

NOTICE OF FILING

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Details of Filing

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| Document Lodged: | Defence - Form 33 - Rule 16.32 |
| File Number: | NSD2179/2017 |
| File Title: | GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR |
| Registry: | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA |



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

Dated: 20/02/2018 12:38:18 PM AEDT

Registrar

Important Information

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

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



Amended Defence to Statement of Claim

No. NSD2179 of 2017

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

Geoffrey Roy Rush

Applicant

Nationwide News Pty Limited and another

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 8 December 2017 (the **Statement of Claim**):

1. The First Respondent admits paragraph 1 of the Statement of Claim.
2. The Second Respondent admits paragraph 2 of the Statement of Claim.
3. As to paragraph 3 of the Statement of Claim, the First Respondent:
 - (a) admits that on or about 30 November 2017 it published in New South Wales the words contained in Schedule A of the Statement of Claim (the **first matter complained of**);
 - (b) denies that it published the first matter complained of in any other State or Territory of Australia other than New South Wales; and
 - (c) otherwise denies ~~does not admit~~ the allegations contained in that paragraph.
4. As to paragraph 4 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning or otherwise:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 4 of the Statement of Claim; or

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- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 4 of the Statement of Claim or any nuance thereof.
- 5. As to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, with the aid of the extrinsic facts particularised at paragraph 5, or otherwise:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or any nuance thereof.
- 6. As to paragraph 6 of the Statement of Claim:
 - (a) the First Respondent admits that on or about 30 November 2017 it published the material contained in Schedule B of the Statement of Claim (the **second matter complained of**);
 - (b) the Second Respondent:
 - (i) admits that he was the author of the material set out in paragraphs 1-4 of page 1, paragraphs 1-15 of page 4 and paragraphs 4-9 of page 5 of the second matter complained of;
 - (ii) denies that he wrote or published the material set out in paragraphs 1-3 and 10-16 of page 5 of the second matter complained of or any other material contained in Schedule B including the headlines, sub-headlines and captions in the second matter complained of; and
 - (c) the Respondents otherwise deny ~~does not admit~~ the allegations contained in that paragraph.
- 7. In relation to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning or otherwise:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or any nuance thereof.

8. In relation to paragraph 8 of the Statement of Claim, the Respondents deny that the second matter complained of, with the aid of the extrinsic facts particularised at paragraph 8, or otherwise:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 8 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 8 of the Statement of Claim or any nuance thereof.
9. As to paragraph 9 of the Statement of Claim:
- (a) the First Respondent admits that on or about 1 December 2017 it published the material set out in Schedule C of the Statement of Claim (the **third matter complained of**);
 - (b) the Second Respondent:
 - (i) admits that he was the author of the material set out in paragraphs 1-5 of page 1, paragraphs 1-11 and 19-30 of page 4 and paragraphs 3-24 of page 5 of the third matter complained of;
 - (ii) denies that he wrote or published the material set out in paragraphs 12-18 and 31-41 of page 4 and paragraphs 1-2 of page 5 of the third matter complained of or any other material contained in Schedule C including the headlines, sub-headlines and captions in the third matter complained of; and
 - (c) the Respondents otherwise deny ~~does not admit~~ the allegations contained in that paragraph.
10. In relation to paragraph 10 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning or otherwise:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 10 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 10 of the Statement of Claim or any nuance thereof.

11. In relation to paragraph 11 of the Statement of Claim, the Respondents deny that the third matter complained of, with the aid of the extrinsic facts particularised at paragraph 11, or otherwise:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or any nuance thereof.
12. The Respondents deny paragraph 12 of the Statement of Claim.

DEFENCES

13. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of and/or the third matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or to be defamatory of him with the aid of extrinsic facts, or as bearing one or more of the imputations in paragraph 4, paragraph 5, paragraph 7, paragraph 8, paragraph 10 or paragraph 11 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:

(a) Justification – section 25 of the Defamation Act 2005 (NSW) (Defamation Act)

- (i) Each of the imputations in sub-paragraphs 4(a), 7(d), 8(d), 10(d), 10(f), 11(d) and 11(f) of the Statement of Claim are substantially true.

(b) Qualified privilege – section 30 of the *Defamation Act* and ~~common law~~

- (i) Each of the matters complained of were published on an occasion of qualified privilege:

~~(A)~~ pursuant to section 30 of the *Defamation Act*; ~~and~~

~~(B)~~—at common law.

PARTICULARS

A. PARTICULARS OF TRUTH

14. In around 2015, the Applicant began rehearsals for the Sydney Theatre Company Limited's (**Sydney Theatre Company**) production of the play "King Lear", in which the Applicant played the role of King Lear (the **Production**).
15. The role of King Lear's daughter, Cordelia, in the Production was played by Eryn Jean Norvill (the **Complainant**).
16. In the period between around 24 November 2015 and 9 January 2016, the Production was performed at the Sydney Theatre Company.
17. In around November 2015, in an interview with Elissa Blake of the Sydney Morning Herald the Applicant described having a "stage-door Johnny crush" on the Complainant.
- 17A. The phrase "stage-door Johnny" refers to a man who frequents a theatre for the purpose of courting an actress or chorus girl.
18. On ~~in~~ or about early 5 January 2016, in the final week of the Production, the Applicant touched the Complainant in a manner that made the Complainant feel uncomfortable.
- 18A. The touch referred to in the preceding paragraph occurred during a performance of the Production and specifically during the final scene in which the Applicant walks on to the stage carrying the Complainant as she simulated the lifeless body of Cordelia, King Lear's daughter.
19. The touch referred to in paragraph 18 above ~~the preceding particular~~ was not directed or scripted by any person or necessary for the purpose of the performance of the Production.
20. Following the performance referred to in paragraph 18A above the Complainant said to confronted the Applicant words to the effect "stop doing it" and asked the Applicant to stop the conduct referred to in paragraph 18 above.
21. Notwithstanding the Complainant's demand conversation referred to in paragraph 20, the Applicant repeated the conduct referred to in paragraphs 18 and 18A above on four a number of occasions on 6, 7, 8 and 9 January 2016 ~~during the final week of the Production.~~

21A. Following each incident referred to in paragraphs 18, 18A and 21 above the Complainant was visibly upset.

22. On around 9 January 2016, the Applicant and the Complainant, ~~amongst others,~~ attended an after party for crew and cast for the purpose of celebrating the conclusion of the Production at Walsh Bay Kitchen restaurant, which is co-located with the foyer of the Roslyn Packer Theatre where the Production was performed.

23. During the after party the Applicant entered the female bathroom located in the foyer of the Roslyn Packer Theatre, knowing that the Complainant was in there, and stood outside a cubicle that was occupied by the Complainant.

23A. The Complainant told the Applicant to "fuck off", and he then left the bathroom.

23B. Following the incident referred to in paragraphs 23 and 23A above the Complainant was visibly upset.

24. The conduct referred to in the preceding paragraphs was inappropriate:

24.1 in a workplace, namely the Sydney Theatre Company; and

24.2 in a location regarded as a workplace for the purposes of characterising the Applicant's conduct, in that the conduct occurred at the after party held immediately at the conclusion of the Production, at a restaurant co-located with the theatre, which was attended by the Applicant's professional colleagues (cast and crew) involved in the Production, for the purpose of celebrating the end of the Production.

25. The imputation set out in sub-paragraph 4(a) of the Statement of Claim ("*the applicant had engaged in scandalously inappropriate behaviour in the theatre*") is substantially true based on the following facts matters and circumstances:

25.1 The Respondents rely upon the particulars set out in paragraphs 14 to 24 above.

26. The imputation set out in sub-paragraphs 7(d) and 8(d) of the Statement of Claim ("*The applicant, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the Sydney Theatre Company's production of King Lear*") is substantially true based on the following facts matters and circumstances:

26.1 The Respondents rely upon the particulars set out in paragraphs 14 to 24 above.

27. The imputation set out in sub-paragraphs 10(d) and 11(d) of the Statement of Claim (*"The applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of King Lear"*) is substantially true based on the following facts matters and circumstances:

27.1 The Respondents rely upon the particulars set out in paragraphs 14 to 24 above.

28. The imputation set out in sub-paragraphs 10(f) and 11(f) of the Statement of Claim (*"The applicant's conduct in inappropriately touching an actress during King Lear was so serious that the Sydney Theatre Company would never work with him again"*) is substantially true based on the following facts matters and circumstances:

28.1 The Respondents rely upon the particulars set out in paragraphs 14 to 24 above.

28.2 In or about April 2016, the Complainant made a complaint to the Sydney Theatre Company about the Applicant's conduct towards her during the Production.

28.3 In the period following receipt of the complaint the Sydney Theatre Company investigated the complaint.

28.4 Following the investigation the Sydney Theatre Company decided that it would never work with the Applicant again.

PARTICULARS OF QUALIFIED PRIVILEGE

29. In the months preceding the publication of the matters complained of:

29.1 There had been widespread reporting in Australia and internationally in relation to allegations of sexual misconduct, bullying and harassment in the entertainment industry which originated with allegations of misconduct by Harvey Weinstein, a powerful Hollywood movie producer and included allegations of misconduct by other men in the entertainment industry including, but not limited to, Kevin Spacey, Dustin Hoffman, Louis CK and Casey Affleck, as well as a report by the Media Entertainment & Arts Alliance Actors Equity into widespread sexual harassment in Australian theatre.

29.2 The reporting included allegations to the effect that the misconduct was known in the industry but covered up, silenced or protected.

- 29.3 The reporting gave rise to a movement commonly referred to as the #metoo movement which encouraged women who had been subject to sexual misconduct, bullying or harassment to speak out with a view to discouraging such conduct from occurring.
- 29.4 It was in the public interest for allegations of sexual misconduct, bullying and harassment to be reported to support other victims of such misconduct to speak out about such misconduct, with a view to discouraging such conduct from occurring.
- 29.5 The Applicant acknowledged, in a statement provided on 10 November 2017 to Rosemary Neill of *The Australian* following an enquiry to the effect of why an AACTA Award to Harvey Weinstein had not been withdrawn, that "many companies have, recently, rightfully condemned many examples of inappropriate behaviour and serious misconduct in the workplace. According to our constitution and by-laws AACTA is currently addressing this grave situation with concern."
30. The matters complained of were published in the background context set out in paragraph 29 above.
31. Each of the first and second matters complained of related to the following subjects:
- 31.1 the alleged misconduct of the Applicant, an Oscar winning Australian actor;
- 31.2 the response of the Sydney Theatre Company to an allegation of misconduct by the Applicant;
- 31.3 the Applicant's response to the allegation,
- (First and Second Matter Subjects).**
32. The third matter complained of related to the following subjects:
- 32.1 the First and Second Matter Subjects;
- 32.2 the alleged misconduct of the Applicant, an Oscar winning Australian actor, in inappropriately touching an actress (the **Complainant**) during the Sydney Theatre Company's production of *King Lear*;
- 32.3 the public support of the Complainant by Meyne Wyatt, an actor appeared with the Applicant and the Complainant in *King Lear*;

32.4 the public support of the Complainant by Brandon ~~Brendon~~ McClelland, an actor who had worked with the Complainant in another production and was working in the Sydney Theatre Company's production of The Three Sisters at the time of publication of the matters complained of,

(Third Matter Subjects).

33. The recipients of the matters complained of had an interest in having information on the First and Second Matter Subjects and the Third Matter Subjects (collectively, the **Subjects**), because the Subjects were matters of proper and legitimate public interest.
34. Alternatively, the recipients of the matters complained of had an apparent interest in having information on the Subjects, because at the time of publication of the matters complained of, the Respondents believed that the recipients of the matters complained of had an interest in having information on the Subjects, because the Respondents believed that the Subjects were matters of proper and legitimate public interest to readers of the matters complained of.
35. The matters complained of were published to recipients of the matters complained of in the course of giving them information on the Subjects.
36. The Respondents' conduct in publishing the matters complained of was reasonable in the circumstances, in that:
 - 36.1 the matters complained of were published in the background context set out in paragraph 29 above;
 - 36.2 the matters complained of related to the Subjects;
 - 36.3 the matters complained of related to the alleged public activities of the Applicant whilst performing in the theatre;
 - 36.4 it was in the public interest in the circumstances for the matters published to be published expeditiously;
 - 36.5 in the nature of the business environment in which the Respondents operate, the Respondents are engaged in the business of providing information to the public;
 - 36.6 prior to publishing the first and second matters complained of, the Respondents had the following information:

- (a) that a complaint had been made to the Sydney Theatre Company by the Complainant in substance that the Applicant had touched her genitals during the production of King Lear without her consent;
- (a1) that a complaint had been made to the Sydney Theatre Company by the Complainant that the Applicant had engaged in inappropriate behaviour;
- (b) that the complaint was received by the Sydney Theatre Company when the Applicant's engagement with the Sydney Theatre Company had ended;
- (c) that the Sydney Theatre Company had conducted an investigation into the complaint;
- (d) that the Sydney Theatre Company continued to work with the Complainant to minimise the risk of future instances of the alleged behaviour occurring in the workplace;
- (e) that the Complainant had requested at the time that her identity be withheld;
- (f) that the Applicant denied the allegation;
- (g) that the Applicant stated that he had not been approached by the Sydney Theatre Company or the Complainant, nor any representative of either of them regarding the complaint, nor informed of the nature of the complaint or what it involves;

36.6A The sources of the information set out in the preceding paragraph were:

- (a) As to the information set out in sub-paragraph (a), actress Sarah Monahan;
- (b) As to the information set out in sub-paragraphs (a1)(b), (d) and (e), the Sydney Theatre Company, through its Public Relations Manager Katherine Stevenson;
- (c) As to the information set out in sub-paragraph (c), a confidential source connected with the Sydney Theatre Company (**Confidential Source 1**);
- (d) As to the information set out in sub-paragraphs (f) and (g), the Applicant, through his solicitor Nicholas Pullen of HWL Ebsworth;

36.7 prior to publishing the third matter complained of, the Respondents had the following information:

- (a) that set out in the preceding particular;
- (b) that the Sydney Theatre Company had prepared a report following its investigation of the complaint;
- (c) that the Applicant had a conversation with Patrick McIntyre, the Executive Director ~~a board member~~ of the Sydney Theatre Company, on about 9 or 10 November 2017 during which conversation the Applicant was told that a complaint had been made of inappropriate conduct but he was not told specific information regarding the nature of the complaint;
- (d) that the Applicant had harassed the Complainant throughout the production of King Lear but that the alleged genital touching had only occurred during the final week of the production;
- (e) that another board member of the Sydney Theatre Company had confirmed that the incident had occurred;
- (e1) that the complaint made was about sexual harassment by the Applicant;
- (f) that other members of the Sydney Theatre Company were aware of the Applicant's conduct and felt strongly about it;
- (g) that further similar complaints have been made to the Sydney Theatre Company about the Applicant's conduct;
- (h) that the Sydney Theatre Company had changed its HR policies and practices as a result of the complaint against the Applicant;
- (i) that the Sydney Theatre Company had vowed to never work with the Applicant again;
- (j) that Meyne Wyatt had published a Facebook post which stated "I was in the show. I believe whoever has come forward. It's time for Sydney Theatre Company and the industry in Australia and worldwide to make a stand on this behaviour!!! It's been going on for far too long! And this culture of protecting people in power has to stop";
- (k) that Meyne Wyatt had worked on the production of King Lear;

- (l) that Brandon ~~Brendan~~ McClelland had published a Tweet which stated "It wasn't a misunderstanding. It wasn't a joke";
- (m) that Brandon ~~Brendan~~ McClelland had worked alongside the Complainant;
- (n) that Brandon ~~Brendan~~ McClelland was at the time working on the Sydney Theatre Company's production of The Three Sisters;

36.7A The sources of the information set out in the preceding paragraph were:

- (a) As to the information set out in sub-paragraphs (b), (d), (f) and (i), a confidential source connected with the Sydney Theatre Company (**Confidential Source 2**);
- (b) As to the information set out in sub-paragraphs (c) and (i), a confidential source connected with the Sydney Theatre Company (**Confidential Source 3**);
- (c) As to the information set out in sub-paragraph (c), Confidential Source 2;
- (d) As to the information set out in sub-paragraphs (e) and (f), a confidential source connected with the Sydney Theatre Company (**Confidential Source 4**);
- (e) As to the information set out in sub-paragraphs (e1), (f) and (g), an email received by the Respondents on 30 November 2017 by a person claiming to have direct knowledge of the particular case;
- (f) As to the information set out in sub-paragraph (h), Sydney Theatre Company executive director, Patrick McIntyre;
- (g) As to the information set out in sub-paragraph (j), the Facebook page of Meyne Wyatt;
- (h) As to the information set out in sub-paragraph (k), the information page relating to the Production that was at the time available on the website of the Sydney Theatre Company;
- (i) As to the information set out in sub-paragraph (l), the Twitter feed of Brandon McClelland;

- (j) As to the information set out in sub-paragraphs (m) and (n), information available on the internet in relation to the Sydney Theatre Company's production of The Three Sisters;

36.8 the Respondents were reasonably satisfied about the sources of the information in the matters complained of and the integrity, authenticity and accuracy of those sources;

36.9 the Respondents believed what it published, specifically the matters set out in paragraphs 36.9A and 36.9C below, to be true;

36.9A the second matter complained of contained the following facts concerning the Applicant, each of which was a matter of substantial truth:

- (a) the Applicant was an Oscar winning actor, having won the Academy Award for Best Actor in 1996 for his role as David Helfgott in the movie Shine;
- (b) the Applicant was nominated an Oscar:
 - (i) in 1998 for in the Best Supporting Actor category for his role in Shakespeare in Love;
 - (ii) in 2000 for in the Best Actor category for his role in Quills;
 - (iii) in 2011 for in the Best Actor category for his role in The King's Speech;
- (c) the Applicant has found fame being one of the few people to have won acting's triple crown - the Academy Award, the Primetime Emmy Award and the Tony Award;
- (d) the Applicant was 66 years old and a married father of two;
- (e) the Applicant is a Melbourne resident;
- (f) the Applicant was the President of the Australian Academy of Cinema Television and Arts;
- (g) the Applicant was expected to attend the annual AACTA Awards at The Star Event Centre the following week;
- (h) the Applicant was one of the country's most successful actors;

- (i) the Applicant had been accused of 'inappropriate behaviour' during the Sydney Theatre Company's production of King Lear;
- (j) the Sydney Theatre Company had told *The Daily Telegraph* that it "received a complaint alleging that Mr Geoffrey Rush had engaged in inappropriate behaviour. The company received the complaint when Mr Rush's engagement with the company had ended. The company continues to work with the complainant to minimise the risk of future instances of the alleged behaviour occurring in its workplace. The complainant has requested that their identity be withheld. STC respects that request and for privacy reasons, will not be making any further comments";
- (k) the Applicant, through his lawyers, vigorously denied the claims;
- (l) the Applicant's lawyers, HWL Ebsworth, said:
 - (i) the Applicant had "not been approached by the Sydney Theatre Company, the alleged complainant nor any representative of either. Further, he has not been informed by them of the nature of the complaint and what it involves. If such a statement has been issued by the STC it is both irresponsible and highly damaging";
 - (ii) the Applicant's "regard, actions and treatment of all the people he has worked with has been impeccable beyond reproach"
 - (iii) that the Applicant had not been involved with the Sydney Theatre Company or its representatives for more than 22 months;
 - (iv) that the *Daily Telegraph's* understanding of what has occurred is fishing and unfounded and that "it does not warrant comment except that it is false and untrue";
- (m) the local production of King Lear ran from November 2015 to January 2016 at the Roslyn Packer Theatre;
- (n) there were several months of rehearsals;
- (o) the Applicant has worked with the Sydney Theatre Company many times, both acting and directing productions like Uncle Vanya, Oleanna,

The Importance of Being Ernest, You Can't Take It With You, King Lear and The Government Inspector;

36.9B in support of the substantial truth of the matter set out in particular 36.9A(i), the Respondents rely upon the following facts, matters and circumstances:

- (a) on 9 January 2016, following the incident referred to in paragraphs 23 and 23A above, Rachael Azzopardi, the Sydney Theatre Company's Director of Programming and Artistic Operations, witnessed the Complainant crying and approached her to see if she was okay. The Complainant told Ms Azzopardi, in substance, that she was not ready to talk about it.
- (b) on around 1 April 2016, the Complainant contacted Ms Azzopardi and asked to arrange a meeting between the two of them.
- (c) on around 4 April 2016, the Complainant met with Ms Azzopardi and told Ms Azzopardi about the Applicant's conduct towards her during the Production.
- (d) on around 14 April 2016, a meeting was held between the Complainant, the Complainant's agent, Lisa Mann, the HR Manager of the Sydney Theatre Company, Kate Crisp, and another employee of the Sydney Theatre Company whose identity is presently unknown to the Respondents. At that meeting the Complainant made a complaint about the Applicant's conduct towards her during the Production.
- (e) the substance of the complaint referred to in paragraphs (c) and (d) was that the Applicant had groped the Complainant "all over" during the Production.
- (f) the Complainant stated at the meeting referred to in paragraph (d) that the main reason for her deciding to report the Applicant's conduct was to bring the matter to the attention to the Sydney Theatre Company in order to minimise the possibility of such an experience occurring again. The Complainant also advised the Sydney Theatre Company that she did not want the Applicant to be informed of the Complaint for fear of repercussions against the Complainant;

36.9C the third matter complained of contained the following facts concerning the Applicant, each of which was a matter of substantial truth:

- (a) two Sydney Theatre Company actors had spoken out in support of the Complainant, namely:
 - (i) Meyne Raoul Wyatt, an actor who also appeared in King Lear, had said he believed the allegations concerning the Applicant and had posted the following statement of his Facebook page: "I was in the show. I believe whoever has come forward. It's time for Sydney Theatre Company and the industry in Australia and worldwide as a whole to make a stand on this behaviour!!!";
 - (ii) Brandon McClelland, an actor who has worked alongside the Complainant, had posted the following statement on his Twitter account: "It wasn't a misunderstanding. It wasn't a joke";
- (b) the Applicant is one of Australia's biggest stars;
- (c) the Applicant was continuing to vehemently deny the claims that he had inappropriately touched the Complainant during the stage production of King Lear;
- (d) Brandon McClelland's tweet had been reposted by several other Sydney theatre actors;
- (e) two sources from the Sydney Theatre Company had said that the company stood by the Complainant's claims;
- (f) the two sources referred to in the preceding particular had both said that the Sydney Theatre Company would not work with the Applicant again, with one saying: "There is no chance. How could we work with him again? That question doesn't even need an answer. Another actor backed what she said ... we've taken this very seriously";
- (g) the source referred to in the preceding particular had also defended not naming the Complainant, saying "It is not our story to tell";
- (h) the Applicant had been told the identity of the Complainant in a telephone call with Sydney Theatre Company's Executive Director, Patrick McIntyre, two weeks earlier;
- (i) the Sydney Theatre Company had revised its HR policies to try to ensure it maintained a safe environment for staff;

- (j) Patrick McIntyre, the Executive Director of the Sydney Theatre Company had stated the following:
- (i) that it was important actors felt safe to speak up and that he believed maintenance of confidentiality was key;
 - (ii) the Sydney Theatre Company had "reviewed policies and procedures in place and that includes educating actors when they come in to the company about our intolerance of inappropriate behaviour, who they should speak to and encouraging them to speak up";
 - (iii) the executive team at the Sydney Theatre Company had a duty of care to ensure all staff feel safe and respected in the workplace;
 - (iv) "This isn't about creating drama and blame but if everyone holds each other accountable, we create the kind of workplace we all want to be in";
 - (v) that it was a wide ranging issue for the industry to address in the wake of the Harvey Weinstein scandal;
 - (vi) "Many still view that speaking up comes with adverse repercussions. This is a trust issue that the industry needs to work towards resolving and the observance of confidentiality is key to this. If people don't trust us with their stories, they won't speak up"
- (k) the Sydney Theatre Company had confirmed it had received a complaint by a staff member over allegations of inappropriate behaviour by the Applicant;
- (l) an Actors Equity survey aimed at theatre actors had preliminary findings that 40% of respondents claimed they had directly experienced sexual harassment, bullying or misconduct;
- (m) the Sydney Theatre Company production of King Lear ran from November 2015 to January 2016;
- (n) the Applicant was 66 years old;

(o) the Applicant had stated the following:

- (i) he had "immediately phoned and spoke to senior management" when he became aware of rumours there was a complaint;
- (ii) "they refused to illuminate me with the details. I also asked why this information was being withheld, and why, according to standard theatre practice, the issue had not been raised with me during the production via stage management, the director, my fellow actors or anyone at management level. However, no response was forthcoming."

(p) the Applicant's lawyer, Nicholas Pullen of HWL Ebsworth, had stated the following:

- (i) it was a "great disappointment" that the Sydney Theatre Company had "chosen to smear his name and unjustifiably damage his reputation. Not to afford a person their right to know what has been alleged against them, let alone not inform them of it but release such information to the public, is both a denial of natural justice and is not how our society operates";
- (ii) that the Applicant "abhorred any form of maltreatment of any person";
- (iii) "until there is the decency afforded to Mr Rush of what the 'inappropriate behaviour' actually is then there is nothing more than can be said at this stage";

(q) the Applicant had worked with the Sydney Theatre Company both acting and directing productions including Uncle Vanya, Oleanna, The Importance of Being Ernest and The Government Inspector;

(r) the Applicant's management had stated the following:

- (i) that the Sydney Theatre Company had "chosen to smear his name and unjustifiably damage his reputation";
- (ii) "his treatment of fellow colleagues and everyone he has worked with is always conducted with respect and the utmost propriety. The allegation made against Mr Rush comes from a statement provided by the Sydney Theatre Company";

- (iii) that it is understood that the Sydney Theatre Company's statement concerned a complaint made more than 21 months previously;
- (iv) "to date, Mr Rush or any of his representatives have not received any representations from the STC or the complainant. In other words, there has been no provision of any details, circumstances, allegations or events that can be meaningfully responded to";
- (v) that Mr Rush reiterated that he denied being involved in any "inappropriate behaviour" whatsoever;
- (s) the Sydney Theatre Company had stated the following:
 - (i) that it "was asked by a News Ltd journalist earlier this month whether it had received a complaint alleging inappropriate behaviour by Mr Rush while he was employed by the company. STC responded truthfully that it had received such a complaint";
 - (ii) that the Complainant had "requested the matter be dealt with confidentially, and did not want Mr Rush notified or involved" in any inquiry;
 - (iii) "STC complied, acting in the interest of the complainant's health and welfare. As already stated, the Company received the Complaint after Mr Rush's engagement had ended";
- (t) the Applicant was the star of the Pirates of the Caribbean.

36.10 the Respondents were reasonably satisfied as to the fairness of the language and the manner in which the matters complained of were composed;

36.10A prior to publishing the second matter complained the Second Respondent read the content of the second mater complained of, including the headline, to Katherine Stevenson of the Sydney Theatre Company for the purpose of it being relayed to the Complainant. Neither Ms Stevenson, nor the Complainant, informed the Respondents that anything in the article was inaccurate;

36.11 the Respondents took other steps to verify the information in the matters complained of;

36.12 the Respondents took reasonable care to distinguish in each matter complained of, and each matter complained of did in fact reasonably distinguish, between suspicions, allegations and proven facts;

36.12A Prior to the publication of the first and second matters complained of the Respondents contacted the Applicant, through his agent Ann-Churchill-Brown of Shanahan Management, by sending an email which:

- (a) indicated that the enquiry related to a story running in *The Daily Telegraph* the next day;
- (b) indicated that the Second Respondent had been investigating an alleged incident of abuse by the Applicant during his time working on the Production;
- (c) set out the content of a statement from the Sydney Theatre Company;
- (d) identified the Complainant;
- (e) provided the Respondents' understanding of the Complainant's complaint;
- (f) indicated that the Respondents would not be naming the Complainant;
- (g) indicated the story was part of a broader investigation into a number of high profile people in the entertainment industry; and
- (h) requested an official response on behalf of the Applicant as soon as possible;

36.13 the Respondents, in the second matter complained of, reported the Applicant's side of the story by publishing that:

- (a) the Applicant "denies 'inappropriate behaviour' during Sydney stage show" (Schedule B, page 1, sub-headline);
- (b) the Applicant "denies complaint made in Sydney Theatre Shakespeare production" (Schedule B, pages 4 and 5, graphic at top of page);
- (c) the Applicant "vigorously denied the claims" (Schedule B, page 1, paragraph 2);
- (d) the Applicant "vigorously denies the allegations and says the [Sydney Theatre Company] never told him of any allegations of wrong doing" (Schedule B, page 4, paragraph 2);

- (e) the Applicant's lawyers had said that:
 - (i) the Applicant had "not been approached by the Sydney Theatre Company, the alleged complainant nor any representative of either" (Schedule B, page 1, paragraph 3 and Schedule B, page 4, paragraph 11);
 - (ii) the Applicant had not "been informed of the nature of the complaint and what it involves" (Schedule B, page 1, paragraph 3 and Schedule B, page 4, paragraph 12);
 - (iii) the Applicant had not "been involved with the Sydney Theatre Company or its representatives for a period of more than 22 months" (Schedule B, page 4, paragraph 13);
 - (iv) "if such a statement has been issued by the STC it is both irresponsible and highly damaging" (Schedule B, page 1, paragraph 4 and Schedule B, page 4, paragraph 14);
 - (v) the Applicant "had never been involved in any 'inappropriate behaviour' and that his 'regard, actions and treatment of all people he has worked with has been impeccable beyond reproach'" (Schedule B, page 4, paragraph 10);
 - (vi) "[the First Respondent's] understanding of what has occurred is, with the greatest respect, simply fishing and unfounded. It does not warrant comment except to say that it is false and untrue (Schedule B, page 4, paragraph 15 and page 5, paragraphs 2 and 4);

36.14 The Respondents, in the third matter complained of, reported the Applicant's side of the story by publishing:

- (a) that the Applicant "denies 'touching'" (Schedule C, page 1, sub-headline);
- (b) that the Applicant was continuing to "vehemently deny" the claims that he inappropriately touched a cast member during the production of King Lear (Schedule C, page 1, paragraph 2 and page 4, paragraphs 4 and 20);

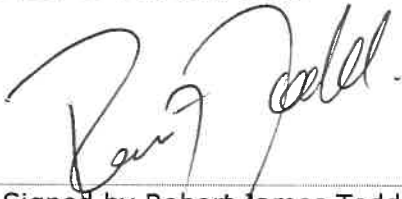
- (c) a statement made by the Applicant the previous day in relation to the allegations referred to in the article (Schedule C, page 4, paragraphs 28-30 and page 5, paragraphs 1 and 3-5);
- (d) a statement made by the Applicant's solicitor on behalf of the Applicant in relation to the allegations referred to in the article (Schedule C, page 5, paragraphs 6-9);
- (e) a statement made by the Applicant's management on behalf of the Applicant in relation to the allegations referred to in the article (Schedule C, page 4, paragraphs 31-41);

36.15 the Respondents made clear in each matter complained of that the allegations referred to in each matter complained of were unproven.

MITIGATION OF DAMAGES

37. If (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 4, 5, 7, 8, 10 and 11 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:
- (a) the substantial truth of the imputations in sub-paragraphs 4(a), 47(d), 8(d), 10(d), 10(f), 11(d) and 11(f) of the Statement of Claim (or so many of them as are established by the Respondents to be substantially true);
 - (b) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
 - (c) the circumstances in which it is proved the matters complained of were published;
 - (d) the background context to which (a) to (c) above comprised.

Date: 15 February 2018

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

Signed by Robert James Todd
Lawyer for the Respondents

This pleading was prepared by Robert James Todd and Nicholas James Perkins, lawyers, and settled by Tom Blackburn SC and Lyndelle Barnett of counsel.

Certificate of lawyer

I Robert James Todd certify to the Court that, in relation to the defence filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 15 February 2018



Signed by Robert James Todd
Lawyer for the Respondents

| | |
|----------------------------|---|
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