application was adequately explained, might cause the fair-minded lay observer to consider that the primary judge might have been partial to the interests of the Respondent.

102. The Appellants also rely upon the matters listed in paragraph 1(m) of the Further Amended Notice of Appeal, which is incorporated into these submissions by reference.

As to the Appellants' reliance upon the tone of the primary judge, the Appellants rely upon the following recordings of the hearing as evidencing a tone which, in combination with all of the matters referred to in respect of this ground of appeal, might give rise to an apprehension of bias[5]:

(a) Recording at AB Part B, Tab 144.1, which relates to paragraph 1(m)(vi) of the Further Amended Notice of Appeal;

(b) Recordings at AB Part B, Tab 144.2, which relates to paragraph 1(m)(vii) of the Further Amended Notice of Appeal;

(c) Recording at AB Part B, Tab 144.3, which relates to paragraph 1(m)(viii) of the Further Amended Notice of Appeal;

(d) Recording at AB Part B, Tab 144.4, which relates to paragraph 1(m)(ix) of the Further Amended Notice of Appeal;

(e) Recordings at AB Part B, Tab 144.5, which relates to paragraph 1(m)(x) of the Further Amended Notice of Appeal;

(f) Recordings at AB Part B, Tab 144.6, which relates to paragraph 1(m)(xi) of the Further Amended Notice of Appeal; and

(g) Recording at AB Part B, Tab 144.7, which relates to paragraph 1(m)(xii) of the Further Amended Notice of Appeal. It is noted in relation to this matter that whilst the published Judgment Summary refers to the second matter being "a recklessly irresponsible piece of sensationalist journalism of the worst kind", when the summary was read out in open court the sentence was appended with "the very worst kind".

103. For these reasons, upon the delivery of judgment, when the juxtapositions referred to above were apparent, an apprehension of bias arose. The matters set out in the whole of these submissions above might have led the fair-minded lay observer to think that the primary judge might have assessed the evidence and applications in the case through a prism of partiality to the Respondent's cause; if evidence was consistent with the

[5] The Appellants do not press their reliance upon the tone of the primary judge in relation to the matter set out in 1(m)(iv), in relation to the reference to T1080.33-1081.08 in 1(m)(x) and in relation to the references to T561.33-36 and T563.01-13 in 1(m)(xi).

Respondent's case it was admitted and accepted; to the extent that evidence was equivocal or insufficient, inferences were drawn which characterised the evidence as being consistent with the Respondent's case; to the extent that the evidence or applications were contrary to the Respondent's case, they were rejected, notwithstanding that the rejected evidence was inherently probable.

104. Accordingly, the trial and the primary judge's decisions in Judgment No 4, Judgment No 5 and Judgment No 6 miscarried.

Ground 5: denial of procedural fairness

105. The Appellants submit that they were denied procedural fairness in several respects.

106. First, in relation to the primary judge's finding at J[389] as discussed in paragraph 38 above. Before such a serious finding was made the allegation should have been put to the Appellants and Mr Winter so that they had an opportunity to respond.

107. Secondly, in relation to the finding at J[416] as discussed in paragraph 101(c) above. The Appellants were not given any notice that such a matter was to be relied upon as a matter going to those witnesses' credit, and were not given the opportunity to be heard on that matter.

108. Thirdly, in relation to the primary judge's statement at J[447] as discussed in paragraph 101(d) above. The Appellants were not given any notice that that statement was to be made, and were not given the opportunity to be heard on that matter.

109. Fourthly, in relation to the primary judge's findings with respect to the Respondent's special damages claim, even though the case had not been pleaded this way, as discussed in paragraphs 79 to 92 and 101(e) above. The Appellants were caught by surprise by the Respondent's unpleaded case and were not in a position to meet it.

110. Fifth, in relation to the primary judge's decision in Judgment No 4 to disallow the evidence of Mr Moody, in circumstances where the Respondent called evidence going to that topic, as discussed in paragraph 101(g) above.

111. Sixthly, in relation to the primary judge's decision in Judgment No 5 to admit as expert evidence the opinions of two of the Respondent's close associates, as discussed in

paragraphs 77 to 78 above, in circumstances where the witnesses had not disclosed the matters of "personal knowledge" they had regard to in forming their opinions.

Conclusion

112. In the above circumstance the appeal ought be allowed, and orders 1, 2, and 3 made on 11 April 2019 and orders 2(a) and 2(b) made on 23 May 2019 set aside. The Appellants seek an order that judgment be entered for the Appellants, or alternatively an order for a re-trial before a new judge. The full orders sought by the Appellants are set out in the Further Amended Notice of Appeal.

Tom Blackburn SC and **Lyndelle Barnett**

Counsel for the Appellants

Dated: 23 September 2019